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16 Cal. App. 572

CARVER v. SAN JOAQUIN CIGAR CO.

(Civ. 741.)

(District Court of Appeal, First District, California. July 12, 1911.)

CORPORATIONS (§ 308*)—OFFICERS—CONTRACTS OF EMPLOYMENT.

Where plaintiff was, in 1907, elected secretary of defendant corporation, that office having been vacated by the resignation of the former incumbent, who had been elected in 1904, and whose salary had been fixed at $40 a month, and plaintiff performed actual duties only a short time, though he continued as secretary, no contract can be implied entitling plaintiff to receive the same salary as was paid to his predecessor; it appearing that he was not aware of her compensation, and that the resolution appointing him made no mention of salary.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 308.*]

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by H. D. Carver against the San Joaquin Cigar Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Stanton L. Carter and Thos. D. Ingersoll, for appellant. E. S. Van Meter and N. C. Coldwell, for respondent.

KERRIGAN, J. This is an action to recover for services rendered. The case was tried, and the court filed its findings of fact, finding substantially as follows: On February 20, 1904, the defendant corporation, at a meeting of the board of directors, passed a resolution, wherein they appointed a secretary and fixed her salary at $40 per month "as compensation for services as secretary, and all other services to be rendered the corporation by her." The person holding the office of secretary at that time, by virtue of such appointment, was a woman, and she held the position until April 2, 1907, when she resigned. On the same day, April 2, 1907, the plaintiff was elected and appointed the secretary of said corporation to fill such vacancy. The plaintiff upon his election immediately entered upon the performance of his duties as secretary, and has ever since continued as such secretary of said corporation. The court, however, further found that while the plaintiff has always been ready, able, and willing to perform any services required of him as secretary, "no actual duties have been performed by, or required of, plaintiff as such secretary since about the 12th day of April, 1907, and no meeting of the board of directors of said corporation has been had or held since said 2d day of April, 1907." No express contract was entered into between the parties fixing the compensation of the plaintiff for his services as secretary. From these facts the court as a conclusion of law found that all the services rendered by the plaintiff as secretary were reasonably worth the sum of $30, and accordingly judgment for that sum was entered in his favor against the defendant. The next day after the entry of the judgment the plaintiff appealed therefrom, and the appeal is brought here upon the judgment roll alone.

The case is well briefed. We think, however, from the facts above narrated, that no contract can be implied, entitling the plaintiff to receive from the defendant the same salary as was paid to his predecessor. Under the resolution appointing plaintiff's predecessor, she was to be compensated at the rate of $40 per month as secretary and for all other services to be rendered by her to the defendant. More than three years after her appointment, the plaintiff was elected, and it does not appear that he knew the amount of her salary. In the resolution designating him as secretary nothing is said about salary, and he performed the duties of the office for only about 10 days; and, while he was ready and willing to discharge the duties of the office at all times, it does not appear that he was required or willing to perform any other services, nor that if so required, and he performed other services, the $40 a month was to cover them. In fine, we believe that the two resolutions depended upon by the plaintiff, together with his willingness to act when required, do not constitute a contract between the parties fixing the plaintiff's compensation as secretary at $40 per month.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The judgment is affirmed.

We concur: LENNON, P. J.; HALL, J.

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16 Cal. App. 761

CARVER v. SAN JOAQUIN CIGAR CO.

(Civ. 735.)

(District Court of Appeal, First District, California. Aug. 5, 1911. Modified Aug. 24, 1911.)

1. APPEAL AND ERROR (§ 706*)—STATEMENT OF FACTS—NECESSITY.

Where the statement of the case as settled and allowed and used upon the hearing of a motion for new trial fails to show the motion or its grounds, an order denying the motion cannot be reviewed, even though defendant's notice of intention to move for a new trial, appearing elsewhere in the transcript, specifies statutory grounds for the motion; such notice being neither referred to nor incorporated in the statement of the case used upon the motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2945; Dec. Dig. § 706.*]

2. APPEAL AND ERROR (§ 604*)—STATEMENT OF CASE—STIPULATION.

Though a respondent stipulated to the correctness of a transcript of the record, it does not preclude him from objecting to the sufficiency of the statement to support a motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2657; Dec. Dig. § 604.*]

3. APPEAL AND ERROR (§ 671*) — RECORD — STATEMENT—QUESTIONS PRESENTED FOR REVIEW.

While the failure of the statement to show defendant's motion for new trial precludes the appellate court from considering defendant's appeal from the order denying such motion, the appellate court may determine the appeal from the judgment in so far as the alleged errors of law occurring at the trial are concerned.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 671.*]

4. BILLS AND NOTES (§ 489*) — ACTIONS — PLEADING—VARIANCE.

In an action upon a note, the defendant corporation for a special defense alleged that, before the execution and delivery of the note, it was agreed between the payee and the president of the defendant that defendant should not execute the note and should not be bound by any of its terms, and that the payee would surrender the note upon demand of the president. *Held*, that evidence that the defendant was indebted to the payee and others, and that the note was delivered solely to close up the account of the payee so as to prevent garnishment by his creditors, and that it was agreed that the debt to the payee should not be paid until all other creditors of the defendant were paid, was materially different from the matters pleaded, and hence inadmissible.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 489.*]

5. EVIDENCE (§ 465*)—PAROL EVIDENCE AFFECTING WRITINGS.

While oral evidence is admissible to impeach the consideration of a note, such evidence is not admissible to show that the payee has been guilty of a breach of a contemporaneous oral agreement; and hence the maker of a note, its consideration being admitted, could not defend upon the ground that it was agreed between the parties that the note should not be paid and that it was given merely to close up the payee's account against the maker, for that would allow parol evidence to contradict a writing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2144; Dec. Dig. § 465.*]

6. BILLS AND NOTES (§ 106*)—ACTIONS—DEFENSES.

In an action on a note, it is a good defense that it was executed and delivered in furtherance of a plan of the payee and maker to defraud the payee's creditors.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 219, 225–232; Dec. Dig. § 106.*]

7. BILLS AND NOTES (§ 489*)—ACTIONS—ANSWER—DEFENSES—FRAUD.

The defense to an action upon a note that it was executed and delivered in furtherance of a plan of the payee and maker to defraud the payee's creditors is new matter, which must be specially pleaded and cannot be established under a general denial.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1587–1642; Dec. Dig. § 489.*]

8. SET-OFF AND COUNTERCLAIM (§ 14*)—CONTRACTS.

The maker of a note may, as a good defense by way of set-off, show that the payee was, at the time of making, and still is, his debtor.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Dec. Dig. § 14.*]

9. BILLS AND NOTES (§ 489*)—ACTIONS—ANSWER—ISSUES.

In an action upon a note, where the answer did not set up that the original payee, who transferred the note to the plaintiff, was indebted to the maker at the time of execution, no such issue was raised, and evidence of such indebtedness was immaterial and properly excluded.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 489.*]

10. BILLS AND NOTES (§ 497*)—WITNESSES (§ 270*) — ACTIONS — DEFENSES — CONSIDERATION.

A note being, under Civ. Code, § 1614, a presumptive evidence of a consideration, and Code Civ. Proc. § 1963, subd. 21, raising a presumption of title in the holder of such a note when it is duly indorsed, a plaintiff in an action upon a note, duly indorsed to him, need not show the consideration for the indorsment, the failure or illegality of consideration of the note itself not having been attacked; and hence, where the plaintiff, upon direct examination, testified that he gave a valuable consideration for the indorsement, such testimony was wholly unnecessary and immaterial, and cross-examination with reference to the nature and amount of the consideration was properly refused, but the rule would be the opposite if the issue of want of consideration had been raised, and plaintiff, in an attempt to anticipate such a defense, had testified with respect to the consideration.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1675–1687; Dec. Dig. § 497;* Witnesses, Cent. Dig. §§ 926, 955–957; Dec. Dig. § 270.*]

11. Bills and Notes (§ 489*)—Actions—Answer.

While the plaintiff in an action on a note must have such ownership that a subsequent recovery cannot be had against the defendant, and an answer putting in issue the plaintiff's ownership presents a good defense, the mere denial of plaintiff's ownership is not sufficient, but there must be alleged some defense against the real owner which could not be pleaded against the plaintiff, and so under the general issue defendant may not show that the note was the property of another.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 489.*]

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by H. D. Carver against the San Joaquin Cigar Company. From a judgment for plaintiff and an order denying defendant's motion for new trial, defendant appeals. Affirmed.

N. C. Coldwell and Edgar S. Van Meter, for appellant. Carter & Carter, for respondent.

LENNON, P. J. This action was brought to recover the sum of $1,335.05, alleged to be due upon a negotiable promissory note in the ordinary form. The note was shown to have been executed by the corporation defendant on April 6, 1907, the day it bears date, and before maturity indorsed and assigned for a valuable consideration by the payee therein named to the plaintiff herein. The answer of the defendant does not deny the execution of the note, but in that behalf alleges in substance that the note in question was made and delivered to H. E. Mootz, the payee thereof, by F. Knobloch, as president of the corporation defendant, without authority of the corporation, and in excess of his powers and duties as such president, and that the plaintiff at all times had full knowledge and notice of these facts. It is denied that the plaintiff was, at the date of the action, the owner of the note sued upon, or that the payee named therein, for a valuable consideration or otherwise, indorsed, transferred, and delivered said note to the plaintiff herein. And for a second and special defense to the action the answer of the defendant in effect alleges that at and before the execution and delivery of the note it was agreed by Knobloch, as the president of the corporation defendant, and Mootz, the payee named in the note, that said Knobloch should, in the name of the defendant San Joaquin Cigar Company, and as president thereof, make, execute, and deliver to the said H. E. Mootz the said note as the promissory note of the said San Joaquin Cigar Company, but at the same time and place and as a part of the same transaction it was agreed, by and between the said F. Knobloch and the said H. E. Mootz, that said note should not be, and was not, executed by the said San Joaquin Cigar Company, and that the said San Joaquin Cigar Company was not and should not be bound by any of the terms of said promissory note, nor by the promise to pay contained therein, and that the said H. E. Mootz would upon demand of the said F. Knobloch surrender and deliver said note into the possession of the said Knobloch. It was also alleged in the answer of the defendant, as a third and special defense to the action, that at and before the execution and delivery of the note sued on, Mootz, the payee thereof, was indebted to the defendant corporation in the sum of $500 for moneys which he had received for and on account of the defendant; that the receipt of this money was concealed by Mootz from the defendant, and was at the time of the making of the note unknown to either the defendant or its representative Knobloch; that the plaintiff was at all of the times mentioned the secretary of the corporation, and had, before and at the time of the assignment of the note to him, full knowledge of all of the facts pleaded in the answer of the defendant as a special defense to the action. It was conceded upon the trial, and the record shows as well, that the corporation defendant had placed Knobloch, as its president, in full control of the business of the corporation, and had empowered and authorized him to transact all the business of the corporation. Judgment was rendered for the plaintiff for the full amount of the principal specified in the note, together with an attorney's fee, as stipulated, in the sum of $100. Upon this appeal—which is from the judgment and order denying defendant's motion for a new trial—the points presented for review relate only to the rulings of the trial court rejecting certain evidence offered by the defendant in support of the special defenses pleaded.

[1] The order denying defendant's motion for a new trial cannot be reviewed, for the reason that the statement of the case, as settled and allowed by the judge of the trial court, and thereafter used upon the hearing of the motion, fails to show the motion itself or the grounds upon which the defendant relied for a new trial. The statement of the case used upon the hearing is absolutely silent upon the subject of the motion. It is

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

true that the defendant's notice of intention to move for a new trial, which appears elsewhere in the transcript, specifies three of the statutory grounds which may be invoked in aid of a motion for a new trial; but, inasmuch as this notice is neither referred to nor incorporated in the statement of the case used upon the motion for a new trial, it cannot now be considered as a part of the record on the appeal from the order denying the motion for a new trial. Leonard v. Shaw, 114 Cal. 69, 45 Pac. 1012; Sprigg v. Barber, 122 Cal. 573, 55 Pac. 419; Williams v. Hawley, 144 Cal. 97, 77 Pac. 762; Roberts v. Hall, 147 Cal. 434, 82 Pac. 66.

[2] The fact that respondent stipulated to the correctness of the transcript does not preclude him from objecting to the sufficiency of the statement to support a motion for a new trial. Todd v. Winants, 36 Cal. 129; Wetherbee v. Carroll, 33 Cal. 549; Leonard v. Shaw, supra.

[3] Although we are precluded from considering the defendant's appeal from the order denying his motion for a new trial, we may nevertheless consider and determine the appeal from the judgment, in so far as the alleged errors of law occurring at the trial are concerned, upon the statement of the case used upon the motion for a new trial and found in the record here. Brown v. Tolles, 7 Cal. 399; Rice v. Gashirie, 13 Cal. 53; McCartney v. Fitz Henry, 16 Cal. 185; Carpentier v. Williamson, 25 Cal. 159; Wall v. Mines, 128 Cal. 136, 60 Pac. 682; Vinson v. L. A. R. R. Co., 141 Cal. 153, 74 Pac. 757.

[4] Upon the trial of the case the plaintiff introduced the note in evidence, and gave testimony which tended to show that the note had been indorsed and assigned to him for a valuable consideration, and Mootz, the payee of the note, testified in effect that the consideration for the note in the first instance was the extinguishment of a pre-existing indebtedness of the defendant to himself, as evidenced by a book account, in the sum of $1,335.05 for services rendered. In rebuttal the defendant called F. Knobloch as a witness in its behalf, and, after objections had been sustained to several questions which were calculated to elicit the facts pleaded and designated as a second special defense in the answer of the defendant, offered to prove in support of said second special defense, by the witness on the stand, that "on the 6th day of April, 1907, the day when the promissory note in suit was signed and delivered to Mr. Mootz, that the San Joaquin Cigar Company was indebted to various other parties than Mr. Mootz in a large sum of money, and that at and before the execution and delivery of this note in suit it was agreed between Mr. Mootz, the payee named in the note, and Mr. Knobloch, the president of the company, that the company should not pay Mr. Mootz anything that the company owed him (Mootz) until the indebtedness of the company to these other parties was fully paid and discharged; that this agreement between them was subsisting at the time that the note was signed and delivered; and that at that time and place Mr. Mootz and Mr. Knobloch, the president of the cigar company defendant, understood, stipulated, and agreed between them that the note in suit, so signed and delivered to Mr. Mootz, was not a valid and subsisting agreement, or any agreement at all, between H. E. Mootz, payee named in the note, and the defendant San Joaquin Cigar Company, but that it was delivered solely and only for the purpose of closing up the account of said H. E. Mootz against the company upon the books of the company, so as to prevent a garnishment of said account by creditors of said Mootz."

The plaintiff objected to the proffered testimony upon the ground that it was immaterial, irrelevant, and incompetent, and intended to alter by parol evidence the terms and conditions of a written agreement. The trial court sustained the objection upon all of the grounds stated, apparently upon the theory that the matters pleaded and designated in the answer of the defendant as a second special defense did not constitute a valid defense to the action. Counsel for the appellant contend here, as they did in the trial court, that the facts specially pleaded by the defendant as a second defense to the action constituted a perfect legal defense to the note. It is argued that the offer of the evidence in question was not an attempt to alter the terms of the note, but was rather an attack upon its validity, in this, that the offer was to show that the note sued on was not the contract of the defendant, and that therefore the evidence so offered was admissible under the exception to the general rule declared by subdivision 2 of section 1856 of the Code of Civil Procedure.

It will be observed that the matters and things offered to be proved by the defendant were materially different from the matters and things pleaded in the defendant's second special defense to the action, and upon this ground alone the trial court was justified in sustaining plaintiff's objection.

[5] But, however that may be, the facts pleaded as a second special defense as well as the evidence offered in support thereof were inadequate as a defense and incompetent as evidence. No such issue as was attempted to be made, either by the defendant's second special defense or the facts contained in the defendant's offer of evidence, could be properly pleaded or proved against the plaintiff herein.

Oral evidence is admissible to impeach the consideration of a promissory note; but there is an evident distinction between showing the absence or failure of consideration, or illegality in its inception, and proving—as was attempted in this case—the breach of a contemporaneous oral agreement totally at variance with the written agreement of the parties as finally expressed in the note. San Jose Sav. Bank v. Stone, 59 Cal. 187; Langan v. Langan, 89 Cal. 186, 26 Pac. 764; Daw v. Niles, 104 Cal. 106, 37 Pac. 876; Id. (Sup.) 33 Pac. 1114.

The pre-existing indebtedness of the defendant to the payee of the note, which was revealed by defendant's offer of proof, and the evidence adduced on behalf of the plaintiff, was a valid consideration for the note. The defendant's offer of proof was not an offer to show by parol evidence the want, failure, or illegality of consideration. It was in fact but an attempt to show the existence of a contemporaneous oral agreement entirely at variance with the terms of the written contract of the parties. "This cannot be done. Want of consideration or failure of consideration may be proved in a proper case, but in the absence of fraud or mistake parol evidence cannot be permitted to vary the terms of a written contract." Lompoc Valley Bank v. Stephenson, 156 Cal. 350, 104 Pac. 449.

In so far as the facts offered to be shown by the testimony of the witness Knobloch tended to prove the existence of a conditional and collateral oral contract, essentially different from and contradictory of the note in suit, the offered evidence was incompetent, and rightly rejected by the court.

The court did not err in its refusal to permit the defendant to show that the true consideration for the note was founded in an attempt to defraud and defeat the creditors of Mootz.

[6, 7] It is undoubtedly a good defense to an action upon a promissory note that it was executed and delivered in furtherance of a common design on the part of the payee and maker to defraud the payee's creditors. That defense would have been available to the defendant against the payee had he sought to recover on the note, and, of course, might have been pleaded against the plaintiff in this action. Such a defense, however, is deemed to be new matter, which must be specially pleaded, and cannot be established under a general denial. McCausland v. Ralston, 12 Nev. 195, 28 Am. Rep. 781; Ager v. Duncan, 50 Cal. 325; Sharon v. Sharon, 68 Cal. 29, 8 Pac. 614.

[8] The fact that Mootz was indebted to the corporation defendant in the sum of $500 at the time of the making of the note, if it had been coupled with an allegation of nonpayment at the time of the commencement of the action, would also have been a good defense, by way of set-off, against Mootz as the original payee of the note.

[9] Whether or not such a defense could have been pleaded against the plaintiff in this action need not be decided. The fact remains that it was not pleaded; and evidence merely of such pre-existing indebtedness was wholly immaterial to the issues and properly excluded by the trial court.

[10] The plaintiff upon direct examination testified that he gave a valuable consideration for the assignment to him of the note in question; and it is now contended on behalf of the defendant that the trial court erred in refusing to permit the witness to be cross-examined with reference to the nature and amount of the consideration so paid or given for the assignment of the note.

A promissory note imports a consideration; and, when duly indorsed, raises a presumption of title in the holder. Civ. Code, § 1614; Code Civ. Proc. § 1963, subd. 21. The plaintiff was not required to show the consideration given for the transfer of the note until the maker, under proper pleadings, had established the want, failure, or illegality of the consideration of the note itself. Jordan v. Grover, 99 Cal. 195, 33 Pac. 889; Graham v. Larimer, 83 Cal. 178, 23 Pac. 286; Eames v. Crosier, 101 Cal. 262, 35 Pac. 873; Sharon v. Sharon, 68 Cal. 29, 8 Pac. 614; Sinkler v. Siljan, 136 Cal. 361, 68 Pac. 1024.

Upon proof of the execution of the note, its indorsement to plaintiff before maturity, and his possession of it, he established a prima facie case, which, in the absence of pleadings impeaching the validity of the consideration for the note itself, made his testimony upon the subject of the consideration given for its indorsement to him wholly unnecessary and immaterial, and therefore the ruling of the trial court, restricting the cross-examination of the plaintiff in the particulars under discussion was correct.

To avoid any misapprehension upon the subject we will say that if the defendant, by adequate pleadings, had impeached the consideration of the note, the burden of proving a bona fide consideration for its indorsement to plaintiff, and want of notice on the part of the plaintiff of the manner of its execution, would shift to the plaintiff upon the defendant offering evidence which would tend to prove want, failure, or illegality of consideration at the inception of the note; and that if, in the presence of such an issue raised by proper pleadings, the plaintiff, in an attempt to anticipate the defense thus relied upon, had testified with respect to the consideration by him given for the indorsement of the note, the question objected to in the case at bar would have been legitimate cross-examination. Kenny v. Walker, 29 Or. 41, 44 Pac. 501; Maxwell v. Bolles, 28 Or. 1, 41 Pac. 661; Graham v. Larimer, 83 Cal. 173, 23 Pac. 286.

[11] It is insisted, however, by appellant that it should have been permitted, under the general issue raised by a mere denial of the plaintiff's ownership of the note, to show, by the cross-examination of the plaintiff and Mootz, the payee, that the note in truth and in fact belonged to Mootz, and not to Carver, the plaintiff.

The plaintiff, in an action upon a promissory note, must be the legal owner of the note, or his ownership must be of a character sufficient to protect the defendant from recovery against him in a subsequent action upon the same note. An answer which puts in issue the plaintiff's ownership of the instrument sued on presents a good defense, and makes it incumbent upon the plaintiff to establish his right to bring the action. It is not sufficient, however, to plead merely, as was done in the present case, that the note sued on is the property of another, and not of the plaintiff. There must be alleged, in addition, some matter or thing which would be a substantial defense against the person alleged to be the real owner of the note which could not be pleaded as a defense against the plaintiff as the prima facie legal owner of the note. Dyer v. Sebrell, 135 Cal. 597, 67 Pac. 1036.

As was said by Mr. Justice Shaw in the recent case of Ramboz v. Stansbury, 13 Cal. App. 652, 110 Pac. 473: "The general rule appears to be that, in the absence of mala fides, which is not claimed here, plaintiff's prima facie title by reason of possession is not subject to rebuttal so long as the maker is protected from further claim by the payment of the judgment."

The defendant in this case having failed to plead a valid defense against Mootz, the payee, which could not have been pleaded and proved against the plaintiff, and as it is apparent that the judgment rendered for the plaintiff on the note will protect the defendant from any further possible claims of Mootz, arising out of the transaction, it was immaterial, either upon cross-examination of the plaintiff's witnesses, or in the development of defendant's case in rebuttal, to know who was the real or bona fide owner of the note.

Appellant's discussion of the point that the note sued on was made, executed, and delivered by the president of the corporation defendant in excess of his authority and without the sanction of the corporation, involves the sufficiency of the evidence to support the trial court's finding that the note was in fact executed and delivered, for a valuable consideration, by and with the sanction of the defendant. This point, however, cannot be considered. The appeal from the judgment in the case at bar was taken more than 60 days from the rendition of the judgment, and therefore the sufficiency of the evidence to sustain the trial court's findings of fact cannot be questioned upon an appeal from the judgment. Code Civ. Proc. § 939; Gilbert v. Kelly, 138 Cal. 690, 72 Pac. 344; Sather Banking Co. v. Briggs, 138 Cal. 726, 72 Pac. 352.

The judgment and order appealed from are affirmed.

We concur: HALL, J.; KERRIGAN, J.

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17 Cal. App. 1

FORD v. SUPERIOR COURT FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 1,052.)

(District Court of Appeal, First District, California. Aug. 15, 1911.)

1. MANDAMUS (§ 61*)—SUBJECT OF RELIEF—DISMISSAL OF INDICTMENT.

Where an accused's right to a dismissal of the indictment for delay in bringing him to trial has been denied, he may enforce it by mandamus.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 125; Dec. Dig. § 61.*]

2. CRIMINAL LAW (§ 576*)—TIME OF TRIAL—DISCHARGE OF ACCUSED FOR DELAY.

Under Const. art. 1, § 13, guaranteeing to accused the right to a speedy and public trial, and Pen. Code, § 1382, providing that the court, unless good cause to the contrary is shown, must order the prosecution to be dismissed if a defendant whose trial has not been postponed on his application be not tried within 60 days after the filing of the indictment or information, an accused, whether confined or on bail, must, in the absence of justification, be brought to trial within that time, or the prosecution must be dismissed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1297–1304; Dec. Dig. § 576.*]

3. CRIMINAL LAW (§ 576*)—TIME OF TRIAL—DISCHARGE OF ACCUSED FOR DELAY—CAUSE OF DELAY.

Over accused's objection the trial, upon indictments charging him with bribery, was postponed nearly three years. These continuances which were for the absence of one witness were had at the request of the state, and mostly over the objection of accused. The missing witness had testified in previous bribery cases against accused, but had left the state intending to remain away as long as these prosecutions were continued, and the state made no showing that he would return other than that he owned property in the state and had relatives there. *Held* that, as continuances for the absence of a witness may be granted only by a showing that the witness is material and essential that the party applying has been guilty of no neglect, and that the witness can be had at the time to which the trial has been deferred, these continuances were improperly granted, for it appeared that the witness openly left the state, and, though the trial was but a few days distant, he was not under subpœna, and that he declared his intention not to return until the prosecutions had been ended, and hence the granting of such continuances was not a good justification for denying accused the right to a speedy trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1297–1304; Dec. Dig. § 576.*]

4. CRIMINAL LAW (§ 594*)—CONTINUANCE—GROUND FOR ABSENCE OF WITNESS.

It is ample justification for continuances asked by the state for the absence of a witness that accused has aided and abetted such witness to leave the jurisdiction.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 594.*]

Original petition by Tirey L. Ford for a writ of mandamus to the Superior Court for the City and County of San Francisco and others, requiring dismissal of certain indictments against petitioner. Writ granted.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Garret McEnerney, A. A. Moore, and Stanley Moore, for petitioner. Fred L. Berry, Deputy Dist. Atty., for respondents.

LENNON, P. J. This is an application for a peremptory writ of mandate directed to the superior court of the city and county of San Francisco and to Hon. William P. Lawlor, judge thereof, requiring and commanding the dismissal of 14 indictments for felony pending against petitioner in said superior court since May 25, 1907, and which it is claimed were continued for trial from time to time for more than 60 days after the filing of said indictments without good cause and over the protest of the petitioner. The petition for the writ was in the first instance presented to the Supreme Court of this state, and by that court transferred to this court for hearing and determination. On July 16, 1911, an alternative writ of mandate issued out of this court directed to respondents, requiring the dismissal of said indictments, or that cause be shown here on July 24th following why the same had not been dismissed. On the last-named day the said matter came on for hearing, and, after argument by the respective counsel for the petitioner and respondents, the cause was submitted for decision upon the facts stated in the petition and respondents' return to the alternative writ of mandate.

[1] No question arises, nor can arise, here as to the right of the petitioner to invoke the remedy of mandamus if the facts pleaded and admitted to be true required as a matter of law the dismissal of the indictments by the lower court. That question was determined in petitioner's favor by the Supreme Court of this state sitting in banc upon his recent application to that court for a writ of habeas corpus. In re Ford (Sup.) Crim. No. 1611, 116 Pac. 757. Upon the record before us the only question to be decided is the sufficiency of the showing made here in justification of the lower court's refusal to grant petitioner's several motions to dismiss said indictments.

[2] It is the established constitutional and statutory rule of law in this state that every man accused of crime by indictment or information must be brought to trial, unless good cause for delay be shown, within 60 days after the finding and filing of such information or indictment. The rule in this behalf was first declared in Ex parte Vinton, 47 Pac. 1019,[1] and was affirmed in People v. Morino, 85 Cal. 515, 24 Pac. 892, where our Supreme Court, speaking through Mr. Justice Works, said: "A party charged with crime has the constitutional right to a speedy trial, and the court has no discretionary power to deny him a right so important, or to prolong his imprisonment without such trial beyond the time provided by law. The statute is imperative. The court, unless good cause be shown to the contrary, must order the prosecution to be dismissed. Here no cause for delay was shown. It was enough for the defendant to show that the time fixed by the statute after information filed had expired, and that the case had not been postponed on his application. If there was any good cause for holding him for a longer time without a trial, it was for the prosecution to show it." The limit of time beyond which the trial of a person charged with crime cannot be extended without violating the constitutional guaranty of a speedy trial is fixed by section 1382 of the Penal Code of this state, which provides: "The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: (1) When a person has been held to answer for a public offense, if an indictment is not found or an information filed against him, within thirty days thereafter. (2) If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment, or filing of the information." The relation which this section bears to the constitutional provision is clearly defined in the course of an opinion written by Mr. Justice Temple, wherein it is said: "The statute is a construction of the constitutional provision so far as to indicate what is a reasonable time within which the case should be brought to trial in order that the constitutional guaranty may be kept; and it may be fairly interpreted to mean that this guaranty is violated whenever 60 days is allowed to elapse without a trial, there being no good reason for delay and the defendant not consenting thereto. * * * It is sufficient for the defendant, in order to make out his case upon a motion for a dismissal in the trial court, to show that he has been detained without a trial for more than 60 days. Upon such showing the court should dismiss the case unless good cause for detaining the defendant and for continuing the prosecution is shown on behalf of the people. There is no presumption in such case, at least in the trial court, that the court has acted regularly, or that good cause in fact exists. It is well to remember that this case involves fundamental rights, and is of universal interest. Around those rights the English have waged their great battle for liberty. Without the narration of the conflicts to which they have given rise the history of the English people would be a dull affair. The right of the government with reference to persons accused of crime has been, and is yet, a matter of grave consideration. It led to the agitation which wrung from power the Great Charter, the Petition of Right, and the habeas corpus act. All the great achievements in favor of individual liberty of which the English people are so justly proud may be said to have come through

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[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 116 Cal. xvii.

contests over the rights of persons imprisoned for supposed crime." Ex parte Begerow, 133 Cal. 349, 65 Pac. 828, 56 L. R. A. 513, 85 Am. St. Rep. 178.

The wisdom and justice of the constitutional provision and the statutory enactment in aid thereof, which guarantee to every man accused of crime a trial within 60 days after the filing of an indictment or information, have never been successfully disputed. Since the Vinton Case, supra, our Supreme Court has rigidly adhered to and applied the rule in every case that has come before it; and, if ever there was any doubt as to what the duty of a trial judge is with reference to granting to a defendant a trial within the prescribed 60 days, whether the defendant be in jail or at liberty on bail, that doubt must be dispelled by the Supreme Court's most recent, as well as its very clear, comprehensive and emphatic exposition of the rule which is found in the case of In re Ford, supra, where, in an opinion concurred in by the six justices constituting the two departments of that court, it was said: "The Constitution of this state guarantees to every person charged with crime the right to a speedy and public trial (Const. art. 1, § 13). In order to prescribe with definiteness what should constitute a reasonable time under the constitutional mandate, it is declared in the Penal Code that, unless good cause is shown to the contrary, a prosecution must be dismissed against a defendant when an indictment or information has not been filed against him within 30 days after he was committed to answer, or he is not brought to trial within 60 days after the filing of the indictment or information against him, and the trial had not been postponed on his application. Pen. Code, § 1382. The effect of the last portion of the Code provision is to imperatively fix the time as 60 days within which, under the constitutional guaranty, a defendant must be brought to trial, and to declare that the guaranty is violated and the defendant entitled to a dismissal of the indictment against him when he is not brought to trial within said 60 days after it is filed, unless good cause for not doing so is shown, or the postponement of his trial beyond that period is made on his application."

With the law undisputed, and the fact admitted that over the continued protest and demand of petitioner, all of the indictments remaining against him have been continued without trial for nearly two years, there remains to be considered and decided only the question of the sufficiency of the justification offered by the trial court for its action in this regard.

[3] The return of the Honorable William P. Lawlor to the alternative writ of mandate concedes the facts stated in the petition for the writ to be true, and then, in response to the command of the writ that cause be shown why the indictments have not been dismissed, declares (1) that the petitioner has been at large upon bail, and therefore has not suffered by reason of the delay; (2) that the refusal to dismiss the indictments "was with good cause and in the exercise of sound discretion upon good and sufficient showing duly made in the premises"; and (3) "that it appears directly and by inference upon the record herein that James L. Gallagher is an indispensable witness in the above entitled cause and to the trial thereof; that he is now and for more than 19 months last past has been absent from the state of California; that the record discloses the fact that San Francisco, Cal., is the home of said witness; that he was absent, traveling in foreign countries; that his residence has been in California for many years last past; that he has many property interests in the state of California; that many of his relatives and members of his immediate family reside in San Francisco, Cal., and that by inference in all likelihood he will return to said jurisdiction." It will be noted, in passing, that no showing or suggestion is made as to when, if ever, the absent witness will return to this jurisdiction. The first response involves, in effect, the proposition that the constitutional guaranty of a speedy trial does not apply to a defendant who is fortunate enough to secure bail. This proposition has been fully and finally disposed of in Re Ford, supra, and requires no further consideration here. The second and third responses are so clearly interwoven that they must be taken and considered together. The mere statement that a trial was refused for "good cause and in the exercise of a sound discretion" is meaningless, unless it be construed in connection with the facts relied upon to support the assertion that the cause is good and the discretion sound.

Those facts, as revealed by the record before us, are in substance as follows: On May 25, 1907, 14 indictments were found and filed against the petitioner herein, charging him with the crime of bribery. Subsequently, on March 26, 1908, three more indictments charging an offer to bribe were returned and filed against the petitioner. One of these latter indictments was dismissed by the trial court, for the reason that it involved the same subject-matter of another indictment upon which the petitioner had been previously tried and acquitted. All of the indictments arose out of a single transaction in which it was charged the petitioner had bribed or offered to bribe various members of the board of supervisors of the city and county of San Francisco for the purpose of securing to the United Railroads, a corporation, the grant of an overhead trolley franchise. Petitioner was tried three times upon one or another of the first batch of indictments. The first trial, which was had within a week of his plea of not guilty, resulted in a disagreement of the jury; and upon the two remaining trials petitioner was by the verdict of the jury declared not guilty of the crimes charged against him. The second trial of petitioner was commenced within two weeks after the conclusion of the first trial, and was ended on the 3d day of December, 1907. The third and last trial of petitioner was commenced on the 9th day of April, and ended on the 2d day of May, 1908; and he has not been brought to trial since upon any of the indictments pending against him. During the three years which have intervened since the last trial of petitioner no effort has been made to bring him to trial upon any one of the remaining indictments; and in those three years the records of the trial court show some 56 continuances from time to time of all of said indictments. These continuances were in each instance granted at the request of the people over the objection of the petitioner and in the face of his repeated demands for a speedy trial and disposition of the charges. Upon more than 40 different occasions from the 1st day of February, 1908, to the 25th day of April, 1909, petitioner answered that he was ready for trial, and upon each occasion objected to the continuances which upon each occasion were ordered by the trial court. However, from June 25, 1909, to January 10, 1910, petitioner for various reasons, not necessary to be stated here, consented to continuances from time to time and up to and including the 10th day of January. From this date on to the 25th day of April, 1910, petitioner, upon every occasion when the cases against him were called, repeatedly and consistently demanded a trial and protested against any further continuances. On April 25, 1910, petitioner moved the trial court to dismiss all of the indictments upon the ground that a trial on each of said indictments had been denied him without good cause and against his protest for more than 60 days from the date of the filing of said indictments. The judge of the lower court refused to decide petitioner's several motions for a dismissal, and kept them undecided for more than 400 days without any suggestion or intimation that any effort would ever be made to bring petitioner to trial upon any of the indictments. The lower court justified its refusal to grant petitioner's motions to dismiss, or to give him a speedy trial upon all or any one of the remaining indictments, solely upon the ground of the absence from the state of the witness James L. Gallagher, who had testified as a witness for the people in the three trials already had.

The record before us contains evidence which tends to show that, notwithstanding the fact that all of the 14 indictments remaining against petitioner had been set down for trial on the calendar of the lower court for November 29, 1909, Gallagher, an indispensable witness for the people, departed from the state of California on November 26, 1909. This witness was not, either at the time of his departure or at any time prior thereto, under subpœna or order of the trial court to appear as a witness upon behalf of the people. Upon an investigation instituted by the trial court upon its own motion it was ascertained that Gallagher had left the state if not openly, at least without concealment of his intention. It was shown that he had openly and freely visited ticket offices inquiring about railroad and steamship transportation; that several days prior to his departure he called upon his relatives and friends to bid them good-bye. He declared that it was his intention to make an extended tour of Europe; that he was not under the process of the court; that the time within which he himself could have been indicted for complicity in the crime charged against petitioner had expired; that there was no reason for his staying in San Francisco any longer, and that he was "not coming back until the whole thing blows over." Gallagher, in fact, did go to New York, and from there to Europe. He has never since returned to this jurisdiction; and it is not pretended by respondents that any one knows when, if ever, he will return. Months afterwards it was shown in a supplemental inquiry that Gallagher was in Vancouver, British Columbia, and in letters written to his brother in San Francisco declared that he did not know when, if ever, he would return to California. These facts are not denied in the return filed in this court to the alternative writ of mandate; and upon the hearing of the writ it was, upon behalf of the respondents, admitted that "the facts as stated both in argument and in the appendix, consisting of two volumes (containing some three hundred and forty-eight pages of printed matter) which have been filed herein and made a part of petitioner's petition, are correct in detail."

In the face of this unquestioned and undisputed showing it is difficult, if not impossible, to conceive a plausible theory in support of respondents' contention that the trial of petitioner's cases was continued for good cause and in the exercise of a sound discretion. None has been suggested by respondents, because, as we apprehend, none could be suggested which would meet with the sanction of the settled and well-known rule of law by which a trial court must be guided and governed in granting or refusing the postponement of a trial because of the absence of a witness for either party. The fundamentals of the rule are to be found in the early English case of The King v. d'Eon, decided in the year 1764, and reported in volume 1 of Blackstone's Reports, at page 510. In that case it was declared by Lord Chief Justice Mansfield that: "Three things are necessary to put off a trial: First, that the witness is really material and appears to the court to be so; secondly, that the party who applies has been guilty of no neglect;

and, thirdly, that the witness can be had at the time to which the trial has been deferred." To this need only be added that a showing made in support of an application for a continuance by either party in a civil or criminal case must contain a definite statement of facts from which it may be reasonably inferred that the absent witness will return or can be brought back to the jurisdiction within such time as to prevent an unreasonable delay in the trial of the case and be available as a witness at the time to which the continuance is ordered. As a matter of course, the rule is applied with ever increasing rigidity where repeated continuances are asked for and in such a case a stronger showing of diligence and certainty is required in support of each successive application.

This continues to the present day, and justly so, to be the accepted rule of law in this and every other jurisdiction, where, in the absence of statutory regulation, the common law of England is recognized and revered. It would be a piling of argument upon argument and a waste of time and space to quote from the authorities which establish and sustain the doctrine here announced upon the authority of The King v. d'Eon, supra. There is no conflict of authority upon the proposition, and the cases dealing with the subject are numerous, among which may be cited the following: Frank v. Brady, 8 Cal. 47; People v. Francis, 38 Cal. 183; People v. Ashnauer, 47 Cal. 98; People v. Leyshon, 108 Cal. 440, 41 Pac. 480; State v. Phillips, 18 S. D. 1, 98 N. W. 171; State v. Miller, 63 Kan. 62, 64 Pac. 1033; Ferrell v. Com. (Ky.) 127 S. W. 162; Power v. State, 8 Ga. App. 408, 69 S. E. 315; Adams v. State, 56 Fla. 1, 48 South. 220; State v. Finch, 54 Or. 482, 103 Pac. 505; Vance v. Territory, 3 Okl. Cr. 208, 105 Pac. 307; Ex parte Tittel, 37 Tex. Cr. R. 597, 40 S. W. 598; State v. Olds, 217 Mo. 305, 116 S. W. 1080; Moffit v. Chicago Chronicle Co., 107 Iowa, 407, 78 N. W. 45. The showing made here by the respondents meets the requirements of the rule referred to in the one particular only that the testimony of the absent witness is material and indispensable.

As to the second requirement, it affirmatively appears that the state was not free from neglect, in this: that the witness was not at the time of his departure, nor at any time prior thereto, under the subpœna or order of the trial court. By its neglect in this respect the state failed to avail itself of the power which it had at its command to compel the attendance of the witness at any future trial of the petitioner.

As to the third requirement, it appears that the witness, taking advantage of the situation, as might be expected of any man in his predicament, placed himself without the jurisdiction of the court and beyond all reach of process. The facts of this case do not warrant the "inference that in all likelihood he will return," but, if such an inference could be fairly deduced from any of the circumstances surrounding the departure of the witness, it would be immediately met and overcome by his expressed intention that, if he ever returned to this jurisdiction, it would not be at a time when he could be compelled to attend and testify in any of the cases pending against petitioner. However that may be, it is certain that no such remote inference as is here relied upon will suffice as a showing o' good cause for the indefinite postponement of the trial of a criminal case. It concerns the public that there should be an end of litigation in criminal as well as in civil cases, and the law will not tolerate the repeated and never-ending postponement of a trial upon the vague hypothesis that perhaps at some indefinite time in the future a fugitive witness may return to the jurisdiction, and thus be available as a witness in the case.

[4] Of course, underlying all that has been said is the familiar maxim of jurisprudence that "no one can take advantage of his own wrong"; and a showing that the absence of an adverse witness was instigated, or knowingly aided and abetted, by a defendant would be ample justification for prolonged, if not indefinite continuances, in aid of a bona fide attempt to apprehend a defaulting witness which in all likelihood will result in his return to the jurisdiction of the court. No such showing, however, has been made or even suggested here. So clear is the right of the petitioner upon the law and the facts to the relief which he seeks that to deny it would be a deliberate defiance of the plain mandate of the law and a manifest misuse of judicial power.

It is therefore ordered that a peremptory writ of mandate issue out of and under the seal of this court to the superior court of the city and county of San Francisco and to the Honorable William P. Lawlor, judge thereof, commanding and directing that all of the fourteen indictments pending against Tirey L. Ford, the petitioner herein, be forthwith dismissed.

We concur: CHIPMAN, J.; KERRIGAN, J.

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17 Cal. App. 13

ABBOTT v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. MULLALLY v. SAME. CALHOUN v. SAME. (Civ. 1,057, 1,056, 1,055.)

(District Court of Appeal, First District, California. Aug. 15, 1911.)

Petitions by William M. Abbott, Thornwell Mullally, and Patrick Calhoun for a writ of mandamus directed to the superior court of the city and county of San Francisco and others, requiring the dismissal of certain indictments against the different petitioners. Petitions granted.

Garret McEnerney, A. A. Moore, and Stanley Moore, for petitioners. Fred L. Berry, Deputy Dist. Atty., for respondents.

LENNON, P. J. The respective petitions of William M. Abbott, Thornwell Mullally, and Patrick Calhoun for a writ of mandate directed to the superior court of the city and county of San Francisco, requiring a dismissal of certain indictments for felony pending in said court against petitioners, were submitted for decision with the case of Tirey L. Ford this day decided.

In point of law and fact the cases are practically identical. The differences are nonessential. In the case of Patrick Calhoun he was once tried. In the cases of the other petitioners they were never given even a single trial. For the reasons stated in the case of Tirey L. Ford v. Superior Court of the City and County of San Francisco et al. (No. 1,052) 118 Pac. 96, the prayer of each petitioner is granted, and it is ordered that a peremptory writ of mandate issue out of this court and under the seal thereof, directed to the superior court of the city and county of San Francisco and to the Honorable Wm. P. Lawlor, judge thereof, directing and commanding the dismissal of all the indictments pending against these petitioners and each of them.

We concur: CHIPMAN, J.; KERRIGAN, J.

16 Cal. App. 775

SOUTH YUBA WATER CO. v. CITY OF AUBURN. (Civ. 705.)

(District Court of Appeal, Third District, California. Aug. 8, 1911.)

1. MUNICIPAL CORPORATIONS (§ 269*)—IRRIGATION DITCHES—CULVERTS—AUTHORITY TO CONSTRUCT.

Municipal Corporation Act (St. 1883, p. 269, § 862, cl. 4), giving to municipal corporations power to establish, build, and repair bridges, to lay out, alter, keep open, improve, and repair streets and other public highways and places within the city, and to construct gutters, culverts, etc., authorizes a city to construct a culvert over a private water canal, unless forbidden by some other act of the Legislature.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 269.*]

2. WATERS AND WATER COURSES (§ 168*)—PRIVATE DITCHES—BRIDGES IN CITY—DUTY TO CONSTRUCT.

Civ. Code, § 551, requiring every water or canal corporation to construct and keep in good repair all bridges across their canal that the board of supervisors of the county where such canal is situated may require, etc., does not require such companies to construct culverts to carry streets established subsequent to the construction of the canal over the same; the duty to construct such culverts being on the city.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 168.*]

3. APPEAL AND ERROR (§ 870*)—APPEAL ON JUDGMENT ROLL—SCOPE OF REVIEW—ORDER REFUSING TO STRIKE OUT PARTS OF PLEADINGS.

Since Code Civ. Proc. § 670, making orders striking out any pleading, in whole or in part, part of the judgment roll, does not include orders refusing to strike out, such an order is not reviewable on appeal on the judgment roll alone.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 870.*]

4. MUNICIPAL CORPORATIONS (§ 1002*) — CLAIMS—PRESENTATION—INTEREST.

Since no part of a claim against a city could be paid, except on presentation for allowance by the board of trustees, as required by Municipal Corporation Act (St. 1883, p. 271), § 864, interest could not be recovered on any part of a claim prior to such presentation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2174; Dec. Dig. § 1002.*]

Appeal from Superior Court, Placer County; J. F. Ellison, Judge.

Action by the South Yuba Water Company against the City of Auburn. Judgment for plaintiff, and defendant appeals. Affirmed.

A. C. Lowell, for appellant. John M. Fulweiler, for respondent.

CHIPMAN, P. J. This is an action to recover the agreed price for the construction of a concrete culvert at the crossing of the street known as Railroad street over plaintiff's canal. The cause was tried by the court, and plaintiff had judgment, from which defendant appeals on the judgment roll.

The court found the averments of the complaint to be true, and the affirmative averments of the answer to be untrue. We have, therefore, only the sufficiency of the complaint to deal with, for it constitutes the findings of the court. The sole question is, Do the findings support the judgment?

It is found: That plaintiff is a duly organized corporation, owning and operating that certain ditch or canal formerly known as the Bear River and Auburn Ditch, and now called the South Yuba Water Company's canal; that said canal was constructed during the years 1850 and 1851, and conveyed the waters of Bear creek from a point near Colfax, Placer county, to and past the town, now city, of Auburn, carrying waters to the westerly portion of said county, and disposing of the same for mining, agricultural, irrigation, and other enumerated purposes, and ever since the years 1850 and 1851 plaintiff and its predecessors have continuously owned and used said canal and said water for said purposes; that the city of Auburn is a city of the sixth class, and was so created in the year 1887; that about the year 1865, and prior to the incorporation of said city of Auburn, there was a traveled road, now called Railroad street, in said city, which said road crossed the said canal of plaintiff about where said street now crosses said canal, across which the county of Placer, by its duly constituted authorities, constructed and maintained a bridge until the incorporation of said city, since which time the said city has maintained and repaired said bridge; that, in the year 1907, the said bridge became out of repair and required rebuilding, and the said city, by its duly constituted authorities, advertised for bids for replacing said bridge by means of a reinforced concrete culvert on said Railroad street and across the same; that bids were presented by plaintiff and others, and the work let, under proper resolution authorizing the same, to plaintiff, and upon terms and conditions set forth in a written contract, which is fully set forth in the complaint, by which the city agreed to pay plaintiff the sum of $660 for said work, 75 per cent. of said sum upon the completion of the said culvert, and 25 per cent. thereof 35 days after said completion and acceptance; and the said city agreed "to pay the said contractor the said sum of $660 for the said work at the time and in the manner hereinbefore provided"; that "thereafter and by the month of June, 1907, plaintiff fully performed each and all of its agreements and obligations as set out in said contract, * * * and the defendant accepted the same, and has ever since used the same for the uses and purposes of said city of Auburn and of its inhabitants"; that "thereafter, to wit, on or about the 2d day of September, 1907, the plaintiff duly presented to the said city board of trustees its claim against said city of Auburn, for said work done under said contract, being for the sum of $660, due and payable and unpaid plaintiff by said city of Auburn" for said work, and pursuant to said contract and acceptance by said city; that said city "delayed and neglected from time to time to act upon said claim of plaintiff * * * until the 1st day of June, 1908," and on that date rejected and refused to pay the said claim of plaintiff, without any just cause or excuse; that said claim is still due and owing and unpaid "since about June 1, 1907." The prayer is for the full amount of $660, "with legal interest thereon from the 1st day of June, 1907, and for costs of suit."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The court gave judgment for the amount claimed, with legal interest from June 1, 1907.

It thus appears that plaintiff's canal was constructed long prior to the establishment of the county highway, in the year 1865, which afterwards, in 1887, became one of the streets of defendant city; that the county built and maintained the bridge over the canal up to the time jurisdiction over the street passed to the city of Auburn, since which time the latter has maintained and cared for the bridge; that a necessity arose for repairing or replacing the bridge by a more substantial structure, and the defendant decided on building a concrete culvert, in pursuance of which it advertised for proposals and let the contract to plaintiff; that the work was duly completed and accepted, but, for some unexplained reason, the defendant refused to pay the price agreed upon, or to pay at all. Hence this action.

[1] That the defendant was authorized by its charter to enter into such a contract, unless forbidden by some act of the Legislature, we think clearly appears from the provisions of the municipal corporation act. The corporation is given power: "To establish, build and repair bridges; to lay out, alter, keep open, improve and repair streets and other public highways and places within the city * * * and to construct gutters, culverts * * * and control all such highways and places and to expend in their discretion the ordinary income and revenue of the municipality in the payment of the cost and expenses of the whole or any part of such work or improvement." Section 862, cl. 4, Stats. of 1883, pp. 93, 269.

[2] But it is claimed that, under the provisions of section 551 of the Civil Code, it became the duty of plaintiff to build and maintain all bridges required at road crossings over its canal; and hence the defendant was unauthorized to incur the expense of the structure. When this case was first under submission, there was a question, not then finally determined, whether canal owners were required to build and maintain bridges over their ditches or canals at crossings of highways laid out and established after the construction of such ditches or canals. The point has been before the Supreme Court in a recent case (City of Madera v. Madera Canal & Irrigation Co., 115 Pac. 936). The question was thoroughly considered, and the court held that, where municipalities lay out or establish a street or highway which crosses a canal or ditch previously constructed by its owner, the duty of erecting the necessary bridge at such crossing devolves upon the municipality, and that section 551 of the Civil Code imposes no duty on the owner of the canal or ditch to construct the crossing. This case seems to be decisive of the point on which appellant relies, and adversely to its contention.

[3] Appellant complains that it was error for the court to deny its motion to strike out certain portions of the complaint. Motions to strike out parts of pleadings and the order denying the same formerly constituted no part of the judgment roll. Sutton v. Stephan, 101 Cal. 545, 36 Pac. 106; Mock v. City of Santa Rosa, 126 Cal. 330, 58 Pac. 826. Section 670 of the Code of Civil Procedure was amended in 1907, making "all orders striking out any pleading in whole or in part" part of the judgment roll. But the amendment does not include orders refusing to strike out.

[4] Appellant also contends that the findings do not support the judgment for interest prior to the date of the presentation of the claim for payment, which was September 2, 1907. The finding is that on that date plaintiff presented its claim for $660, and no more. The contract was completed "by the month of June, 1907," which could not mean an earlier date than June 1st, and the evidence probably so showed. The contract provided that 75 per cent. was payable on completion of the contract, but the remaining 25 per cent. was made payable "35 days after its completion." Interest was

certainly not allowable on this 25 per cent. from June 1st. But no part of the claim could be paid, except upon its presentation in due form for allowance by the board of trustees. Stats. 1883, p. 271, § 864. This was not done until September 2, 1907, and the board had no opportunity prior to that date to approve or reject the demand. It seems to us that interest should not have been allowed from any earlier date.

The judgment is modified so as to allow legal interest on the contract price for the work from September 2, 1907, and, as thus modified, is affirmed.

We concur: BURNETT, J.; HART, J.

16 Cal. App. 692

CALIFORNIA PORTLAND CEMENT CO. et al. v. WENTWORTH HOTEL CO. et al. (Civ. 922.)

(District Court of Appeal, Second District, California. July 28, 1911. Rehearing Denied by Supreme Court Sept. 25, 1911.)

1. Appeal and Error (§ 931*) — Presumptions — Findings — Sufficiency of Evidence in Support.

In an appeal on the judgment roll alone, the court will assume that the evidence was sufficient to sustain the findings below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762–3771; Dec. Dig. § 931.*]

2. Appeal and Error (§ 1039*)—Harmless Error—Pleadings—Variance.

Code Civ. Proc. § 469, provides that no variance shall be material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits, and section 470 provides that, where the variance is not material, the court may direct the fact to be found according to the evidence, or may order an immediate amendment. The complaint in an action against the assignee in insolvency of a hotel company to establish a mechanic's lien alleged that the person with whom the contract for materials was made was an original contractor acting under an unrecorded contract, while the findings showed that such person's contract with the hotel company was one creating an agency in him by which he represented the hotel company in the purchase of materials, etc. *Held*, that as the trial court ordered no amendment to the complaint, and as the proof did not establish any entirely different cause of action, the variance could not reasonably have misled the assignee to his prejudice, and that the finding or conclusion of the trial court would be sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075–4088; Dec. Dig. § 1039.*]

3. Appeal and Error (§ 197*)—Objections—Pleading—Variance.

Where a party desires to raise a question as to any variance between the pleading and the proof, such objection must be presented in the trial court, otherwise it is waived.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 197;* Pleading, Cent. Dig. §§ 1428–1441.]

4. Mechanics' Liens (§ 48*)—Right to Lien —Material Furnished But Not Used.

Code Civ. Proc. § 1200, which provides that in case a contractor fails to perform his contract in full, or abandons it before completion, persons other than the contractor who have delivered material on the ground shall have a lien therefor, does not apply to a case where the work is abandoned by the owner, and in such case persons who have delivered material on the ground to be used in the building, but which has not been actually used in its construction, have no right to liens, and the fact that some of the material was manufactured especially for use in the building does not affect the case.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 51; Dec. Dig. § 48.*]

5. Mechanics' Liens (§ 277*)—Pleading—Variance Between Claim and Proof—Statutory Provisions.

An elevator company under contract to furnish and install elevators in a hotel for $6,875 deducted $340 from the contract price upon information as to a change in the owner's building plans, and installed elevators in the hotel as finished, with machinery, ready for operation, but in its notice or claim of lien, and in one count of its action to enforce its lien, it recited full performance of the contract, and claimed the original contract price to be due. *Held* that, as there was a substantial completion of the contract to furnish and install the elevators, there was no such variance as would defeat the claimant's right to a lien therefor.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 546–554; Dec. Dig. § 277.*]

6. Mechanics' Liens (§ 157*)—Proceedings to Perfect—Claim of Lien—Effect of Defects.

Code Civ. Proc. § 1202, provides that any person who shall willfully include in his claim filed under section 1187 work or materials not performed upon or furnished for the property described in the claim shall forfeit the lien. An elevator company under contract to furnish and install elevators in a hotel building for $6,875 filed a claim or statement of lien in which a deduction of $340, made during the work, was not offset against the contract price which was claimed to be due. *Held* that, as the amount of offset was such a small part of the whole contract price agreed to be paid, failure to credit it would not deprive it of its lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 268–274; Dec. Dig. § 157.*]

7. Mechanics' Liens (§§ 5, 157*)—Construction of Lien Law in General—Error in Claim or Statement.

The lien law is a remedial statute, and should be liberally construed to effect its object, and its requirements as to notices to be given regard substance rather than form, but Code Civ. Proc. § 1202, providing for a forfeiture of lien for willfully including work or materials not performed upon, or furnished for, the property is penal, and will be strictly construed, and the evidence must be clear that a violation was willful before claimant's right to a lien will be denied.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 3, 5, 268–274; Dec. Dig. §§ 5, 157.*]

8. Mechanics' Liens (§ 74*)—Contract or Consent of Owner—Filing Contract for Elevators.

A contract for the furnishing and installation of elevators in a hotel building then under construction is not a contract for construction work, but rather for furnishing material, so that the elevator company is a materialman, and not an original contractor, and hence the statute requiring that building contracts providing for the payment of more than $1,000 shall be recorded does not apply.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 109, 110; Dec. Dig. § 74.*]

9. MECHANICS' LIENS (§ 277*)—ENFORCEMENT —ISSUES, PROOF, AND VARIANCE.

An electrical contractor whose work upon a hotel was to be paid for according to the amount done filed a notice of lien, setting forth his completion of the work according to the contract and containing the recitals required by statute, and in a proceeding to enforce the lien the allegation of acceptance as completed was not denied, though, in fact, the owner had stopped work at the fourth story, instead of completing six stories as planned, though the electrical contractor was in no default. *Held* that, as it was not strictly incorrect to say that the work had been completed, there was no such variance between the recitals in the notice and the proof as would defeat his claim to a lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 546–554; Dec. Dig. § 277.*]

10. MECHANICS' LIENS (§ 33*)—RIGHT TO LIEN—IMPROVEMENTS OUTSIDE OF BUILDING—PLANTS AND TREES.

Under Code Civ. Proc. § 1191, which provides that any person who, at the request of the owner of any lot in any incorporated city or town, grades, fills in, or otherwise improves the same, has a lien upon said lot for his work and materials, the furnishing and planting of seeds, trees, and shrubs, and the caring for them long enough to insure that they were well started, and settled in the ground, is an improvement to real estate, which entitles the party furnishing and caring for them to a lien therefor.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 32, 33, 38; Dec. Dig. § 33.*]

11. MECHANICS' LIENS (§ 74*)—OWNERS—CONTRACT—FILING OF CONTRACT—ROOFING AND TILING CONTRACT.

A contract to furnish roofing laid in asphalt pitch on a concrete surface for a hotel building, and a contract to furnish and set roofing tile, are not contracts for construction work, but are contracts for materials, to which the statute which requires contracts providing for the payment of more than $1,000 to be recorded does not apply.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 109, 110; Dec. Dig. § 74.*]

12. MECHANICS' LIENS (§ 48*)—RIGHT TO LIEN—MATERIAL INCORPORATED IN WORK BUT NOT REQUIRED—WINDOWS AND DOORS.

One who furnishes screens for windows and doors of a hotel building, and fits them and actually puts them in place, so that they are held by the grooves in which they run or the hinges by which they are fastened, is entitled to a lien therefor as for material used in construction, although, when the construction was abandoned at the fourth story instead of completing six stories as planned, they were taken out and stacked on the fourth floor.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 51; Dec. Dig. § 48.*]

13. MECHANICS' LIENS (§ 139*)—PERFECTING LIEN—NOTICE OR STATEMENT OF CLAIM.

Where a lather engaged in work upon a hotel at a day rate has been paid for his work upon the hotel building, it is a correct statement to set forth the time engaged upon a garage connected with the hotel and the amount due therefor, without showing the whole amount earned while at work upon the hotel.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 234–236; Dec. Dig. § 139.*]

14. MECHANICS' LIENS (§ 281*)—ENFORCEMENT—SUFFICIENCY OF EVIDENCE.

Evidence in a proceeding to enforce a mechanic's lien for furnishing plastering material for the construction of a hotel *held* to sustain a finding as to the amount due in accordance with the allegation of the complaint that no specific price was agreed on.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 281.*]

15. APPEAL AND ERROR (§ 231*)—SUFFICIENCY OF EVIDENCE—FAILURE TO MAKE EXCEPTIONS.

Under Code Civ. Proc. § 648, which requires that an exception to a judgment for insufficiency of the evidence shall specify the particulars in which the evidence is insufficient, an appellant whose bill of exceptions contains no specifications as to the insufficiency of the evidence, and who made no motion for a new trial is not entitled to have the sufficiency of the evidence reviewed, since section 939, entitling appellant to have the judgment reviewed providing his appeal is taken within six months after the entry thereof, does not dispense with the general requirements affecting bills of exceptions where the sufficiency of the evidence to sustain the judgment is questioned.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 231.*]

16. MECHANICS' LIENS (§ 204*)—ASSIGNMENT OF LIEN OR CLAIM—EFFECT AS TO LIEN NOT PERFECTED.

There can be no assignment made of a debt to be secured by the mechanics' lien law (Code Civ. Proc. §§ 1183–1203a) which will carry with it to the assignee the right to enforce a lien, where such assignment is made prior to the assignor's perfection of the lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 379; Dec. Dig. § 204.*]

17. MECHANICS' LIENS (§ 74*)—OWNER'S CONSENT OR CONTRACT—FILING OF CONTRACT—LIGHTING FIXTURES.

A contract for $2,900 for the furnishing of special lighting fixtures and installing them in a hotel building, where the fixtures are made at the contractor's foundry and the work of installing them constitutes but a small part of the contract price, is a contract for the furnishing of materials to which the statute requiring certain contracts to be filed for record does not apply.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 109, 110; Dec. Dig. § 74.*]

18. MECHANICS' LIENS (§ 31*)—RIGHT TO LIEN—MATERIALS—LIGHTING FIXTURES.

Lighting fixtures designed especially for use in a hotel building and made a part thereof by being regularly attached thereto are a necessary part of the completed hotel, and are material for which a lien is intended to be given by the Constitution and lien statute.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 36; Dec. Dig. § 31.*]

19. MECHANICS' LIENS (§ 132*)—PERFECTING—TIME TO FILE CLAIM—COMPLETION OF CONTRACT.

A building will be deemed completed, even though not in accordance with the plans and specifications, where the owner abandons the intent to make it a completed structure pending work upon it, and hence where a contractor furnished laundry machinery to a hotel building, but did not file his notice of lien until after the owner's notice that work upon the building had ceased, and that the building had been accepted by him, had been filed and recorded, the claim of lien was too late.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 190–207; Dec. Dig. § 132.*]

20. Mechanics' Liens (§ 142*)—Proceedings to Perfect—Notice—Defects.

For a materialman or contractor to perfect his lien, his notice or statement of claim must be substantially in statutory form, and must set forth a statement of the demand after deducting all just credits and offsets, the name of the owner, and a statement of the terms, time given, and conditions of his contract, and this requirement is not relaxed where the claimant is dealing directly with the owner, and where a notice of lien alleged that the contract price was to be paid in installments on the delivery of the material at various dates, whereas, in fact, prices were agreed upon for various parts of the material furnished and payment therefor was to be made on the 10th of each month for all material furnished during the preceding month, the statute was not complied with, since there was a misstatement as to the time of payment.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 239; Dec. Dig. § 142.*]

21. Mechanics' Liens (§ 74*)—Contract or Consent of Owner—Filing—Carpentry or Joiner Work.

A contract which provides that contractors under the direction of the architect should perform and finish the entire carpentry and joinery required in the construction of a hotel building, and that the owner should pay to the contractor the net profits of the work, plus 5 per cent. as a compensation to the contractors for services, and that material ordered should be paid for upon presentation of a bill for it from the parties of whom it is purchased and upon certificate of the architect, is a contract for construction required by Code Civ. Proc. § 1183, to be in writing and recorded.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 109, 110; Dec. Dig. § 74.*]

22. Mechanics' Liens (§ 73*)—Contract of Owner—Requisites of Contract—Stipulations as to Time of Payment.

Where a contract to furnish labor and material for a hotel building provided that the contractors should be paid 75 per cent as the work progressed, the balance of 25 per cent. "of their commissions" for purchasing, etc., and not 25 per cent. of the whole contract price, as required by Code Civ. Proc. § 1184, should be payable 35 days after final completion of the contract, it was void, and the contractor could have no right of lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 87, 88, 90–102; Dec. Dig. § 73.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by California Portland Cement Company and others for the enforcement of liens against Wentworth Hotel Company and H. S. McKee, appointed assignee of its insolvent estate after the institution of the actions. Judgment for plaintiffs, except the A. T. Hagan Company, the Pacific Coast Planing Mill Company, and Yard & Hichborn, and they appeal, and the assignee appeals generally from the judgments entered against the hotel company. Judgment modified and affirmed. Rehearing denied (118 Pac. 113).

D. Joseph Coyne, for appellant Pacific Coast Planing Mill Co. John W. Kemp and Kemp & Collier, for appellants Yard & Hichborn and others. G. C. De Garmo and Jeff P. Chandler, for defendant McKee, assignee in insolvency, etc. William T. Craig and Mulford & Dryer, for defendants A. T. Hagan Co. and others. S. J. Parsons, for respondent Crane Co. Willard Butler, for respondent Faroe-Pettebone Co. Hutton & Williams, for respondent United States Flexible Metal Tube Co. A. J. Copp, Jr., for respondents Otis Elevator Co. and another. M. M. Meyers, for respondent H. W. Johns-Manville Co. R. P. Congdon, for respondent Dunn. Smith, Miller & Phelps, for respondent Simon Brick Co. Denis & Loewenthal, for respondent Mayberg Co. Walter & Pratt, for respondent Fairbanks-Morse Co. E. G. Kuster, for respondent Hipolito Screen & Sash Co. J. G. Scarborough and Arthur Hawes, for respondent Pacific Coast Mfg. Co. Geo. C. Sanders, for respondent Western Hardware & Arms Co. J. H. Merriam, for respondent Chisholm. H. E. Guthrie, for respondent Hames, Jones & Cadbury. Moody, Noyes & Simpson, for respondent Reliance Machine Works. Gray, Barker & Bowen, for respondents Falls and others. Job. Harriman, for respondent Plagan & Co. G. C. De Garmo, for defendant Los Angeles Lime Co. D. P. Hatch and O'Melveny, Stevens & Millikin, for respondent Wentworth Hotel Co. J. H. Shankland and Oscar A. Tuppet, for respondents California Portland Cement Co. and others. Grant Jackson, for respondents Morton and others. H. S. G. McCartney, for respondent H. Raphael Co. W. T. Craig, for defendants California Hardware Co. and others. Hahn & Hahn, for respondent Munger & Munger. Borden & Carhart, for respondents Carpenter & Biles Mill & Lumber Co. and another. Gibson, Trask, Dunn & Autcher, for respondent Fairchild-Gilmore-Wilton Co. Lawler, Allen, Van Dyke & Jutten, for respondents Foulkes and others.

JAMES, J. Various lien claimants who furnished lumber and materials for use in the construction of a large hotel building erected by the Wentworth Hotel Company at Oak Knoll, in the city of Pasadena, sought to foreclose liens in satisfaction of the indebtedness alleged to be owing to them. The building erected by the Wentworth Company was originally designed to be six stories in height. After four stories had been completed, it was decided by the owner to stop the work of construction, and thereupon the building was accepted as a completed structure. The several actions brought to foreclose liens were consolidated, and a trial was had, which resulted in judgments of foreclosure in favor of the plaintiffs and cross-complainants generally, except as to plaintiffs A. T. Hagan Company, Pacific Coast Planing Mill Company, and cross-complainant

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Yard & Hichborn, which latter were denied liens by the trial court. After the institution of the actions, the Wentworth Hotel Company was declared to be insolvent, and H. S. McKee was appointed as assignee of its estate. There are appeals taken by the Pacific Coast Planing Mill Company and Yard & Hichborn from the judgment and from orders denying their motions for new trial, and an appeal taken by the A. T. Hagan Company from the judgment. McKee, assignee in insolvency, took a general appeal from the judgment entered against the hotel company in favor of the successful claimants. The assignee, however, on his appeal has raised questions affecting the judgment as to only a certain number of the lien claimants.

The Warren & Bailey Manufacturing Company in their complaint alleged that the hotel company had entered into a contract with one Vesper, whereunder Vesper agreed to furnish labor and material for the construction of the hotel building, that the contract provided for the payment of more than the sum of $1,000, and that it had never been filed with the county recorder. The complaint further set out that plaintiffs furnished to Vesper material and labor for which the amount of $1,354.77 remained unpaid. The answer of the assignee denied the allegations of the complaint in general, but admitted that the contract between the hotel company and Vesper had not been recorded. In the findings of the court is set out in full the contract made between Vesper and the hotel company, from which it appears that Vesper was employed as the purchasing agent, and was not an original contractor. It is found that the labor and materials furnished by plaintiffs were furnished to Vesper for use in the hotel building, and that they were so used. The judgment awarded a lien to the plaintiffs. The points urged by the assignee as to this claim are that the findings do not sustain the judgment, and that the findings are not within the issues as made by the pleadings. The findings, we are satisfied, do sustain the judgment. While it is not found expressly that Vesper was acting as the agent of the hotel company in purchasing the labor and materials, it appears from the contract made between him and the former that such was his relation.

[1, 2] It is true, as insisted by appellant, that there was a variance between the allegations of the complaint and the findings of the court. If that variance was a material one within the definition as given in section 469 of the Code of Civil Procedure, then the judgment as to this claimant should be reversed. That section provides that no variance is to be deemed material, "unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the court may order the pleading to be amended, upon such terms as may be just." The variance here was only as to the character of the relationship established by the contract which was entered into between the hotel company and Vesper. The claimant pleaded in its complaint that Vesper was an original contractor acting under an unrecorded contract, while the findings of the court show that Vesper's contract with the hotel company was really one creating an agency in Vesper by which he represented his employer in the purchase of material et cetera. As this appeal is presented on the judgment roll alone, we must assume that the evidence was sufficient to sustain the findings of the court. It is not made to appear that any objection was offered to any evidence which was introduced, upon which the findings were made, on the ground that there was a variance between the allegations of the complaint and the proof, and therefore we must assume that there was no such objection. And it does not appear from the record as it is presented to us that the variance was such as could reasonably have misled the appellant to his prejudice. Section 470 of the Code of Civil Procedure provides as follows: "Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs." Evidently the trial court concluded that the variance was not material, for it was not ordered that the pleading be amended as is provided to be done by section 469 of the Code of Civil Procedure, where a party has been misled by reliance upon allegations contained in a pleading which showed different facts from those established by the evidence. Of course, if the proof established an entirely different cause of action from that alleged in the complaint, then the variance would have been fatal. Such, however, was not the condition respecting the allegations and proof in this case, and we think that the conclusion of the trial court was correct, and should be sustained. Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 51 Pac. 555. [3] It may be added that it is an established rule of practice that, where a party desires to raise a question as to any variance shown between allegations in a pleading and the proof offered at the trial, such objection must be presented in the trial court; otherwise it is waived. Eversdon v. Mayhew, 85 Cal. 1, 21 Pac. 431, 24 Pac. 382. As we have suggested, it does not appear that objection was made to the evidence as introduced, which evidence we must assume was competent and sufficient to sustain the findings as made by the court.

[4] Several claimants were awarded liens for material which was placed upon the premises of the hotel company, but which did not actually enter into the construction of the building as the same was left at the time work ceased thereon. The court found in each of these cases that the material was furnished to be used in the building, and that it was necessary to the completion of the building in the manner and form it had

originally been designed to be completed. The position of the assignee is that liens should not have been given, except for work or materials furnished to be used and which were actually used in and upon the hotel building. At the time the work was stopped, plumbing material of the value of $2,970.69, furnished by the George H. Tay Company, was unused, but remained upon the premises. The John Douglas Company had furnished toilet fixtures of large value, and there remained upon the premises unused of such materials at the time of the cessation of work a quantity thereof of the value of $1,810.38. The Carpenter & Biles Mill & Lumber Company had furnished doors, windows, etc., of special design manufactured for the hotel building, and of these a number, intended for use on the fifth floor of the building, remained unused upon the premises when the work ceased; the value of such unused materials and articles being found by the court to be the sum of $566.59. The court further found with respect to the last-mentioned unused materials that they had been primed and fitted to the openings in the fifth floor of the building, but had not been actually hung therein, but were stored in unfinished rooms of the fifth story of said building. It is contended on the part of respondents who were awarded liens for these unused materials that, as section 1200 of the Code of Civil Procedure recognizes the right of a materialman to a lien for materials unused, where the work has been abandoned by the contractor, such a right is intended to be given in the case of an abandonment by the owner. It may be said here that it is the law that the right of lien is not given a materialman ordinarily for materials furnished to be used in a structure, but which are in fact not used, even though they may have been diverted to other purposes beneficial to the owner of the ground and building. The courts of the different states, construing statutes very similar to ours in terms, do not, however, all agree in this conclusion. In those states where liens are held to attach in favor of the materialmen for material to be used in the construction of a building, even though such materials are not in fact incorporated into the structure, the consideration mainly kept in view and to which great weight is given is that the creditor has parted with his property upon the faith that the building to be erected and the ground upon which it is to stand will furnish security for the payment of his debt. The counter line of decisions, holding that such liens are given only where the materials have actually entered into and become a part of the structure, are reasoned out on a line of argument having as a basis the theory that liens of the variety mentioned are provided to be given upon the assumption that the property to which they are made to attach has been improved and its value enhanced by the labor bestowed or materials furnished; hence that, where such labor or materials do not actually enter into the structure, no lien results. To the latter effect are all of the California cases: Bottomly v. Rector et al. of Grace Church, 2 Cal. 90; Houghton v. Blake, 5 Cal. 240; Holmes v. Richet, 56 Cal. 307, 38 Am. Rep. 54; Silvester v. Coe Quartz M. Co., 80 Cal. 513, 22 Pac. 217; Bewick v. Muir, 83 Cal. 373, 23 Pac. 390; Hamilton v. Delhi Mining Co., 118 Cal. 148, 50 Pac. 378; Stimson Co. v. L. A. Traction Co., 141 Cal. 30, 74 Pac. 357. Unless section 1200, Code of Civil Procedure, furnishes authority in support of the judgment awarding liens for unused materials to the claimants hereinbefore mentioned, then, under the California decisions cited, such liens cannot be sustained. We do not think the provisions of this section are applicable to the conditions shown in these cases. That section is designed to provide a method whereby the extent of the liability of the owner under his building contract may be ascertained and fixed where the contractor abandons the work. It does in terms so provide, and it would be indeed a strained construction to read into it words to make it apply equally to a case where the owner voluntarily causes work to be stopped. It would not likely be insisted, in view of the decisions to which attention has been called, that if a man purchased lumber to be used in the erection of a certain building, and the lumber was placed upon the premises where it was intended the structure should be erected, and the purchaser then decided he would not build at all, that the seller would have a lien upon the real estate for the value of the materials so sold. Why a different conclusion should follow where the building was actually commenced, but abandoned by the owner at any later stage of the work, is not apparent to us. Nor does the fact that some of the materials were manufactured especially for use in the hotel building in our opinion affect these cases. They were not, in fact, so used; and each of the vendors of the materials was charged with the knowledge of the law which gave him no lien until his property had become merged into the structure, and each must be deemed to have contracted with that knowledge present in mind. Until materials furnished under conditions like those shown in these cases, therefore, are actually employed in some part of the structure, no right of lien exists on the part of the person furnishing such materials, but his right of action is a personal one against the owner.

[5] The contract of the Otis Elevator Company required that there be furnished and installed one passenger elevator and one freight elevator, for which the hotel company agreed to pay the sum of $6,875. These elevators were furnished and installed in accordance with the terms of the contract, except that, because the hotel company decided to omit the two upper stories of the hotel building as originally designed, there was a saving worked to the contractor on

account of labor and materials not used amounting to the value of $340. The president of the hotel company notified the elevator company that the work was to be stopped at the fourth story, and requested to be told what difference would be made in the cost of installing the elevators. He was advised that a deduction would be made in the amount above stated. In the notice of lien it was recited that the contract had been fully performed, and that the full amount agreed to be paid, to wit, $6,875, was owing thereon. Under these facts, it is contended that the variance between the statements contained in the notice of lien and the facts proved at the trial is fatal to the right of the elevator company to have a lien as security for its debt. Notices of lien must, in so far as they purport to set out matters made essential by the statute to be stated therein, be substantially true. It often happens, however, that the amount for which a claimant is given a lien is less than that stated in his notice, and it is not held that, because a claimant and the owner may differ as to the amount of money due under the contract, the claimant must, if he chooses to litigate that controversy, run the risk of losing his lien because he has overstated in his notice the amount which a court may finally determine to be due him. In this case the elevators furnished and installed by the Otis Elevator Company were completed machines and ready for operation. They were of the kind and character called for by the specifications. In order that the elevators might be made to operate to the additional stories, it only required that the guide rails be extended in length and the necessary supports furnished therefor. The expense of doing this was found by the court to amount to $340, and that amount was deducted from the contract price. No contention is made that the elevators were not complete and fully installed in the building as constructed. On this point counsel for the assignee in their brief say: "Appellant is not complaining of a failure on the part of respondent to complete its contract, but of a variance between the statement contained in its notice of lien and the proof as to completion." There was a substantial completion of the contract to furnish and install the elevators, the only real inaccuracy shown by the notice of lien consisting in the fact that credit for the sum of $340 on account of unused labor and materials was not set off against the contract price. In one count of its complaint the plaintiff alleged a cause of action for the full contract price agreed to be paid. In another count the facts were fully alleged showing the exact conditions which attended the furnishing and installing of the elevators.

[6] We do not think that the mere failure of the lien claimant to offset against the contract price the credit of $340 in the statement of its claim of lien, where it does not appear that its failure so to do amounted to a willful intent to assert that which the claimant knew to be false, should deprive it of its security which the law provides it may have for its debt, especially where the amount of offset is such a small part of the whole contract price as agreed to be paid. Section 1202, Code Civ. Proc., provides that "any person who shall willfully include in his claim filed under section one thousand one hundred and eighty-seven, work or materials not performed upon or furnished for the property described in the claim, shall forfeit his lien."

[7] It has been held that the provisions of this section are penal in character, and must be strictly construed, and that the evidence must be clear and convincing that a violation was willful and intentional before a court will take away the right of the claimant to a lien. Pacific Mutual L. I. Co. v. Fisher, 106 Cal. 224, 39 Pac. 758; Schallert-Ganahl L. Co. v. Neal, 91 Cal. 362, 27 Pac. 743. In Macomber v. Bigelow, 126 Cal. 9, 58 Pac. 312, referring there to an objection made that there was a variance between the evidence and complaints and claims of lien, the Supreme Court, quoting from McGinty v. Morgan, 122 Cal. 103, 54 Pac. 392, said: "The statute is a remedial statute, and, for the purpose of carrying into effect the object for which it was enacted, is to receive a liberal construction, and the notices which, under its provisions, are required to be given, have regard to substance rather than to form."

[8] The point is also made by the assignee, but not insisted upon with much vigor, that, as the contract for the furnishing of the elevators provided for the payment of more than the sum of $1,000 and was not recorded, it is void. This contract was not a contract properly to be termed one for the doing of construction work, but rather one for the furnishing of material, and the elevator company was a materialman rather than an original contractor. The statute requiring building contracts which provide for the payment of more than $1,000 to be recorded does not therefore apply. Hinckley v. Field's Biscuit Co., 91 Cal. 136, 27 Pac. 594; Roebling's S. Co. v. Humboldt Electric L. & P. Co., 112 Cal. 288, 44 Pac. 568; Bennett v. Davis, 113 Cal. 337, 45 Pac. 684, 54 Am. St. Rep. 354; Bryson v. McCone, 121 Cal. 153, 53 Pac. 637. We have examined carefully the very voluminous transcript filed in this case, which in the main sets out the pleadings of the parties to the several actions which were consolidated, and we fail to find that the assignee made any answer to the second amended complaint of the Otis Elevator Company. The second amended complaint appears in the transcript followed by a demurrer of the assignee to the said second amended complaint, but it neither appears that any answer was afterwards filed, nor that any ruling of court was made upon the demurrer. Neither does it appear by any of the stipulations entered into that the

allegations of this complaint were deemed to be denied for the purposes of the trial. Yet counsel on both sides have argued the propositions which we have referred to as though issue were made upon all of the matters involved in the action, and evidence was also introduced at the trial by both the claimant and the assignee. Of course, if the demurrer was never ruled upon, the case of the Otis Elevator Company was never at issue and was not ready for trial at the time trial was had thereof; but as it appears that the case of this claimant was treated at the trial as though fully at issue, and has been so treated by the several counsel on this appeal, we have considered the questions argued in the light of that assumption.

[9] Thomas Foulkes was in our opinion properly allowed a lien for electrical work done in and about the hotel building. The point is made by the assignee that there was a variance between the proof and the recitals in the notice of lien, in that the notice set forth that the work had been completed according to the provisions of the contract, when, in fact, the work had been stopped at the fourth story of the building. The notice of lien contained the recitals required by the statute to be therein stated, and it is not claimed that these recitals incorrectly set forth the facts, except in the one particular noted. It was not strictly incorrect to say that Foulkes had completed his work, under the circumstances shown in this case. He did complete all of his work, which was to be paid for according to the amount done, and not in the way of a lump or aggregate sum for the entire work. The building was stopped by the owner at the fourth story, and Foulkes, the contractor, was in no way in default at that time. Foulkes alleged in his amended complaint that the work was accepted as complete, and this allegation the assignee did not deny in his answer. The notice of lien gave very full information as to the claim and the amount thereof, and stated all the facts required by the statute in proper form and with substantial accuracy.

[10] Thomas Chisholm entered into a contract with the hotel company on or about the 15th day of September, 1906, whereby he agreed to grade, fill in, and otherwise improve the grounds surrounding the hotel building. He was to furnish trees, shrubs, plants, flowers, seeds, bulbs, etc., to be used in the making of such improvements, and to employ necessary labor to grade, fill in and improve the grounds. The reasonable cost of the plants, trees, and shrubs furnished by him, and the actual cost of labor employed, was to be paid to him, and, in addition thereto, he was to receive the sum of $20 per week for his own services. The court found that there was a balance of $2,712.61 due the claimant, for which he was awarded a lien. It is contended that this plaintiff was entitled to a lien only for work and labor performed in grading and leveling the grounds and the making of drives and walks thereon; that no lien is created in favor of any person who furnishes and plants seeds, trees, or shrubs. The assignee argues that as the plaintiff was unable to segregate the value of the grading, excavating, etc., for which the assignee admits a right of lien might accrue, from the other labor and materials furnished, for which it is contended no lien should be allowed, the entire lien must fail. The proposition first suggested involves a consideration of the provisions of section 1191 of the Code of Civil Procedure, which, in its material part, provides as follows: "Any person who, at the request of the reputed owner of any lot in any incorporated city or town, grades, fills in, or otherwise improves the same, has a lien upon said lot for his work done and materials furnished." This section has been construed in several decisions of the Supreme Court. In Macomber v. Bigelow, 126 Cal. 9, 58 Pac. 312, it is said that "section 1191 of the Code of Civil Procedure applies to grading or other improvement of a lot, done independent of and not as a necessary part of the construction of a building." In Warren v. Hopkins, 110 Cal. 506, 42 Pac. 986, it is held that the lot upon which the lien is authorized by section 1191 is not limited to any particular subdivision, or to official designation upon a map, but that it includes whatever territory is owned by the person for whom the improvement is made. In Williams, Belser & Co. v. Rowell, 145 Cal. 259, 78 Pac. 725, it was held that a system of sewers was such an improvement of lots within the meaning of section 1191, Code Civ. Proc., as to entitle the contractor to a lien as security for the payment for the work performed and material furnished. The furnishing and planting of seeds, trees, and shrubs, and the caring for the same for such a period of time as would insure that the seeds had become well started and that the plants and trees were thoroughly settled in the ground, would seem to be an improvement to the real estate which was among those intended to be included in the provisions of section 1191, Code Civ. Proc. It is probably not true that under the terms of this section a gardener or tiller of the soil could claim a lien by reason of labor expended in the general care of trees or crops, but under the contract made by Chisholm it appears that he was only to plant the seeds, trees, flowers, shrubs, etc., and to see that they were well started after being placed in the ground. From the testimony set out in the transcript it would seem that he made no claim for any other service done or materials furnished, and we think that the court properly allowed a lien for the amount hereinbefore mentioned. It seems to be conceded that the Wentworth Hotel grounds were at the time the contract of Chisholm was made, and at the time the

work was performed and materials furnished, located within the limits of the city of Pasadena. Section 1191 in terms provides only for a lien to be given upon a lot located within the incorporated limits of a city or town.

[11] As to the claims of E. G. Judah and B. V. Collins, the only objection urged by the assignee is that as the amounts found due to these claimants in each case exceeded the sum of $1,000, and as their contracts were not recorded, such contracts should be held void. Judah was to furnish roofing and lay the same in asphalt pitch on concrete surfaces, and Collins was to furnish and set roofing tile. In our opinion neither of these claimants contracted to do work which can properly be termed construction work, but they were materialmen, and therefore their contracts were not required to be placed of record. What we have said with relation to the claim of the Otis Elevator Company on this point applies to these cases.

[12] The Hipolito Screen & Sash Company furnished screens for the windows and doors of the hotel building, which the evidence shows were actually fitted to and left upon the various openings for which they were designed. It was stipulated that screens to the value of $373.20 were at the time work was stopped upon the building stacked on the fourth floor thereof. As before noted, the evidence shows that the screens were all put in place by the contractor—not only fitted, but actually run into the grooves by which they were held, or fastened to the frames with hinges. When once so attached to the building, the screens became fixtures thereof, just as much as would a door hung upon hinges which would be removable by taking out a hinge-pin, and the fact that they were, for some one's convenience, taken down and piled up, would not destroy the right of lien acquired by the materialman so furnishing them. We think the court properly allowed a lien to this claimant.

[13] As to the claim of James S. Falls, assignee of Frank Lavine, the latter being a mechanic who was engaged on the hotel building as a lather, the appellant makes the point that the court should not have allowed said claim and a lien as security for the same, because there was a variance between the notice of lien as filed with the recorder and the proof made at the trial. More particularly specified, the objection as made is that the assignor of this claimant performed a large amount of work prior to that for which he made his claim, and that the amount of his claim represented only a balance due on account, whereas the notice of lien stated the same to be for a certain number of days' work at the agreed rate per day, without showing the whole amount earned under Lavine's engagement with the hotel company. This contention is scarcely borne out by the testimony shown in the transcript. The witness Richards, who engaged Lavine to do the lathing, testified that the amount for which the claim was made represented money due for particular work, and that there was no entire contract covering lathing to be done for the whole job. We quote from the testimony of this witness: "Whenever he (Lavine) came to a place where there seemed to be no more work for a time and then all persons stopped and the bill would be paid. He has been paid practically, I think, entirely for all work done on the hotel proper, and this work (meaning that for which the claim was made) was for the garage, really a separate proposition. Well, it entered into the hotel building, but I mean—I could not state definitely how long a time elapsed between his stopping work on the hotel building proper and his commencing work on this garage, but some little time; my impression is, several days. I think this work was not a continuation of the other work that he had been doing." The work performed by Lavine was paid for at a certain rate per day, and it appears that all work done by him previous to that performed upon the garage had been completely paid for and that no account existed in that behalf. It was therefore a correct statement to set forth in the notice of lien the number of days which the claimant was engaged on the particular work referred to, and the amount due to him therefor.

[14] A. R. Field, assignee of the Fire Pulp Plaster Company, was awarded judgment in the sum of $602.85 and a lien to secure payment thereof. The Fire Pulp Plaster Company furnished plastering material, and it was stated in the notice of lien, and also in the second cause of action set forth in the complaint of Field, that no price was agreed upon for such material, and that the reasonable value thereof was agreed to be paid. The court found in accordance with the allegations of the second alleged cause of action, which were consistent with the claim made in the notice of lien. The appellant contends that the evidence does not sustain the findings of the court. Considered as a whole, the evidence received in support of this claim in our opinion does sustain the findings of the court. One of the witnesses testified that the price of $9 per ton was quoted at the time some of the plastering material was ordered, and that this price was accepted, but it also reasonably appears from the evidence that it was contemplated by the parties that this material should be ordered from time to time as needed, and that the price to be paid therefor was not necessarily a uniform price of $9 per ton, but such a price as might be indicated by the state of the market at the particular time the merchandise was ordered. Charles E. Richards, one of the persons who supervised the ordering of this material, testified as follows: "The price on all that sort of things fluctuates, and he simply agreed to

give me the lowest market price whenever we ordered the goods." The testimony of witness Richards clearly indicates what the understanding of the parties was at the time, and the court was fully warranted in making the finding in accordance with the allegations of plaintiff's second alleged cause of action.

On the appeal from the judgment entered in favor of the Richards-Neustadt Construction Company, the appellant contends that the judgment is not supported by the evidence. On behalf of the respondent here concerned, it is urged that the question of the sufficiency of the evidence cannot be inquired into for the reason that appellant's bill of exceptions contains no specification as to the particular matters embraced within the findings of the court which it is claimed are insufficiently supported by the evidence. This point was made by the same counsel with respect to the claims of Field and Falls previously considered herein. The judgment as to those cases was sustained by the evidence, conceding that the record properly preserved to appellant the right to raise question as to that matter.

[15] It is a fact, however, that in the bill of exceptions there are contained no specifications pointing out wherein the evidence is deemed to be insufficient to support the decision of the court, and for that reason, under the provisions of section 648, Code of Civil Procedure, the appellant is not in a position to insist upon the evidence being reviewed by this court for the purpose of determining whether or not the judgment is thereby supported. In the case of San Luis Water Co. v. Estrada, 117 Cal. 168, 48 Pac. 1075, the Supreme Court has said: "It is true, as a general proposition, that this court will not review the evidence in a bill of exceptions, unless it specifies the particulars in which the evidence is alleged to be insufficient to sustain the decision. Code Civ. Proc. § 648." And again, in the case of Swift v. Occidental Mining, etc., Co., 141 Cal. 161, 74 Pac. 700, we find these expressions: "No reference to the evidence is required in the specification except to say that it is insufficient to justify the particular finding called in question. * * * The object of the rule requiring these specifications is, first, to shorten the statement of the evidence by excluding everything irrelevant to the specified fact; and, second, to notify the opposing party of the particular finding called in question, in order that he may see that the statement fairly and fully presents the evidence bearing upon that particular matter. This object accomplished, the statute is satisfied." There was in this case no motion for a new trial, and while it is true that a party is entitled upon an appeal from a judgment to have the evidence reviewed, providing the appeal is taken within six months after entry of the judgment (Code Civ. Proc. § 939), there is no provision in case of such an appeal which dispenses with the usual requirements affecting the preparation and form of a bill of exceptions, where the sufficiency of the evidence to sustain a decision is sought to be questioned.

[16] It is the law as contended for by appellant that there can be no assignment made of a debt provided to be secured by the mechanic's lien law (Code Civ. Proc. §§ 1183–1203a) which will carry with it to the assignee the right to enforce a lien, where such assignment is made prior to the lien having been perfected by the assignor. The authorities uniformly hold that, while the assignment of a debt may carry with it the lien given for its security, in order that this result shall accrue in favor of the assignee, the lien must have been perfected prior to the time the assignment was made. Duncan v. Hawn, 104 Cal. 10, 37 Pac. 626; McCrea v. Johnson, 104 Cal. 224, 37 Pac. 902; Rauer v. Fay, 110 Cal. 361, 42 Pac. 902. As we have suggested, however, the objection made on this point by appellant involves a consideration of the matter as to the sufficiency of the evidence to sustain the findings made by the court, and that matter cannot be considered on the state of the record as it is here presented.

[17] The Meyberg Company made a claim, which was sustained by the court and a lien awarded, for the furnishing of special lighting fixtures, and installing them in the hotel building. The fixtures were all manufactured at the factory of the claimant, and the work of installing them constituted in value but a very small part of the total compensation agreed to be paid by the hotel company. This claimant was a materialman, and, although the contract price was the sum of $2,900, it was not necessary that such contract should have been recorded. The further point is made by appellant that the materials furnished were not such as to entitle the claimant to a lien, as they were fixtures not permanently attached to the structure. With this contention we do not agree.

[18] The various articles furnished by this claimant were designed especially for use in this hotel building, and they did become a part thereof by being regularly attached thereto, and in our view constituted as much a part of the building as did the doors, windows, and other attachments and appurtenances which were fastened by means of hinges, cleats, and other similar arrangements. They constituted a necessary part of the completed structure in view of the use for which it was designed to be put, and we think came fairly within the definition of materials for which a lien is designed to be given by the Constitution and statute.

The same points are made with respect to the claim of Ferve-Pettibone Company, and for the same reasons which have been given with respect to the claim last above considered the judgment in favor of this claimant should be sustained.

[19] The court refused to allow a lien as security for the payment of the claim for laundry machinery furnished by A. T. Hagan Company. This claimant filed its notice of

lien with the recorder on July 11, 1907. The hotel company on the 8th day of April, 1907, had filed a notice with the recorder setting out that work had ceased on the hotel building, and that the building had been accepted by the owner. The trial court found, and we doubt not correctly, that the hotel company having abandoned the design of completing the building at that time, and having filed the notice just referred to showing an acceptance of the building, that this notice was in effect a notice of completion and that the time for filing of liens then commenced to run. It has been held that a building will be deemed completed, even though not constructed in accordance with the plans and specifications, where the owner abandons the intent to make it a completed structure at any time during the course of work upon it. In Schwartz v. Knight, 74 Cal. 432, 16 Pac. 235, reaffirmed in Marchant v. Hayes, 120 Cal. 137, 52 Pac. 154, it is said: "The Code does not mean that the building, if, as in this case, it was intended to be a dwelling house, must be completed in all respects as contemplated by the plans and specifications, or even that it shall have become habitable as a dwelling. Ordinarily the lien cannot be filed until a building is so completed. But when it is made to appear that it was the original purpose of the owner to erect and build it in part only, or that the owner, having proceeded to erect the house in part, abandoned his design of finishing it, the building should be held to be completed, within the meaning of section 1187, from the time it was so built in part. The purpose of the owner may be inferred from his acts or omissions, but the ultimate fact to be determined is his original or substituted purpose to leave the building unfinished." The trial court, therefore, properly held that the claim of lien of the Hagan Company was filed too late, and that the claimant was not entitled to a lien.

[20] The Pacific Coast Planing Mill Company appealed from the judgment denying it the right to a lien for lumber and finishing material furnished for the hotel building. In their notice of lien the statement of the demand, etc., was in the following form: "And the following is a statement of the terms, time given and conditions of said contract, to wit: Lumber material, mill finish, furnished between July 31, 1906, and March 30, 1907, amounting to the sum of $15,436.57, which said sum was to be paid in installments on the delivery of the said material at the various dates of delivery." The proof made at the trial showed that prices were agreed upon for various of the material furnished and that payment therefor was to be made on the 10th day of each month for all material so furnished during the preceding month. Appellant contends that the trial court erred in holding that there was a variance between the notice of lien and the proof. We think that the judgment with respect to this claim is correct. Conceding that the statement in the notice of lien as to the amount to be paid was sufficient to indicate that that amount was in accordance with prices agreed upon, still the notice contained a statement as to time of payment which was in direct variance with the evidence offered by the claimant. We think this variance was fatal to the right of the claimant to a lien. The statute requires the notice of lien to set forth a statement of the demand, after deducting all just credits and offsets, with the name of the owner and, "with a statement of the terms, time given and conditions of his contract." In order for a materialman or contractor to perfect his lien, it is necessary that this statement be made substantially in the form required by the statute. This requirement is not relaxed where the claimant is a person dealing directly with the owner, rather than a laborer or materialman engaged through the agency of a contractor. If such a notice is insufficient in one case, it is insufficient in all cases. Here there was a misstatement at least as to the time of payment. The provisions of the statute were therefore not complied with. There is nothing in the case of McGinty v. Morgan, 122 Cal. 103, 54 Pac. 392, cited by appellant, inconsistent with this view.

[21] Yard & Hichborn were denied by the trial court the right to enforce a lien for money due under a contract made with the hotel company. This contract provided that the contractors, under the direction of the architect, should perform and finish the entire carpentry and joinery required in the construction of the hotel building, according to the plans and specifications. It was provided that there was to be paid by the owner to the contractors the net cost of the work, plus 5 per cent., which 5 per cent. should be compensation to the contractors for services, and accounts for labor were provided to be paid for on the second and fourth Saturdays of each month upon statements to be rendered by the contractors to the owner, giving the names of the parties employed, the wages paid per day and amounts of labor performed; and the material used was to be paid for upon presentation of a bill for the same from the parties of whom it was purchased, and upon certificate of the architect. Subdivision 6 of the contract provided as follows: "That the said contractors shall be paid 75 per cent. as the work progresses; the balance of 25 per cent. of their commissions for purchasing, hiring of labor and superintending of work, shall be retained until thirty-five days after the building is fully completed, and then paid with the final certificate of the architect, which shall not be issued before the work under this agreement is fully and finally completed." This contract was a contract for construction. It was undoubtedly so regarded by the parties, for it was reduced to writing and recorded in the usual form. Its effect was not merely to employ the contractors as agents of the owner to ne-

gotiate for labor and materials and superintend the work of building. It is clear from the terms of the contract that the cost of labor was to be paid directly to the contractors, and not to the employés engaged by such contractors to do work upon the building. See Malone v. Big Flat Gravel M. Co., 76 Cal. 578, 18 Pac. 772. The contract was such a contract as is required by the provisions of section 1183, Code Civ. Proc., to be reduced to writing and recorded.

[22] It was defective in its provisions, however, in that 25 per cent. of the whole contract price was not made payable 35 days after final completion of the contract. Twenty-five per cent. of the profit to the contractors, otherwise termed as commission in the contract, only, it is conceded by respondent, was reserved for payment 35 days after the completion of the building. The contract was therefore void and no right of lien accrued for the benefit of the contractors. Code Civ. Proc. §§ 1183, 1184; Morris v. Wilson, 97 Cal. 644, 32 Pac. 801; Spinney v. Griffith, 98 Cal. 149, 32 Pac. 974; Willamette, etc., Co. v. College Co., 94 Cal. 229, 29 Pac. 629; Merced Lumber Co. v. Bruschi et al., 152 Cal. 372, 92 Pac. 844.

As to the George H. Tay Company, the judgment is modified by deducting from the amount for which said claimant was adjudged entitled to a lien and a foreclosure thereof, the sum of $2,970.69. As to John Douglas Company, the judgment is modified by striking from the amount for which said claimant was adjudged entitled to a lien and a foreclosure thereof, the sum of $1,810.38. As to Carpenter & Biles Mill & Lumber Company, the judgment is modified by deducting from the amount for which said claimant was adjudged entitled to a lien and a foreclosure thereof, the sum of $566.59. The judgment as entered by the trial court in all other respects as to other claimants is affirmed. The orders denying motions for new trial as made by the Pacific Coast Planing Mill Company and Yard & Hichborn are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

16 Cal. App. 692

CALIFORNIA PORTLAND CEMENT CO. et al. v. WENTWORTH HOTEL CO. et al. (Civ. 922 and L. A. 2,648.)

(Supreme Court of California. Sept. 25, 1911.)

Mechanics' Liens (§ 48*)—Right to Lien—Materials Furnished But Not Used.

There is no lien upon a building for materials furnished and necessary for its completion according to its original plan, but left unused by reason of a change of plan by the owner after the materials have been delivered.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 51; Dec. Dig. § 48.*]

In Bank. Petition for a rehearing. Denied.

For opinion of the District Court of Appeal, see 118 Pac. 103.

PER CURIAM. The sole question presented by the petition for a rehearing of this cause is whether the law secures a lien upon a building for the value of materials furnished (and necessary) for its completion according to its original plan, but left unused by reason of a change of plan by the owner after the materials have been delivered. Upon this question the views of the District Court of Appeal are sustained. Other questions discussed in the opinion of that court, several of which are novel and difficult, have not been considered.

Rehearing denied.

160 Cal. 749

CONDON v. DONOHUE. (S. F. 5,630.)

(Supreme Court of California. Sept. 18, 1911. Rehearing Denied Oct. 18, 1911.)

1. Contracts (§ 44*)—Building Contracts—Filing—Validity—Enforcement.

Plaintiff orally agreed to construct a building for defendant according to certain plans for $33,000. The written contract, when presented to defendant for execution, called for $35,000, and when defendant objected plaintiff stated that he put in $35,000 because the agreed price would look too cheap, and that he would give defendant a private contract. The contract was thereupon signed as prepared, and filed for record. Immediately after its execution, plaintiff wrote and delivered to defendant a private memorandum, by which he agreed to complete the building for $33,000. *Held*, that such memorandum was a part of the contract between the parties, and, never having been filed, the whole contract was unenforceable under Code Civ. Proc. § 1183, requiring building contracts to be in writing when the amount exceeds $1,000, and the memorandum filed in the office of the county recorder; otherwise "they shall be wholly void, and no recovery shall be had thereon by either party."

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 44.*]

2. Contracts (§ 44*)—Building Contracts—Statutes.

Code Civ. Proc. § 1202, relating to mechanic's liens, and providing that if the owner and contractor, directly or indirectly, agree that the written contract filed shall appear to show the contract price to be less than it really is, and it shall accordingly so show, then the contract shall be void, and no recovery shall be had thereon, etc., relates to a case where the entire contract as written is properly filed, but fails, by design of the parties, to state the real consideration, and does not apply to a case where a part of the contract was not filed.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 44.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by David Condon against Timothy Donohue. Judgment of dismissal, and defendant appeals. Affirmed.

Rehearing denied; Beatty, C. J., dissenting.

J. F. Cowdery (Wal J. Tuska, of counsel), for appellant. E. F. Conlin (J. L. Nagle, of counsel), for respondent.

ANGELLOTTI, J. The plaintiff, a building contractor, brought this action to recover an amount alleged to be due as the reasonable value of labor and materials furnished in the construction of a building at the corner of Hayes and Gough streets, in San Francisco. The defendant relied on the claim that all of the same were furnished in pursuance of a written contract between the parties for the construction of such building for $33,000, that plaintiff abandoned his contract without completing the same, and that he was compelled to finish the same at his own expense, at a cost, reasonably incurred, of some $5,000 and more in excess of the contract price. By cross-complaint he sought judgment for the damage so caused. The judgment was that plaintiff take nothing, and that defendant recover simply his costs. This is an appeal by defendant on the judgment roll from the judgment and from an order made after judgment, denying defendant's motion, made under section 663 of the Code of Civil Procedure, to vacate the judgment, annul the conclusions of law, and enter a judgment in favor of defendant for $5,578.80, as well as costs.

It is urged that the order last referred to is not an appealable order. It is immaterial in this case whether it is or not, in view of the fact that there is an appeal from the judgment, and the questions involved on the appeal from the order are likewise presented on the appeal from the judgment. But it has been held that such an order is appealable, as a special order made after final judgment. Rahmel v. Lehndorff, 142 Cal. 681, 76 Pac. 659, 65 L. R. A. 88, 100 Am. St. Rep. 154; Bond v. United R. R., 113 Pac. 366.

[1] The facts found, so far as material here, are as follows: Plaintiff orally agreed to construct the building, according to plans and specifications prepared by himself, for $33,000. On February 28, 1907, he presented to defendant a written contract for execution, in which contract the price stated was $35,000. Objection being made to the price stated, plaintiff said that he put it at $35,000, instead of $33,000, "because $33,000 would look too cheap, and he would give a private contract." Thereupon the paper was signed by the parties with $35,000 specified as the contract price, and defendant on the same day filed the same for record in the office of the county recorder. About 20 minutes after this paper was executed, plaintiff wrote and delivered to defendant a private memorandum, which was never filed for record. By this paper, plaintiff agreed to complete said building for the sum of $33,000. Undoubtedly this paper constituted a part of the written contract between the parties. On March 1, 1907, plaintiff commenced work on the building, and continued such work until May 2, 1907, when the frame was up. Completion to this stage entitled him, under the terms of the contract, to one-eighth of the contract price, and a dispute arose between the parties as to whether the true contract price was $35,000 or $33,000. Defendant paid plaintiff $4,125, which was on the basis of a contract price of $33,000, and refused to pay more. Plaintiff then, on May 2, 1907, abandoned his contract, having paid for work, labor, and materials furnished an aggregate sum of $3,044.75. He had contracted to pay for lumber already delivered, $5,934.78, and for mill work to be subsequently delivered and which was delivered, $1,500, both of which amounts defendant subsequently paid. On May 13, 1907, defendant commenced work on said building, and completed it, according to the plans and specifications, on September 6, 1907. In so completing the contract, the defendant used the materials delivered under contracts made by plaintiff. The cost of the building to defendant, including the $4,125 paid to plaintiff, was $38,578.90, and this expenditure by defendant was reasonable in amount.

Upon these facts, the trial court concluded, as matter of law, that defendant's "neglect to file the $33,000 modification part of the contract in the office of the county recorder of the city and county of San Francisco, where the property is situated, made the contract wholly void, and no recovery shall be had thereon by either party thereto."

Defendant's claim is that upon the facts found, it should be held, as matter of law, that the contract is valid between the parties, and that consequently he is entitled to recover the damage occasioned him by plaintiff's failure to complete the same, viz., the difference between the agreed price of $33,000 and the actual cost of the building. It is not disputed that, if the contract may be regarded as valid between the parties, the facts found entitle defendant to the amount claimed as damages for the breach thereof.

The conclusion of the lower court that the contract was wholly void, and that no recovery could be had thereon by either party, was based, of course, on the provisions of section 1183, Code of Civil Procedure, as it stood at the time of the transaction in question. That section is contained in title 4 of part 3 of the Code of Civil Procedure, which title is entitled "Enforcement of Liens," and in chapter 2 of such title, entitled "Liens of Mechanics and Others upon Real Property." The section, after providing for a lien in favor of persons performing labor upon or furnishing material in the matter of the construction of a building, etc., which lien shall extend to the entire contract price, requires that every such contract shall be in writing when the amount agreed to be paid thereunder exceeds $1,000, and that the same, or a memorandum thereof, setting forth certain things, "shall, before the work is commenced, be filed in the office of the county recorder of the county, or city and county, where the property is situated; * * * *otherwise, they shall be wholly void, and no recovery shall be had thereon by either party;* and in such case the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." The italics are ours. It cannot seriously be questioned that there was, in view of the facts found, a failure to comply with the provisions of this section, and the question is as to the effect of the portion of the section that we have italicized, where the rights of any party, other than the owner and the contractor, are in no way involved. May the contract be treated as valid as between the parties thereto?

Defendant's claim for damages is, of course, based on the alleged contract. He is seeking damages for the breach thereof on the part of plaintiff, and his cause of action therefor is one *on* the alleged contract. The portion of section 1183, Code of Civil Procedure, that we have heretofore quoted expressly provides that if the provisions of such section as to the filing of the contract in the recorder's office are not complied with, the contract shall be wholly void, "*and no recovery shall be had thereon by either party thereto.*" Language more clearly precluding any action by either party on the contract in the event of noncompliance with such provision could not have been chosen by the Legislature, and, unless we can find some warrant for the conclusion that the provision is not applicable where the rights of lien claimants are not involved, the effect is necessarily to prevent a recovery of damages by defendant upon the facts shown by the findings. No such warrant can be found, based upon any reasonable construction of the language used. To our minds, it is plain that the provision is in the nature of a penalty imposed upon parties for failure to comply with provisions of the lien law designed to protect the rights of subcontractors, materialmen, artisans, and laborers. It was apparently considered essential to such protection that, where the contract price exceeds $1,000, such contract, or a memorandum thereof, showing certain specified things, be filed in the county recorder's office prior to the commencement of the work. That the Legislature might lawfully require such filing in furtherance of such purpose, and declare the contract unenforceable, unless it be so filed, without unlawfully invading the right of contract, cannot be doubted. "The Legislature may prescribe the form in which contracts shall be executed, in order that they may be valid or binding" (Stimson Mill Co. v. Braun, 136 Cal. 122, 125, 68 Pac. 481, 482 [57 L. R. A. 726, 89 Am. St. Rep. 116]), and, unless an attempted provision in that behalf is manifestly without foundation in reason, it cannot be nullified by the courts. The fact that the provision is contained in the part of our statute law relating to liens and the manner of their enforcement does not warrant a construction confining its operation to those cases where the rights of lien claimants are involved. It is a part of the general plan devised for the protection of possible lien claimants, and is very properly placed in the title of the Code of Civil Procedure relating to such matters.

The decisions of this court are not opposed to our conclusion as to the effect of this provision, but, on the contrary, support it. Certain of the earlier decisions, which are reviewed and considered in the later case of Laidlaw v. Marye, 133 Cal. 170, 65 Pac. 391, were apparently to the effect that, in the event of noncompliance with the provisions of section 1183, Code of Civil Procedure, not only were both parties precluded from any action on the contract, but also that the provisions of the contract could not be relied upon by the owner as constituting the measure of the contractor's recovery, in an action in assumpsit for the labor and materials furnished by him, or as forbidding a recovery by him, where the special contract under which the work was done and materials furnished had not been complied with. In Laidlaw v. Marye, supra, the earlier decisions were reviewed, and it was concluded that the true rule in such a case is, not that the contract is valid and binding between the parties in the sense that either party may enforce its terms as against the other, for the language of the statute expressly prohibits any action looking to that end, but simply that, as it could not have been intended to give to the contractor in such a case greater rights as against the owner than would have been his, had he complied with the law in the matter of filing the contract for record, in any action brought by him for the reasonable value of the labor and materials furnished, the only action remaining to him in view of the statutory provision, the contract must remain, to use the language of this court, "*not the basis of his recovery*, but the measure and test of his right to recover." Laidlaw v. Marye, supra. The italics are ours. It is declared that he may not recover for something which the owner never in fact ordered or contracted for, and that he will not be allowed to recover as the reasonable value of the labor and material furnished a sum in excess of that specified in the attempted contract. In other words, according to Laidlaw v. Marye, supra, the contractor "must still show a substantial compliance with its terms to warrant any recovery at all, and the measure of his recovery, even under implied assumpsit, must be limited, as to him, by the contract price." In the case just cited, the contractor was denied recovery, in an action for the reasonable value of materials and labor, because there was a substantial variance, to the damage of the owner, between the work called for by the unrecorded contract and the work done, and the failure to complete the work so called for had not been waived or excused in any way. There is nothing in the opinion intimating that the court entertained the view that either party could maintain any action on the contract, as the defendant here seeks to do by virtue of his counterclaim and cross-complaint. The language of the opinion is most carefully guarded in this respect, indicating very clearly the views of the justices concurring that, as was substantially stated in a quotation therein from Barker v. Doherty, 97 Cal. 10, 31 Pac. 1117, it is apparent from a cursory reading of the statutory provision that the contract is void as forming the basis of a recovery, and that no legal liability can be created by any of its provisions. The later case of Sullivan v. California Realty Co., 142 Cal. 201, 75 Pac. 767, was an action in equity by the owner against the contractor to cancel a building contract which had not been properly filed for record. The contractor had already furnished materials and begun work, and there was no offer by the plaintiff to pay for this work or material, or to place the defendant in his former position. One of the grounds of the decision in favor of the contractor was simply, that, as held in Laidlaw v. Marye, supra, as between him and the owner, the contract must remain, not the basis of recovery by him, but the measure and test of his recovery, and so remaining the owner was not entitled to have the same canceled. The opinion of Judge Cooper in that case cannot be taken as deciding more than this. Portions of the opinion of the District Court of Appeal of the Second district, in Los Angeles, etc., Co. v. Higgins, 8 Cal. App. 514, 526, 97 Pac. 414, 420, are in conflict with the views we have stated, but this court expressly withheld its approval from such portions, and denied a rehearing here solely because they were not essential to the judgment given by that court.

[2] There is nothing in the provisions of section 1202, Code of Civil Procedure, to assist defendant. That section refers to an entirely different case, a case where the entire contract, as written, is properly filed in the recorder's office, but, as written, fails, by design of the parties, to state the real consideration. The provision of section 1183 applied in this case precludes any action *on the contract* in every case where there has been a failure to file the whole of the written contract, and it is entirely immaterial whether a court may feel that the omission was of such a nature that no right was in fact prejudiced thereby.

It thus appears that the learned judge of the trial court was correct in his conclusions of law, and that the judgment given is supported by the findings of fact.

The judgment and order appealed from are affirmed.

We concur: SHAW, J.; SLOSS, J.

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160 Cal. 743

COOKSON et al. v. HAMILTON et al.

(S. F. 5,600.)

(Supreme Court of California. Sept. 18, 1911. Rehearing Denied Oct. 18, 1911.)

WILLS (§ 548*)—TESTAMENTARY TRUST—CONSTRUCTION—"ANY DECEASED CHILD."

Testator died leaving him surviving a son and two daughters and two grandchildren, children of a deceased son and daughter, who died before the execution of the will. To these two grandchildren he bequeathed pecuniary legacies, and then directed that the residue of his property should be held in trust, to pay one-third of the net income monthly to each of his three remaining children, and, on the death of either of said children of testator without issue, to pay his or her one-third share of the net income to the survivors of them, share and share alike, and to the children of "any deceased child" by right of representation, and, on the death of the last survivor of testator's children, all the property and estate representing the one-third share or interest of any child who may have died without issue. *Held*, that the term "any deceased child" referred only to children living at the time of the execution of the will, and who had been made beneficiaries of the trust, so that, on the death of testator's son, who was one of the three surviving children, without issue, his one-third share of the net income passed to his surviving sisters, and was not to be divided among them and the grandchildren, whose parents died prior to the death of the testator and the making of his will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1182, 1183; Dec. Dig. § 548.*

For other definitions, see Words and Phrases, vol. 1, pp. 412–433; vol. 8, pp. 7575–7577.]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Charles C. Bemis, as trustee under the will of David R. Jones, deceased, against Annie D. Cookson and others and Mabel Dodge Hamilton and others, adverse claimants to a portion of the income of certain trust property. From a determination on an order of interpleader, finding such income to belong to claimant Cookson and others, claimant Hamilton and others appeal. Affirmed.

Rehearing denied; Beatty, C. J., dissenting.

Garret W. McEnerney, for appellants. John A. Wright and John F. Barnett, for respondents.

ANGELLOTTI, J. This action was brought by Charles C. Bemis, as trustee of the trusts created by the last will of David R. Jones, deceased, against various persons claiming a portion of the income of the trust property, to compel said persons to interplead among themselves and procure a determination of their several claims. On stipulation of the parties, the trustee having deposited in court the amount in dispute, an order was made discharging him from all liability in regard thereto, and requiring the defendants to interplead among themselves with respect to their several claims. The plaintiffs in interpleader, Annie D. Cookson and Lily Butterfield, the other plaintiffs being their respective husbands, filed their complaint, claiming the whole of said money, and the defendants in interpleader, Mabel Dodge Hamilton and Beatrice Jones, filed their answer, claiming all of the same. On motion, judgment on the pleadings was rendered in favor of the plaintiffs in interpleader. This is an appeal from such judgment by said defendants.

The rights of the respective parties depend upon the construction to be given to clause 5 of a trust created by the will of David R. Jones, deceased, and declared by the decree of distribution in exactly the same language used in the will.

David R. Jones died testate on September 11, 1903, leaving surviving one son, John R. Jones, and two daughters, plaintiffs Annie D. Cookson and Lily Butterfield, and also two grandchildren, defendants Mabel Dodge Hamilton and Beatrice Jones, the former being the only child and lawful issue of Mary Jane Dodge, a daughter of deceased, and the latter being the only child and lawful issue of David H. Jones, a son of deceased, both of whom had died before deceased executed his last will. By his will, deceased gave to said Mabel Dodge Hamilton $75,000, and to said Beatrice Jones $75,000, which legacies were paid in full prior to distribution. He gave all the rest of his property to Charles C. Bemis in trust for the following purposes, viz.:

"1. To hold, invest, manage and control the same and to receive the income therefrom.

"2. To pay monthly to testator's son, John R. Jones, during his natural life, one-third of the net income derived from said trust estate.

"3. To pay monthly to testator's daughter, Lily Butterfield, during her natural life, one-third of the net income derived from said trust estate.

"4. To pay monthly to testator's daughter, Annie D. Cookson, during her natural life, the remaining one-third of the net income derived from said trust estate.

"5. Upon the death of either of said children of said testator without issue, to pay his or her one-third share of said net income to the survivors of them, share and share alike, and to the children of any deceased child by right of representation.

"6. That upon the death of either of said testator's children leaving issue, one-third of the original trust estate with its accretions shall at once descend to and vest in the issue of such deceased child, and the trustee shall pay over and deliver the same forthwith absolutely to such issue.

"7. Upon the death of the last survivor of said testator's children, all the property and estate representing the one-third share or interest of any child who may have died without issue shall vest absolutely in and go to the heirs at law of such child so dying without issue."

In due course, namely, on May 29, 1905, the residue of the property was distributed to the trustee. The surviving son, John R. Jones, died without issue in the month of June, 1905. The foregoing facts are shown by the pleadings.

The question presented is whether, under clause 5 of the trust, the whole of the one-third share of the net income which would have gone to said John R. Jones, in the event that he had continued to live, goes to the surviving daughters of the testator, the plaintiffs herein, or is to be divided, share and share alike, among them and the children of children of the testator who died prior to his death, and prior to the making of his will. The learned judge of the trial court concluded that the whole of said one-third share of the income belongs to the surviving children, Lily Butterfield and Annie D. Cookson, and that the provision of clause 5, "and to the children of any deceased child by right of representation," referred only to children of such deceased children as were living at the time of the execution of the will, and had been made beneficiaries of the trust. In other words, that such provision was solely for the purpose of allowing the children of any such deceased *beneficiary* to take in his or her place the share of said income which would have gone to such beneficiary under the other provisions of clause 5, if he or she were still alive. That this is the true meaning of the provision in both the will and decree of distribution seems very clear to us.

Taking all of the provisions of the trust scheme together, in the light of the admitted facts, including the bequests made by the will to the two defendant grandchildren, the meaning of clause 5 is, to our minds, so clear as to reasonably admit of no other construction than that given to it by the learned judge of the trial court. The trust provisions were obviously solely for the benefit of the three living children and their issue. The children of such children as had died prior to the making of the will were specifically provided for by other provisions of the will; $75,000 being given to each. These provisions having been made, the testator proceeded to create a trust for his surviving children and their issue. As long as the three surviving children continued to live, no other person was permitted to enjoy any portion of the income of the trust property, but the income of the same was to be paid, in one-third parts, to said three children. If any of said children died leaving issue, no one outside of said issue was to participate in his or her share, which at once vested in such issue, free of the trust. Upon the death of any of such children without issue, the trust was not to terminate as to the share of the child so dying, but was to continue until the death of the last survivor, when, the purpose of the trust having been fully accomplished, such share was to go to the "heirs at law" of such deceased child. In the meantime, under clause 5, the income of such share was to be divided, share and share alike, among the survivors of said three children, and "the children of any deceased child by right of representation." The bringing in, under the phrase just quoted, of the children of David H. Jones and Mary Jane Dodge, for whom specific provision had already been made, would appear to be foreign to the whole purpose of the trust scheme, and the language used is not reasonably susceptible of any construction that would include them. The only children of testator specifically mentioned in the provisions relating to the trust were the surviving children, John R. Jones, Lily Butterfield, and Annie D. Cookson, and the term "any deceased child," in clause 5, in the connection in which it was used, would naturally be taken as referring only to such of the children as were so named, and for whose benefit primarily the trust was created. If it had been intended to include known children of children already deceased in this income distribution, the natural thing would have been to specify them as intended to be so included. The term "any deceased child," in the connection in which it is used, would reasonably appear to refer only to children living at the time of the execution of the will.

But all-important in the ascertainment of the intention is the language "by right of representation." The one-third share of the income which would have gone to the child dying without issue, if he had lived, is to go "to the survivors of them (the three children), share and share alike, and to the children of any deceased child *by right of representation.*" Learned counsel for appellants earnestly contends that these words technically mean no more than that the children of deceased children shall take per stirpes, instead of per capita. They do mean this, of course; but they further necessarily imply that the children so take, as a class, because of the death of a parent who would have taken, had he lived, and as his representatives. As his surviving children, they are to take *his* share—the same share their parent would have taken, if living. The use of these words by the testator indicates very clearly his intention simply to place the children of any one of the three children who may die in the same position with reference to the income that the parent would have been, had he continued to live.

In our opinion, there is nothing in clause 7 of such a nature as to warrant a different conclusion. This clause is in fact no part of the trust, but is a testamentary disposition of property subject to the trust, and is not one in favor of children of deceased children, as such, but is to "the heirs at law" of any child dying without issue. It has very little, if any, bearing, on the question of the intent of the testator as to the manner in which the income of the trust property shall be applied by the trustee.

We find nothing in the cases cited by learned counsel for appellants in support of his claim that appears to us to demand a conclusion contrary to that reached by the lower court.

It is not claimed by defendants that the provisions of the decree of distribution are any more unfavorable to defendants than the provisions of the will. In fact, as we have said, the trust provisions of the will have been placed, word for word, in the decree, thus making the trust provisions of the decree follow the terms of the will absolutely. In view of what we have said, it is clear that no prejudice resulted to defendants from the refusal of the trial court to allow them to amend their answer by setting up the will of the testator. Notwithstanding such amendment, the plaintiffs would still have been entitled to judgment upon the facts shown by the pleadings.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.

(160 Cal. 800)

CITY OF LOS ANGELES v. LANKERSHIM.

(L. A. 2,604.)

(Supreme Court of California. Sept. 26, 1911.)

1. CONSTITUTIONAL LAW (§ 208*) — LICENSES (§ 7*) — CLASS LEGISLATION — DISCRIMINATION AGAINST PARTICULAR PERSONS.

Los Angeles ordinance licensing and regulating occupations, and by section 54 providing that every person or corporation maintaining for the purpose of letting office rooms or storerooms a building containing more than 30 rooms shall as a license pay $1 per year for each office room, and $3 per year for each storeroom, is invalid, being class legislation, in artificially separating persons engaged in the same business, contrary to both the general law and Los Angeles charter authorizing the city to impose license taxes upon occupations, which provides that no discrimination shall be made between persons engaged in the same business otherwise than proportioning the tax on the amount of business.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 649–677; Dec. Dig. § 208;* Licenses, Dec. Dig. § 7.*]

2. LICENSES (§ 9*)—ORDINANCES—CONSTRUCTION.

While every intendment is to be indulged in favor of the validity of a municipal ordinance imposing a license fee for the carrying on of a particular business, the courts cannot uphold an ordinance when clearly invalid.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 9.*]

Department 2. Appeal from Superior Court, Los Angeles County; Frank F. Oster, Judge.

Action by the City of Los Angeles against J. B. Lankershim. From a judgment for plaintiff, and an order denying motion for new trial, defendant appeals. Reversed and remanded.

John D. Works and Bradner W. Lee, for appellant. Leslie R. Hewitt and John W. Shenk, for respondent.

HENSHAW, J. This is an action to recover moneys due under a revenue license ordinance of the city of Los Angeles providing "for licensing and regulating the carrying on of certain professions, trades, callings and occupations." Judgment passed for the plaintiff, and from the judgment and from the order denying his motion for a new trial defendant appeals. While thus described as "regulatory," an inspection of the ordinance discloses that it is an ordinance simply for revenue, the only attempt at regulation being the prohibition against conducting or carrying on any of the enumerated professions, trades, callings, or occupations without first procuring a license so to do. Section 54 of the ordinance is as follows: "Sec. 54. For every person, firm or corporation maintaining, managing or conducting a building for the purpose of letting office rooms or store rooms, the following license: For every building containing more than 30 rooms, $1.00 per year, for each office room, and $3.00 per year for each store room contained in said building." Defendant is admittedly the owner of an office building containing more than 30 rooms which are rented or leased.

Against the enforcement of this license ordinance and against its validity, it is first urged that the ordinance in design and in effect levies an unequal and ununiform tax upon property which the owner may elect to rent (Const. art. xiii, § 1); that an owner's right to rent his property and receive the rents thereof is one of the inherent rights of property ownership; that to call the renting an "occupation" is a mere subterfuge, and that to exact a license tax for the right to conduct this so-called "occupation" is but an attempt to evade the law forbidding unequal taxation. The question thus presented is certainly a serious one. If a man owning an office building with offices to rent who has paid all taxes, state, county, and municipal upon his property is to be charged a dollar a room for every office he rents under a declaration that he is engaged in the "occupation" of "conducting a building" for the purpose of letting office rooms and that, consequently, a license may be exacted on the occupation, equally well might the board of supervisors under the guise of licensing the "occupation of renting land" exact from the farmer a dollar per acre for all farming lands which he might rent.

[1] But in the present case we need not pause to determine this point, for the ordinance in the matter here under review is certainly obnoxious to the general law and to the charter provisions in its unjust discrimination between persons engaged in the same business. It imposes a burden upon one owner which it does not impose upon another in the same class. We need do no more than refer to such familiar cases as Ex parte Mirande, 73 Cal. 365, 14 Pac. 888, Abeel v. Clark, 84 Cal. 230, 24 Pac. 383, City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604, County of El Dorado v. Meiss, 100 Cal. 268, 34 Pac. 716, Hellman v. Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057, and Van Harlingen v. Doyle, 134 Cal. 53, 66 Pac. 44, 54 L. R. A. 771, which lay down the general principles touching the limitations upon the power to impose burdens or immunities upon classes. The charter of the city of Los Angeles speaks upon the precise subject-matter, and in authorizing the city to impose a license tax upon occupations, businesses, and trades to raise revenue for the city expressly provides "that no discrimination shall be made between persons engaged in the same business otherwise than by proportioning the tax on any business and amount of business done." While, then, it is held that all businesses of a certain class may be subjected to a license tax in a single amount, or what is much more equitable, that the license tax may be imposed in proportion to the business done (Los Angeles v. Los Angeles Gas Co., 152 Cal. 765, 93 Pac. 1006), it is distinctly forbidden by this charter, as it is by the general law of this state, to discriminate in the matter of licenses between persons engaged in the same business unless that discrimination takes the form of regulating the amount of the license in proportion to the amount of the business done. So here conceding, but only for the purpose of this decision, that the renting by an owner and the receiving of rents from his own property is an "occupation" and conceding, further, that the owners of office buildings who rent rooms therein for office purposes form a class which may be segregated for the purposes of license

taxation, it is still plain that no valid distinction exists based upon the size of the building or the number of offices for rent. Surely a man who owns a building with 30 office rooms for rent is engaged in no different "occupation" than the man alongside of him owning an office building with 29 office rooms to rent, and if, as in the case of this ordinance, a tax is to be levied at the rate of a dollar a room upon the person engaged in the "occupation" of renting office rooms, no reason appears or is shown why, belonging to the same class as they do, the man who rents 5 office rooms should not pay $5 if the man who rents 50 is compelled to pay $50. The contention that for the purposes of taxation the municipal council may draw a class line at 30 rooms and declare those who rent 30 rooms and over are engaged in an occupation, while those who rent less than 30 rooms are not engaged in the same occupation, is purely fanciful, as would be plainly exemplified if the ordinance imposed a tax upon those who rent from 1 to 30 rooms and relieved from the tax those who rented over 30 rooms. Yet, if this asserted ground of classification is substantial, the city council would have the power to do precisely this thing.

No ordinance which has come under the review of this court has ever gone to the limits of this ordinance or has been upheld if it has done so. In Ex parte Sisto Li Protti, 68 Cal. 635, 10 Pac. 113, the license charge was regulated according to the number of employés. There was no objection there made that a laundry which employed nobody was exempt from a license fee; the sole objection being that the fixing of the license in accordance with the number of employés was not a sound basis of classification. In Ex parte Lemon, 143 Cal. 558, 77 Pac. 455, 65 L. R. A. 946, by the license tax upon restaurants, all restaurants were taxed, but the tax was graded and made less in the case of small restaurants where the cooking and service were by the proprietor or members of his family. No question was there presented of the omission of any part of the class, the attack being made upon the differences of the class by reason of the nature of the business. So in Ex parte Haskell, 112 Cal. 412, 44 Pac. 725, 32 L. R. A. 527, it was held that an ordinance imposing a license tax upon traveling salesmen higher than the license tax upon the merchant who sold the same goods at a fixed place of business was founded in a legitimate distinction.

[2] The well-settled rule that "every intendment is to be indulged in favor of the validity of a municipal ordinance imposing a license fee for the carrying on of a particular business" means that a court will be zealous in its search for any substantial ground for upholding such an ordinance when attacked; but it does not mean that the court must shut its ears to reason and declare in every case that because an ordinance has been passed there must be valid reasons for its existence. The true principle, repeatedly affirmed in this state, is thus expressed by the Supreme Court of Georgia: "The Legislature has absolutely no power to classify persons, natural or artificial, engaged in precisely the same occupation, laying a tax upon some of them and excepting others, or imposing a tax not operating uniformly upon all." Singer Manufacturing Co. v. Wright, 97 Ga. 114, 25 S. E. 249, 35 L. R. A. 497.

The ordinance here, therefore, is unjust and discriminatory in making an unwarranted exception in favor of members of the same class, or what is the same thing phrased differently, imposing upon a part of a class artificially created a burden not imposed upon all who stand in the same relation to the same subject-matter (City of Pasadena v. Stimson, supra), for which reason the ordinance as to the section under consideration is invalid.

The judgment and order are therefore reversed, and the cause remanded.

We concur: LORIGAN, J.; MELVIN, J.

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160 Cal. 810

CITY OF LOS ANGELES v. UNION TRUST CO. OF LOS ANGELES. (L. A. 2,603.)

(Supreme Court of California. Sept. 26, 1911.)

Department 2. Appeal from Superior Court, Los Angeles County; Frank F. Oster, Judge.

Action by the City of Los Angeles against the Union Trust Company of Los Angeles, a corporation. From a judgment for plaintiff, and an order denying its motion for new trial, defendant appeals. Reversed.

John D. Works and Brander W. Lee, for appellant. Leslie R. Hewitt and John W. Shenk, for respondent.

PER CURIAM. The above-entitled case is in all respects identical with the case of City of Los Angeles (a Municipal Corporation), Plaintiff and Respondent, v. J. B. Lankershim, Defendant and Appellant (L. A. 2,604) 118 Pac. 215, this day decided.

For the reasons given in the latter case, the judgment and order appealed from are reversed, and the cause remanded.

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161 Cal. 23

SOLOMON v. ALEXANDER, Mayor, et al. (L. A. 2,609.)

(Supreme Court of California. Sept. 26, 1911.)

MUNICIPAL CORPORATIONS (§ 108*)—ORDINANCES—REFERENDUM PETITION—TIME OF FILING—"FINAL PASSAGE."

Los Angeles City Charter, § 39, provides that all ordinances finally adopted shall be published, and until such publication no ordinance shall be valid, but does not provide when it shall be published; and section 198b provides that no ordinance shall go into effect before 30 days from the time of its final passage and its approval by the mayor, and if during said 30 days a petition, signed by a certain number of electors, protesting against its passage, be presented to the council, the ordinance shall be suspended, and the council shall reconsider it, and, if it be not repealed, shall submit it to a vote of the electors. *Held*, that the 30-day period for filing the referendum petition commenced to run from the final passage of the ordinance by approval by the mayor, or its passage over his veto, and not from the date of its publication; the term "final passage" merely meaning favorable action on the ordinance by the council.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 108.*

For other definitions, see Words and Phrases, vol. 3, pp. 2802, 2803.]

In Bank. Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Suit by F. H. Solomon against George Alexander, Mayor of the City of Los Angeles, and others, to enjoin the enforcement of an ordinance. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Haas, Garrett & Dunnigan, for appellant. Leslie R. Hewitt, Ex-City Atty., and John W. Shenk, City Atty., for respondents.

LORIGAN, J. This appeal involves a construction of the "referendum" provision of the city charter of the city of Los Angeles.

Section 39 of the charter provides that "all ordinances finally adopted under the provisions of this charter shall be published * * * by at least one insertion in some daily newspaper printed and published in the city of Los Angeles and until and without such publication * * * no ordinance shall be valid or take effect." Section 198b provides that no ordinance passed by the city council (except emergency and street improvement ordinances) "shall go into effect before 30 days from the time of its final passage and its approval by the mayor; and if during said 30 days a petition, signed by electors of the city equal in number to a certain percentage of the vote cast at the last preceding election for certain officers, protesting against the passage of such ordinance, be presented to the council, the same shall thereupon be suspended from going into operation and it shall be the duty of the council to reconsider such ordinance, and, if the same is not entirely repealed the council shall submit the ordinance, as provided in section 198a of this charter, to the vote of the electors of said city, either at the next general election or at a special election to be called for that purpose. * * *"

On October 5, 1909, the city council of the city of Los Angeles adopted an ordinance entitled "An ordinance regulating dance halls and providing for the granting and revocation of permits therefor," which ordinance was approved by the mayor of the city on October 16, 1909, and was published in the Los Angeles Daily Journal on October 19, 1909. On November 16, 1909, pursuant to said section 198b, and in an attempt to comply with its provision, a referendum petition was filed with the city clerk, but, notwithstanding its filing, the city council disregarded it, and refused to take any action upon it, on the ground that it had not been filed within the time provided in said section 198b of the charter.

Plaintiff, the proprietor of a public dance hall in the city of Los Angeles, alleging that the mayor and city council and chief of police maintained that the filing of said petition did not suspend the operation of said ordinance, and were proceeding to enforce it, to his irreparable injury, brought this action to enjoin the enforcement of said ordinance. A general demurrer to his complaint was sustained, and plaintiff declining to amend judgment was entered against him, from which this appeal is taken.

The only point involved on this appeal is, When does the 30-day period within which the referendum petition must be filed commence to run? Does it begin to run from the time of the approval of the ordinance by the mayor, or from the date of the publication of the ordinance?

In the present case, if it commenced to run from the date of the approval by the mayor, it is conceded by the appellant that the referendum petition was filed too late by a day. If, on the other hand, the time within which to file the petition ran from the publication of the ordinance, the petition was filed in ample time, and it was the duty of the council to have acted with reference to it as section 198b of the charter provides.

The position of the appellant is that by the use of the term "its final passage and approval by the mayor," in the referendum clause, is meant the publication of the ordinance, because section 39 of the charter provides that "an ordinance shall not be effective until its publication"; that "final passage" means the "taking effect" of the ordinance by publication.

We cannot agree with this claim. On the contrary, the publication of the ordinance has nothing to do with fixing the time when the right to file a referendum petition commences to run. Publication of the ordinance could not, at any time prior to the 30 days from the final passage and approval of the ordinance by the mayor, put the ordinance in force. The ordinance, it is true, could not become effective until after such publication; but such publication, if made at any time prior to 30 days after its final passage and approval, would only put the ordinance in a position of being capable of enforcement after the expiration of 30 days allowed for filing the referendum petition, because the referendum clause declares that the ordinance shall not go into effect until then. It could only go into effect 30 days after the final passage and approval, and then only if publication was made. If the referendum petition is filed within the 30 days, then the ordinance, as the referendum section further provides, is suspended from going into operation. This is true whether the ordinance has been published or not.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The stress of the argument of appellant is addressed to the use of the word "final," as it is employed in the referendum provision, "final passage and approval by the mayor of the ordinance." He insists that "final passage" includes putting the ordinance into effect by publication. But a construction of the charter provisions satisfies us that "final passage" of an ordinance, as used in the referendum clause, means something quite different from the taking effect of the ordinance by its publication.

Under the charter of Los Angeles, legislative power is vested in the city council to be exercised by ordinance, and subject to the power of approval or veto by the mayor, with further power in the city council to pass an ordinance over the veto of the mayor. When an ordinance receives the requisite favorable action of the city council and the approval of the mayor, it is "finally passed," and if it is returned by the mayor with his veto, and is passed thereover, it is equally "finally passed," though to this latter situation the term "finally passed" has more exact application. But, whether favorably acted on by the council and approved by the mayor, or favorably acted on over the veto of the mayor, such "final passage" has reference only to favorable legislative consideration of the ordinance by the council as distinct from the going into effect of the ordinance after such action and by publication.

Section 39 of the charter, which provides that all ordinances "finally adopted" shall be published, and until publication shall not take effect, is found among the provisions of the original charter of the city, adopted in 1889. The referendum section, suspending ordinances from going into effect before 30 days from the time of "final passage and approval," was inserted in the charter by amendment in 1903.

It will be observed that in section 39 ordinances "finally adopted" are then to be made effective by publication. This, of course, means final legislative action in passing an ordinance, as distinct from putting it into effect by publication; and this section recognizes them as entirely different things. There is no distinction in meaning between the phrase "finally adopted," as used in section 39, and "finally passed," as found in the referendum clause; they are synonymous, and, as "finally adopted" in section 39 does not mean taking effect of the ordinance by publication, but only favorable action by the council itself, so equally "finally passed" in the referendum clause does not mean taking effect by publication, but solely favorable action by the council on the ordinance.

Now, while we have considered more particularly the meaning of the phrase "finally passed," because under the charter this term would be applicable to final favorable action by the council in passing an ordinance. whether it received the approval of the mayor, or is passed over his veto, it is to be observed that by the referendum clause during 30 days from the time of its "final passage and approval by the mayor" the ordinance shall not go into effect, and if during said 30 days a petition, protesting against the passage of said ordinance, be presented to the council, it shall be suspended from going into operation. When the charter clause speaks of the "approval by the mayor" in connection with "final passage," there can be no doubt but that simply the legislative enactment of the ordinance is meant, as a period from which the 30 days to file a protesting petition shall begin.

This is the obvious meaning to be given to the section. The purpose was to afford the electors of the city a reasonable opportunity to protest against legislation which they deemed objectionable, and to provide for the filing of such protest before the ordinance became effectual. In such a scheme one of the essential things to be provided for was to fix a definite time within which such protest could be presented. To say that such time was intended to be from the publication of the ordinance provides no certainty as to time, because the charter does not provide when an ordinance shall be published after its passage and approval. On the other hand, after an ordinance is passed by the council, those interested in objecting to the ordinance know that the mayor has but 10 days after its presentation to him to act upon it. They can thus readily ascertain whether his action is favorable or adverse, and the result of the action of the council, if it is the latter, and govern themselves accordingly. There is a degree of certainty as to time by making the period for protesting run from the final passage, if passed over the veto of the mayor, or its final passage and approval if he approves it, which could not be afforded if the time was to run from the indefinite and uncertain period when the ordinance might be published.

Counsel for appellant cite us to a number of cases where it was held that the terms "after the passage of the act," "at the time of the passage of the act," or "prior to the time of the passage of the act," meant the time the act took effect. Harding v. People, 10 Colo. 387, 15 Pac. 727; State ex rel. Churchhill v. Bemis, 45 Neb. 724, 64 N. W. 348; Mills v. State Board, etc., 135 Mich. 525, 98 N. W. 19. But in these cases it was uncertain and doubtful when the act in question took effect; no time was specified, nor any definite language from which that fact could be ascertained. Under such circumstances, it is only a reasonable construction to hold that the passage of the act meant when it took effect. But in the referendum clause here the term "final passage" of the ordinance is not used alone, as was the term "passage of the act" in the cases cited. It is used in connection with the approval of the mayor. Effect must be given to this language, and no other effect can be given than that the time when legislative action was complete, and approved of is the date from which the right to file a referendum petition commences to run.

In this view the referendum petition here in question was filed too late, and the trial court properly sustained the demurrer to the complaint.

The judgment appealed from is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

BEATTY, C. J. I concur. The numerous decisions cited by counsel for appellant, holding that such expressions as "the final passage" (of legislative acts) refer to the date (subsequent to their approval by the executive) when, by their terms, or by constitutional provision, they first became operative, were made in cases involving the question whether the rights or duties of individuals or public officers were changed or affected by the act before the time it was to take effect. As to this question, it was necessarily held that "final passage" and similar expressions referred to the date when the act first became operative. It could not have been held otherwise without defeating the manifest policy of a constitutional or statutory provision suspending the obligation of a new rule of conduct until its terms can be made known, and the affairs of those affected by it adjusted to the changed conditions. No such principle of construction applies to the referendum provisions of the charter of Los Angeles, the avowed intention of which is to prevent an ordinance against which a sufficient protest is filed from ever taking effect, unless ratified by a popular vote. This case furnishes an illustration of how an ordinance could, under appellant's construction of the charter, become and be operative for one day, notwithstanding the opposition of a sufficient percentage of protestants, and cases can easily be supposed in which, upon the same construction, objectionable ordinances might become operative and remain so for weeks, and then be suspended by protest and finally defeated by popular vote. It is easy to see how much inconvenience and confusion this might involve.

(161 Cal. 13)

FREELON v. ADRIAN et al. (L. A. 2,520.)

(Supreme Court of California. Sept. 26, 1911.)

1. BOUNDARIES (§ 3*)—DESCRIPTION BY METES AND BOUNDS—PROPERTY CONVEYED.

A mortgage covering a large tract, described therein by metes and bounds, includes any lots, blocks, and streets in an addition within the exterior limits of the tract described, though not specifically referring to them.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 3–41; Dec. Dig. § 3.*]

2. MORTGAGES (§ 554*)—FORECLOSURE—DEED—CONSTRUCTION—FAVORABLE TO GRANTOR.

Civ. Code, § 1069, requiring every grant by a public officer or body, as such, to a private party to be interpreted in favor of the grantor, refers to grants of public property, and does not apply to a sheriff's sale of private property under mortgage foreclosure.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1582–1591; Dec. Dig. § 554.*]

3. MORTGAGES (§ 533*)—FORECLOSURE—SALE—INTEREST ACQUIRED.

Under Code Civ. Proc. § 700, providing that the purchaser of real estate acquires all the right, title, and interest of the judgment debtor on the day of the levy of execution, where the judgment is not a lien upon the property, and, if it be a lien, acquires all the judgment debtor's interest on or after the date it became a lien, a purchaser under a sheriff's deed at mortgage foreclosure sale acquired all of the judgment debtor's right, title, and interest in the property when the mortgage lien attached.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1554; Dec. Dig. § 533.*]

4. BOUNDARIES (§ 20*)—PROPERTY CONVEYED—CENTER OF STREETS.

In view of Civ. Code, § 831, providing that an owner of land bounded by a street is presumed to own to its center, though the contrary may be shown, and section 1112, providing that a transfer of land bounded by a highway passes title to the soil to the center thereof, unless a different intent appears, a sheriff's deed upon mortgage foreclosure, conveying lots and blocks by numbers and letters, passed title to the purchaser to the middle of abutting streets; the sheriff's deed having the same effect as a deed from the mortgagor would have had.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 123–130; Dec. Dig. § 20.*]

Department 2. Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action to quiet title by Louise B. Freelon against H. A. Adrian and others. From a judgment for defendants and an order denying a new trial, plaintiff appeals. Affirmed.

Toland & Rogers and Morrison, Cope & Brobeck (Edward Hohfeld and W. I. Brobeck, of counsel), for appellant. G. H. Gould, for respondents.

LORIGAN, J. In 1886 plaintiff owned a large tract of land in Santa Barbara county, a portion of which she platted into lots and blocks, and the map thereof entitled "Map of Las Piedras addition to the city of Santa Barbara, Cal.," was on February 10, 1888, recorded in the records of Santa Barbara county, having indorsed thereon a duly acknowledged grant, dedication, and abandonment to the public of a right of way over the streets platted on the map, which included, among others, certain streets, named Freelon avenue, Live Oak avenue, Loma, Orena, and Montgomery streets, which were laid out on the map as affording access to the lots in the blocks, and also bounding the blocks thereon. On May 14, 1892, plaintiff executed to William Barber a deed absolute in form, but intended as a mortage, which deed described the tract conveyed by metes and bounds, and included within its exterior limits, among other lands, the Las Piedras addition, although no reference was made to the addition or the map thereof, save to except from the conveyance a few lots and blocks described by reference to the map thereof. In 1895 this mortgage was foreclosed, and in that year the sheriff of the county of Santa Barbara issued to William Barber as purchaser at the execution sale under said decree of foreclosure a deed, which was duly recorded, and which, as far as involved here, conveyed part of the property mortgaged by designated lots and blocks as delineated on the map of the Las Piedras addition, and another part of said addition, lying north of Freelon avenue as delineated on said map, by metes and bounds, the north line of Freelon avenue being referred to as the southern boundary, which, with the other general boundaries, described an acreage of 51 acres. On December 9, 1895, William Barber conveyed to Sheffield and Edwards the 51 acres lying north of the north line of Freelon avenue, and described in the deed from the sheriff by metes and bounds, and in 1900 William Barber made a gift deed to his wife, Elizabeth J. Barber, of the other property described in the sheriff's deed to him. On October 3, 1901, Elizabeth J. Barber and Sheffield and Edwards decided to change the course of Freelon avenue, and for that purpose entered into an agreement and interchanged deeds, the effect of which, as far as it could be done by the parties, was to vacate Freelon avenue as delineated on the map of the Las Piedras addition, and to substitute therefor another avenue similarly named and running through the lands of Barber, Sheffield, and Edwards. This arrangement affected only that portion of Freelon avenue lying between the lands of Mrs. Barber and those of Sheffield and Edwards. Some four years subsequently Mrs. Barber had the Las Piedras addition south of Freelon avenue resurveyed, and a new map thereof made. In such survey and map some of the streets were retained as originally established, but Live Oak avenue and Loma, Montgomery, and Orena streets were closed and abandoned. Freelon avenue was also changed to conform to that avenue as relocated under the Barber, Sheffield, and Edwards agreement and deeds, and thereby a portion of said avenue abandoned. This map was entitled "Map of new subdivision of a portion of the Las Piedras addition to the city of Santa Barbara," and was filed for record on March 2, 1903, and on the same day the board of supervisors of Santa Barbara county (the lands being then outside the city limits of the city of Santa Barbara), upon the petition of Mrs. Barber theretofore filed, consenting to and praying for an order for the abandonment of the avenues and streets above described, made an order abandoning and discontinuing them, and accepting the streets as delineated on the new map. On February 21, 1908, plaintiff brought this action to quiet title to a large portion of the land described in the mortgage from her to William Barber, and the exterior limits of which embraced, together with other lands, that portion of the original, as well as the new, plat of the Las Piedras addition lying south of Freelon avenue, including the avenue itself. A large number of persons were made defendants, but Elizabeth J. Barber was alone served with process. She answered, denying that plaintiff had any interest in the property, alleged her own ownership to certain portions thereof, which alone are actually involved in this controversy, pleaded also the statute of limitations, and by cross-complaint asked that her title be quieted.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The findings of the court were in favor of defendant, except as to a small strip to which defendant disclaimed ownership, and which was awarded to plaintiff, and from the judgment thereon entered against plaintiff and in favor of defendant, quieting her title, plaintiff appeals, as she likewise does from the order denying her motion for a new trial.

While under her complaint plaintiff asserted title to a large tract of land including the Las Piedras addition, no claim to that extent was asserted on the trial; her sole claim of ownership being limited to the strips of land consisting of Freelon avenue, Live Oak avenue, and Loma, Montgomery, and Orena streets, as originally located on the map of said addition, and which were closed and abandoned under the resurvey and new map filed by Mrs. Barber on March 2, 1903, and all of which streets were vacated and discontinued by order of the board of supervisors of Santa Barbara county on that day. It appears from the record that none of the streets in the Las Piedras addition, otherwise called the Freelon map, have been used by the public; the platted tract being in its native condition. No interest of the public in any streets is involved here; the only question being one between the parties litigant as to the ownership of the strips of land represented by the streets above named, which were by the resurvey of the addition abandoned.

Appellant, in support of her claim of title to these abandoned streets and avenues, asserts that: (1) The filing of the map of the Las Piedras tract, in 1886, constituted merely an offer to dedicate to the public the avenues and streets indicated thereon. (2) The mortgage (in form a deed) from her to William Barber amounted to a withdrawal of this offer of dedication. (3) The description in the deed from the sheriff to William Barber under the foreclosure sale, by making reference to the lots and blocks by letter and number, conveyed only the lots and blocks so designated, and did not convey to Barber any title to streets on which said lots and blocks abutted. (4) The sheriff's deed to Barber for that portion of the tract north of Freelon avenue did not convey title to the avenue itself. (5) Whatever title Barber acquired depended on the deed to him from the sheriff, and as the foreclosure out of which it issued was a proceeding in invitum such deed must be construed most strongly against the grantee under it. Claiming that all these points are well taken, appellant insists that she never parted with her title to these avenues and streets.

[1] We will not discuss the claims urged under the first two points, namely, that the filing of the Las Piedras map was merely an offer to dedicate, and that the mortgage to William Barber amounted to a withdrawal of the dedication. Let it be conceded that all this is true, yet, we do not perceive how it is of any advantage to appellant. If the filing of the map was a mere offer to dedicate, which the mortgage to Barber had the effect of withdrawing, she retained no title to any of the avenues and streets delineated upon the map which did not pass to Barber under the mortgage to him, if its descriptive calls were sufficient to include them. And they were. Her mortgage to him was not solely of the lots and blocks in the Las Piedras addition by dimensions or by metes and bounds, even if that fact would be of any importance in determining the quantum of title that passed under such a description. The description in the mortgage was in fact of a large tract of land of which the Las Piedras addition was only a part, and the tract was described by metes and bounds, which included within its exterior limits the entire addition, and the effect of such a description in the mortgage was to impress a lien upon the entire title and interest of the appellant of all property owned by her within its exterior calls. It operated as any other conveyance would, and conveyed all the title which appellant had to any property included within the description in the mortgage, and if she owned lots and blocks and streets within the addition, as that addition was brought within the general exterior boundaries, whatever interest she had therein, and of whatever character, was embraced in the mortgage.

The third point advanced by appellant is that, as the description in the deed from the sheriff to Barber under the foreclosure proceedings was by reference to lots and blocks by letter and number, such a description served to convey only the lots and blocks so designated, and did not give the grantee title to the streets and avenues upon which said lots and blocks abutted. The particular claim of the appellant in this regard is that, as it appears from an inspection of the map referred to in the deed that all Barber was having conveyed to him were lots and blocks included within scientifically defined lines and measured by precise number of feet, that expression was thus given by the deed that the conveyance to him was only of lots and blocks having a definite number of square feet of land, and excluded the idea that title to the streets abutting thereon was intended to pass.

[2] In this connection is made the fifth point that in construing the sheriff's deed to Barber a construction must be placed upon it most strictly against the grantee; appellant citing, as supporting this latter proposition, section 1069 of the Civil Code; Cullen v. Sprigg, 83 Cal. 63, 23 Pac. 222; and Oakland v. Oakland Water Front Co., 118 Cal. 175, 50 Pac. 277. But neither the section quoted nor the cases cited have any relation to conveyances by sheriffs. They have reference to grants of public property by public officers or public bodies to private persons. The Cullen Case speaks "of public grants to private persons," and "grants by the state" are referred to in the Oakland Case. As to the map having the dimensions marked upon it, this is true as it is usually true of any correct map of a subdivision or addition. But the conveyance to Barber is not of lots and blocks by precise numbers of feet, but by numbers or letters, which is not, of course, a conveyance by metes and bounds.

[3] The mortgage of the appellant to Barber embraced her title to all lots, blocks, and streets in the addition, and was subject to sale in satisfaction of the indebtedness secured thereby. Under a sheriff's deed, a purchaser acquires all the right, title, and interest of the judgment debtor in the property sold. Code Civ. Proc. § 700. When such a deed is executed, by the doctrine of relation, it is deemed and taken as though executed as at the date when the lien of which it is the sequence originated (Foorman v. Wallace, 75 Cal. 552, 17 Pac. 680), and "the effect of the sale is itself * * * to invest in the purchaser the title of the mortgagor at the date of the mortgage." Sichler v. Look, 93 Cal. 600–610, 29 Pac. 220, 222.

Section 831 of the Civil Code provides that "an owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown;" and section 1112 of the same Code provides that "a transfer of land bounded by a highway passes the title of the person whose estate is conveyed to the soil of the highway in front to the center thereof unless a different intent appears from the grant." If the appellant had made a deed to Barber of the lots and blocks in the Las Piedras addition, designating them simply as streets and blocks therein, it would not be questioned for a moment but that under such a conveyance his title extended to the middle of the street upon which said lots and blocks so conveyed abutted, and if the conveyance had been of all the lots and blocks in the addition, simply designated as such, he would have taken title to all the streets.

[4] So, under the authorities above referred to, there is no good reason to be advanced why the sheriff's deed, which is in effect the deed of appellant, and is deemed to be executed as on the date of the mortgage under which title to these streets was conveyed, should not be given the same effect, and be held to grant and convey the same title, as her simple conveyance would have done.

The conclusion we have reached makes it unnecessary particularly to discuss the fourth point made as to Freelon avenue. Title to it passed under the sheriff's deed to Barber as effectually as did the title to the other streets involved in the action. Our conclusion that title to these avenues and streets vested in Barber under the sheriff's deed, and by conveyance from him to defendant, makes it unneccessary to consider the claim of appellant that she had acquired title thereto by adverse possession.

The judgment and order appealed from are affirmed.

We concur: MELVIN, J.; HENSHAW, J.

(161 Cal. 29)

PRUITT v. SAN PEDRO, L. A. & S. L. R. CO. (L. A. 2,705.)

(Supreme Court of California. Sept. 26, 1911.)

1. CARRIERS (§§ 331, 347*) — PASSENGERS — CONTRIBUTORY NEGLIGENCE—STATUTES.

Under Civ. Code, §§ 483, 484, requiring railroads to furnish sufficient accommodations within its cars for all passengers, and relieving railroads from liability for injuries to passengers while riding on the platforms of the cars in violation of posted rules, a passenger who in violation of posted rules voluntarily goes on the platform of a car solely to ride there, though accommodations are provided for him in the car, may not recover for an injury received while riding there; but, where the passenger seeks to protect himself against an anticipated injury, or there is an invitation by the railroad requiring him to go on the platform while the train is in motion, the question whether it is necessary for him to go on the platform, or there is such invitation from the railroad as to amount to a waiver of a violation of its rules, is for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1355, 1376; Dec. Dig. §§ 331, 347.*]

2. CARRIERS (§ 347*)—PASSENGERS—CONTRIBUTORY NEGLIGENCE—STATUTES.

Where a passenger, after the announcement of his station and the train had slackened its speed, left his seat in the coach and went on the platform, expecting to alight at the station, the question whether he violated the posted rules of the railroad prohibiting passengers from riding on the platform, so that he could not recover for a personal injury while on the platform, was for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1355; Dec. Dig. § 347.*]

3. NEGLIGENCE (§ 4*)—ORDINARY PRUDENCE.

Whether one exercised ordinary prudence must be determined by the special circumstances and surroundings, and his conduct must be tested by the conduct of a reasonably prudent man under similar circumstances.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 7; Dec. Dig. § 4.*]

4. NEGLIGENCE (§ 136*)—QUESTION FOR JURY —QUESTION FOR COURT.

Where the facts are such that all reasonable minds must conclude that a party was guilty of contributory negligence, the court may determine the question; but, where reasonable men may fairly differ, the question is for the jury, and this is true whether the evidence is conflicting or undisputed.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by George M. Pruitt against the San Pedro, Los Angeles & Salt Lake Railroad Company. From an order granting plaintiff a new trial after verdict and judgment against him, defendant appeals. Affirmed.

A. S. Halsted and S. M. Johnstone, for appellant. Morton, Pruitt & Goodrich, for respondent.

LORIGAN, J. This appeal, originally before the District Court of Appeal for the Second appellate district, resulted in a judgment affirming the order of the superior court, granting the plaintiff a new trial after verdict and judgment against him. A petition for rehearing in this court was thereafter granted.

The opinion of the District Court of Appeal, written by the late Justice Taggart, is as follows:

"Action by father to recover damages for loss of 16 year old son, who died from injuries sustained by the derailment of one of defendant's trains while the son was a passenger thereon. Verdict and judgment were for defendant, and a motion by plaintiff for a new trial was granted. This appeal is by defendant from the order of the superior court, granting a new trial.

"Defendant is a common carrier of passengers, operating a line of railroad between San Pedro, Cal., and Salt Lake, Utah, via the cities of Los Angeles and Pomona, Cal. On the morning of March 3, 1907, Walter C. Pruitt, the son of plaintiff, purchased a ticket from defendant, and became a passenger upon one of its regular trains from Pomona to Los Angeles. He rode in the smoking car until within the city limits and near Seventh street of Los Angeles city, at which point he and a companion by the name of Thomas went upon the front platform of the smoker next to the baggage car. At or about the time they did so, the train ran into an open switch, and was derailed and wrecked. The engine was overturned, and the baggage car wrenched from between the smoker and the engine, so that the front end and platform of the smoker came into collision with the engine, and Pruitt and his companion were both thrown about the platform and injured, and so scalded by the steam escaping from the boiler of the engine that they died in a few hours. There was some conflict in the evidence as to whether or not the young men had reached the platform at the time of the accident, but the jury found in response to a special interrogatory submitted to them that Pruitt was upon the platform, and this is sustained by evidence.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"It appears from a stipulation, read in evidence that prior to the accident, and just before reaching Seventh street, the train was running at a speed of 35 to 40 miles an hour. That the train whistle blew, the Fourth street station was announced by the conductor, and the speed was reduced to about 25 miles per hour when the accident occurred. That the distance from Seventh street to Fourth street station is 2,500 feet. That the train was going to stop at the Fourth street station, and that after the whistle blew, and the station was announced, and the train had slackened its speed, Pruitt and Thomas arose from the seat in which they were riding, which was the fourth from the front door of the car, and stated in the hearing of passengers in the car that they were going to get off at the Fourth street station. That at least half a dozen other passengers in the same car, who intended to leave the train at that station, arose simultaneously with Pruitt and Thomas from their respective seats, and were making preparation to leave the car. None of the passengers, except Pruitt and Thomas, left the inside of the car, or were scalded or bruised or seriously injured, or injured at all, except a few slightly. The smoking car left the rails, but was not overturned or wrecked or injured to any material extent. That there was conspicuously posted on both ends of, and inside of each and every car, the printed rules and regulations of defendant, regarding the conduct of passengers, in plain, conspicuous type, among which rules was the following: 'Notice to Passengers. (1st) Passengers are not allowed to ride on the engine, or on the baggage, mail or express cars, or on platform or steps of cars, and are required to remain in their seats while train is in motion, and at all times to keep their heads and arms inside of the car windows.' At all the times mentioned, there were vacant seats in the car that Pruitt and Thomas might have occupied, if they had so desired.

"Acting upon the theory that, if it were shown that Pruitt was injured on the platform of the car in violation of the printed regulation so posted, under the provisions of sections 483 and 484 of the Civil Code, the corporation defendant was not liable for damages for the injuries sustained by him, the trial court advised the jury that there was but one thing for them to consider: 'That is whether or not Walter C. Pruitt, the deceased, was on the platform at the time of the accident;' and in accordance with this view instructed them: 'If you believe from the testimony that he was, then the plaintiff cannot recover.' It was the contention of plaintiff that it is not the intent and purpose of the sections of the Code mentioned to require that a passenger remain quietly in his seat in a railroad car until the train comes to a full stop at the station before arising and preparing to go out of the car; and he requested the court to give to the jury certain instructions framed upon the theory that whether or not Pruitt was negligent in going upon the platform after the whistle blew, the station had been announced, and the speed of the train had slackened, was to be determined by the jury as a question of fact. These instructions the trial court refused to give.

"Another instruction given by the court advised the jury that: 'The deceased had a right to presume that the train upon which he was riding would stop long enough at the Fourth street station to enable him and the other passengers to alight after the train should come to a stop. He was not required to and should not, before the train came to a stop, go upon the platform to be ready to get off when it did stop.' This instruction embodies a literal application of section 484, when taken alone. In reaching the true intent and purpose of the law, these two sections (483 and 484) must be construed together. As originally enacted, section 483 was in the form of a proviso to a section of an act, of which section 484 was the principal clause, entitled 'Act to provide for incorporation of railroads and the management thereof,' etc. Section 48, Stats. 1861, p. 625. The apparent purpose of this section (48), and of the sections of the Code (483 and 484), was to absolve railroad companies from liability for injury to passengers who were *riding* upon the platform in violation of the posted rules, provided there were seats furnished for them to occupy inside the car, but it cannot be presumed in the face of the commonly known habits of the traveling public, and the conveniences arranged for travelers by the railroads in this state, that it was intended thereby to say, as the last-mentioned instruction in effect says, that if a passenger goes upon the platform of a car, and is injured while there, the railroad company may by the posting of such a rule absolve itself from liability, whatever the circumstances, purpose, motive, or reason which induced him to go, provided the train was in motion at the time, and regardless of the cause of the injury.

[1] "If a passenger voluntarily goes upon the platform solely for the purpose of *riding* there, notwithstanding accommodations are provided for him within the car, the intent of the law would no doubt justify a trial court in instructing the jury, as a matter of law, that the railroad company is not liable, because the passenger has violated its rules. But where the question of the necessity of a passenger going upon the platform is involved, as, for instance, where he is seeking to protect himself against an anticipated or threatened injury, or there is an invitation, either implied or express, by the company to do that which requires that he go upon the platform, while the train is in motion (for example, to move from one car to another in order to smoke at the place or in the car provided for that purpose, or to go to the dining car for the purpose of eating, or where the train stops at a way or flag station and the time to get off is limited and he is asked, or beckoned to, by the conductor to come to the platform, so that he will be ready to get off with the least possible delay to the train), it can hardly be said that the going upon the platform is a violation of the rule, or within the meaning and intent of the law. Under such circumstances, the question whether it is necessary, or there is such an invitation from the railroad company as to constitute a waiver of the violation of its posted rules, or to estop it from taking advantage of such violation, is a mixed one of law and fact, and should be submitted to the jury under appropriate instructions.

"That the case before us is among the last-mentioned classes is held by the United States Circuit Court of Appeals for the Ninth Circuit, in the case of Thomas v. San Pedro, etc., Co., 170 Fed. 129 [95 C. C. A. 371], wherein the question of law before the United States court was the same as that now before us, and arose upon the facts attending the injuries and death of Thomas, the companion of Pruitt, caused by the same accident; the two cases being identical in the respect here considered. The court in the Thomas Case reviews quite a number of decisions from other jurisdictions, but rests its conclusion upon a construction of sections 483 and 484 of the Civil Code made by the Supreme Court of this state in Mitchell v. Southern Pacific R. R. Co., 87 Cal. 62 [25 Pac. 245, 11 L. R. A. 130].

[2-4] "The sounding of the whistle, the announcement of the station, the reduction of speed, the nearness of approach to the station, the length of time ordinarily given for passengers to leave the train at this station, the number of passengers who expect to alight, etc., were all facts to be considered in determining whether there was such an invitation as released the deceased from his obligation to obey the rules and regulations relating to remaining in his seat while the train was in motion. They were to be considered in determining whether Pruitt acted with ordinary prudence in preparing to get off the train. What constitutes ordinary prudence is always a matter of relative significance. The special circumstances and surroundings of each case are to be noted and the conduct of the parties tested by the standard of what would be the conduct of a reasonably prudent man under a similar state of affairs. If the state of facts is such that all reasonable minds must draw the same conclusion therefrom, the court may say, as a matter of law that contributory negligence has been established; but, if reasonable men may fairly differ in such conclusion, the question of contributory negligence is one of fact for the jury, and this whether the facts be conflicting or undisputed. Johnson v. Southern Pacific R. R. Co., 154 Cal. 285, 295 [97 Pac. 520].

"While a difference may be recognized between this case and one in which the ordinary question of contributory negligence is involved, because of the application of the provisions of section 484, nevertheless the invitational character of the acts of the defendant, and their relation to its responsibility, are all matters affecting the question of the contributory negligence of the deceased, and determinable in the same manner. The New York Court of Appeals, in the case of Buel v. New York Cent. R. R. Co., 31 N. Y. 319 [88 Am. Dec. 271] (a case approved by our Supreme Court in Mitchell v. S. P. Co., supra), says: 'The statute was intended to prevent the imprudent act of standing or riding on the platform, but not to absolve railroad companies from responsibility for every injury which might happen at that place, when a passenger is passing over it, while jutifiably entering or leaving the car.' So it is said in the Thomas Case: 'It is also usual for passengers to prepare to leave their car before the train reaches the station at the place of destination, and they are permitted to proceed towards and sometimes upon the platform of the car for that purpose while the train is still in motion. It is therefore manifest that this rule is subject to the qualification that a passenger may leave his seat in a car while the train is in motion and go upon the platform of the car if, under all the circumstances, such action is prudent and careful, and whether it is so or not is a question of fact for the jury.'"

This decision of the District Court reaches what we deem to be the proper construction to be given to sections 483 and 484 of the Civil Code. In its opinion the District Court refers only to the cases of Mitchell v. Southern Pacific Railroad Co., 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130, and the case of Buell v. New York Central R. R. Co., 31 N. Y. 319, 88 Am. Dec. 271, cited therein, and Thomas v. San Pedro, etc., Co., 170 Fed. 129, 95 C.

C. A. 371, in support of its conclusion, and it is earnestly insisted by appellant that the Mitchell Case (which he claims should control the question in this state) not only does not sustain the contention of the District Court of Appeal, but, on the contrary, is opposed to it, as is the weight of authority elsewhere. In the case here at bar, the superior court refused to instruct the jury, at the request of plaintiff, that it was for them to determine as a question of fact whether, under the circumstances attending his going upon the platform contrary to the rules of the company, the deceased was or was not guilty of contributory negligence. On the contrary, the court instructed them that the only question to be considered by them was whether, when the accident occurred, the defendant was or was not on the platform, and if they found he was plaintiff could not recover. The right of the plaintiff to have the jury thus pass upon the question of negligence as a question of fact was denied, and the court by refusing, on the one hand, to instruct the jury as requested by plaintiff, and in giving, on the other hand, the instruction asked by defendant, took that question from them and decided, as matter of law, that if the deceased was on the platform when the accident occurred, under the circumstances disclosed by the evidence, it constituted negligence per se, which precluded a recovery by plaintiff.

Appellant claims that this view of the court and the instruction so given to the jury in harmony with it are supported by the Mitchell Case referred to above; that under that authority the conduct of the deceased in this case in going upon the platform to be ready to alight from the train when it stopped at the station, was unnecessary and in violation of the rules and therefore per se negligence. But there is nothing in the Mitchell Case upon which any such claim can be based. In that case the train on which plaintiff was injured, in running down a heavy grade on a new and curved track, was derailed, and plaintiff injured. When the train began to descend the grade, plaintiff was in the smoking car, but had left it, and was on the platform when the accident occurred. He testified that the steepness of the grade and unusual speed at which the train was descending it, in connection with the fact that the road was new and temporary, led him to believe that an accident would occur; that he left the smoking car and went out on the platform, intending to jump therefrom to the sand on the inside of the curve, whereby he would escape with less injury than if he remained on the car, but that he had no sooner got to the platform than the car was overturned, and he was thrown to the ground and injured. The defendant offered evidence tending to show that plaintiff had been on the platform some minutes before the accident occurred and on the theory of this defense the court instructed the jury as to contributory negligence. Plaintiff obtained a verdict. On appeal the instructions given on the trial were brought under review.

One instruction was: "If you find from the evidence that at the time plaintiff left his seat in the smoking car there was no imminent peril of life or limb and no apparent danger, but that such imminent peril of life or limb or apparent danger arose after plaintiff took his position on the platform of the car, then plaintiff cannot recover and your verdict must be for the defendant." This court approved this instruction, and it is from such approval that appellant insists that the views and instruction of the trial court were correct; that, as the deceased was on the platform for the purpose only of alighting from the train when it reached the station, he was voluntarily and unnecessarily there, in violation of the rules of the company, and that the trial court properly instructed the jury to that effect as matter of law. Undoubtedly, as under the facts stated in this instruction in the Mitchell Case, where a passenger, while the train is in motion, is riding upon a platform thereof at his own volition, and without any necessity, real or apparent, for being there, this will constitute contributory negligence as a matter of law. And if the deceased in the case here was upon the platform under such circumstances, as matter of law he was guilty of contributory negligence. This would follow, of course, because all reasonable minds under such circumstances could only reach one conclusion—that of negligence. But where, as pointed out and discussed in the above opinion of the District Court of Appeal, the facts and circumstances surrounding and accompanying the act of the deceased in going upon the platform are such that reasonable men might differ upon the question whether his presence there constituted contributory negligence or not, a question of fact is presented to be determined by the jury under proper instructions.

In the Mitchell Case itself, the question whether Mitchell, in being upon the platform at the time the accident occurred, was or was not guilty of contributory negligence was submitted to the jury as a question of fact. In addition to the instruction above quoted, the court, among other instructions, in the Mitchell Case, gave the following: "If you believe that plaintiff went upon the platform under reasonable apprehension of a derailment of the train, and for the purpose of jumping off in case of an accident, and while there for that purpose was injured by the overturning of the car, I instruct you that his being on the platform under these circumstances was not riding or standing on the platform within the meaning of the rule which prohibits such riding or standing." The court further instructed them: "If the danger of overturning was imminent, and the plaintiff, acting upon the instinct of self-preservation, placed himself in the position which appeared to him, as a reasonable man, to be most safe, and make such choice as a person of ordinary prudence and care, placed in the same situation, might have made, this does not constitute negligence on the part of the plaintiff. The peril of remaining in the car or going upon the platform is to be judged by the circumstances as they then appeared, and not by the result." These instructions were also approved.

It will be observed from these instructions that no rule is laid down in the Mitchell Case that the presence of a passenger on the platform, in violation of the rules of the company, constitutes of itself contributory negligence, but, on the contrary, that whether he was acting with ordinary care and prudence, or was negligent in going on the platform, was to be determined by a consideration of all the facts and circumstances attending his being there. The Mitchell Case recognizes that the rules of the company, posted in compliance with the Civil Code sections, are not absolute and inflexible, but are subject to the qualification as declared in the above opinion of the District Court of Appeal, and whether one is or is not guilty of contributory negligence in going upon the platform of a car while it is in motion, in violation of the rules of the company, depends upon the circumstances of the particular case, and is to be determined by a consideration of whether, under all the circumstances, his conduct in doing so was prudent and careful, and whether it was or was not is a question to be submitted to the jury under proper instructions from the court.

Whether a passenger is negligent or not in leaving his seat and approaching towards the platform or is actually on the platform of a train while it is motion, in violation of the rules and regulations of the company, after the station at which he intends to leave the train has been announced and the train is approaching, is held in the following cases to be a question of fact for the jury: Schultze v. Missouri Pac. Ry. Co., 32 Mo. App. 438; Scheiber v. Chicago, St. P., M. & O. Ry. Co., 61 Minn. 499, 63 N. W. 1034; Barden v. Boston, Clinton & Fitchburg R. R. Co., 121 Mass. 426; Newton v. Central Vermont R. Co., 80 Hun, 491, 30 N. Y. Supp. 488; Balt. & O. Ry. Co. v. Meyers, 62 Fed. 367, 10 C. C. A. 485; Thomas v. San Pedro, L. A. & S. L. R. Co., 170 Fed. 129, 95 C. C. A. 371; Wylde v. Northern R. R. Co., 53 N. Y. 156; Romine v. Evansville, etc., R. R. Co., 24 Ind. App. 230, 56 N. E. 245; Lane v. Spokane Falls & N. R. Co., 21 Wash. 119, 57 Pac. 367, 46 L. R. A. 153, 75 Am. St. Rep. 821.

In Schultze v. Missouri Pac. Ry. Co., supra, the facts were practically the same as here, and the statute of Missouri under consideration there similar to our section 484 of the Civil Code. In that case the engine whistle blew, the porter announced the station where the plaintiff, a passenger, was to get off, and the train slackened its speed. Plaintiff went to the platform and stepped down on the steps, thinking the train was stopping. Discovering that it was not, he started to go back into the car, and a sudden jerk of the train threw him off, injuring him. This being substantially all the evidence, the defendant, at the close of the case of plaintiff, moved for an instruction in the nature of a demurrer to the evidence, which was denied. Plaintiff had judgment, and on appeal defendant raised as error the denial of its motion for an instruction. In passing on this question, the court said: "It is difficult to see what act or acts of plaintiff in this case could be imputed to him as negligence. He was a passenger to Lee's Summit, and expected to get off there; the whistle was blown for this station, the train began to check, and the porter passed through the car and announced the station. There certainly was nothing careless or unreasonable in the conduct of plaintiff in preparing to get off the train. While he might have remained in his seat until the train came to a standstill at the depot, his approaching the door and platform in the manner stated in his evidence certainly was not such contributory negligence as to disprove the cause of action stated in his petition. He evidently expected to alight from the train. * * * In our opinion, the case at bar does not fall within the spirit and object of section 800 of the Revised Statutes, 1879. It cannot be reasonably claimed that the plaintiff was riding or remaining on the platform of the car in the sense condemned in this statute. As before suggested, he was induced to go there to alight from the train by the conduct of defendant's agents and servants. The whistle signaled the station, the train checked, the porter announced the station—what might have been reasonably expected of a passenger expecting to leave the train at that point? * * * The defendant will not be heard to say that the plaintiff's conduct under such circumstances is negligent for the purpose of a defense to the action."

In Scheiber v. Chicago, St. P., M. & O. Ry. Co., supra, the Minnesota court said: "It is not negligence per se for a passenger in a railway car, as it approaches a station, to leave his seat and go to the door of the car in order to alight when it stops; neither is it such negligence under all circumstances, for him to ride on the platform, or go upon it before the car stops for the purpose of getting off when it does stop, for there may be cases where from necessity, or by the express or implied invitation of those in charge of the train, a prudent man would do so; but, in the absence of such facts, it is such negligence."

In Thomas v. San Pedro, L. A. & S. L. Ry. Co., supra, the facts were identical with those here. In fact, Pruitt and Thomas were fellow passengers on the train of defendant, left their seats together, and started for the platform with the intention of alighting at the station which was their destination, when they were both so badly injured as to cause their death. The same attorneys who represent the respective parties in this case were also attorneys in the Thomas Case. In that case the circuit court before which it was tried granted the motion of defendant for a nonsuit; the court deciding as matter of law that deceased, Thomas, was guilty of contributory negligence in going on the platform of the car while in motion, in violation of the rules and regulations of defendant. The Circuit Court of Appeals in reversing the judgment went into a full examination of the authorities on both sides (practically the same as are cited here), quoted from them, and pointed out that the cases relied on by appellant here and cited there were clearly distinguishable in their facts from those presented in the case at bar, and holding that under the same facts presented there, and which are involved here, it could not be said in view of the authorities that the conduct of the deceased in going upon the platform was so reckless or negligent as to make the question of his contributory negligence one of law; that it was a question upon which reasonable minds may differ, and therefore a question of fact to be determined by the jury under proper instructions.

The order granting a new trial is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

BEATTY, C. J. I dissent. Section 484 of the Civil Code reads as follows: "Every railroad corporation must have printed and conspicuously posted on the inside of its passenger-cars its rules and regulations regarding fare and conduct of its passengers; and in case any passenger is injured on or from the platform of a car, or on any baggage, wood, gravel, or freight car, in violation of such printed regulations or in violation of positive verbal instructions or injunctions given to such passenger in person by any officer of the train, the corporation is not responsible for damages for such injuries, unless the corporation failed to comply with the provisions of the preceding section." It is then a positive law of this state, to which we are bound to give effect, that, in case any passenger is injured on or from the platform of a car in violation of the printed and conspicuously posted regulations of the company, the company is not responsible in damages for such injury. It is admitted that among the printed and conspiciously posted regulations of this company was the following: "Notice to Passengers. (1st) Passengers are not allowed to ride on the engine, or on the baggage, mail or express cars, *or on the platform or steps of cars, and are required to remain in their seats while the train is in motion.*" That this is a salutary rule, and that its observance would have saved the life of plaintiff's son, is proved by the fact that he and his companion alone, of all the passengers on the train, were seriously injured by the accident which cost them their lives, and this solely by reason of the fact that they *had left their seats and gone upon the platform* of their car while the train was moving at the rate of 25 miles an hour. Such being the case, it is not what was decided or left undecided in Mitchell v. So. Pac. R. R. Co. that bars a recovery of damages, but it is the positive terms of a statute which, in my opinion, is not subject to the qualifications and exception which are imposed upon it by the opinion of the court.

160 Cal. 680

BARENDT v. McCARTHY, Mayor, et al.

(S. F. 5,507.)

(Supreme Court of California. Sept. 8, 1911. On Petition for Rehearing, Oct. 7, 1911.)

1. OFFICERS (§ 82*)—INJUNCTION—PURPOSE OF RELIEF—TITLE TO PUBLIC OFFICE.

Injunction does not lie to try title to public office.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 114; Dec. Dig. § 82.*]

2. OFFICERS (§ 82*)—INJUNCTION—PURPOSE OF RELIEF—PROTECTION OF PUBLIC OFFICERS.

While title to public office may not be tried in an injunction suit, equity will protect the possession of de facto officers by injunction pending quo warranto proceedings to determine their title.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 114; Dec. Dig. § 82.*]

3. OFFICERS (§ 82*)—INJUNCTION—PURPOSES OF WRIT—TITLE TO PUBLIC OFFICE—DE FACTO OFFICERS.

The mayor of a city, with power to appoint and remove members of the board of health, gave due notice of the removal of plaintiff and the other officers of the board of health, and appointed others in their place, all apparently pursuant to the city charter, and, the office of the board of health being locked and plaintiff having the keys, the new appointees had the door opened and took possession, and are conducting the business of the board in the usual manner. *Held*, that the mayor's appointees were at least de facto members of the board, and an injunction will not be granted, restraining them from removing plaintiff from the actual possession of his office as a member of the board; proceedings in the nature of quo warranto being his remedy.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 114; Dec. Dig. § 82.*]

Beatty, C. J., and Sloss and Angellotti, JJ., dissenting.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

On Petition for Rehearing.

4. MUNICIPAL CORPORATIONS (§ 162*)—OFFICERS—SALARY—OUSTED OFFICER.

A city official wrongfully ousted from office by an intruder is entitled to his salary.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 357-367; Dec. Dig. § 162.*]

5. QUO WARRANTO (§ 12*)—PURPOSE OF WRIT—RECOVERING POSSESSION OF OFFICE.

An officer wrongfully ousted from his position as member of a city board of health by an intruder therein may apply for quo warranto to establish his right to and recover possession of the office.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 14; Dec. Dig. § 12.*]

6. MUNICIPAL CORPORATIONS (§ 162*)—OFFICERS—COMPENSATION—WITHHOLDING SALARY—INTRUSION IN OFFICE.

A city auditor or treasurer could withhold the salary attached to a city office from one who unlawfully intruded therein, and thus protect the rights of the city against the usurpation.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 162.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; George Sturtevant, Judge.

Suit by Arthur H. Barendt against P. H. McCarthy, Mayor of the City and County of San Francisco, and others. From a decree for defendants, plaintiff appeals. Affirmed.

Barclay Henley and Arthur H. Barendt, for appellant. Cleveland L. Dam, George Appell, and A. L. O'Grady, for respondents McCarthy and Sharp. Frank J. Murphy, for respondent Martin.

MELVIN, J. This is an appeal from a judgment in favor of the defendants. The complaint alleged that Arthur H. Barendt was a member of the board of health of the city and county of San Francisco, duly appointed; that the mayor and chief of police of that city and county had, in the absence of the health officer and the members of the board of health, broken into the headquarters of the board, and had placed in possession thereof Arthur M. Sharp, as a pretended successor of plaintiff, and other persons, assuming to succeed plaintiff's associates. The complaint further averred that the appointees of the present mayor assumed to hold a meeting as a board of health; that they had organized by electing a president and secretary; and that they pretended to exercise authority over all the departments properly subject to the control of plaintiff and his associates. There was a further averment that defendant P. H. McCarthy claimed a right, as mayor of the city and county of San Francisco, to remove plaintiff from office, and that in the exercise of that asserted authority he had made an order purporting to declare plaintiff's place on the board of health vacated, and to substitute Arthur M. Sharp in his stead. The power and authority of the mayor in the premises was denied, and an injunction was prayed, restraining defendants from removing or attempting to remove plaintiff from actual possession of his office as a member of the board of health of the city and county of San Francisco.

To this complaint defendants demurred, and thereafter the matter was heard on an order to show cause. At the hearing the following facts appeared by affidavit: On January 28, 1910, Mayor P. H. McCarthy, of the city and county of San Francisco, made an order removing Arthur H. Barendt, George B. Somers, William F. Wilson, Thomas W. Huntington, and Joseph E. Cutten, as members of the board of health, immediately notified the board of supervisors of such removal, and furnished said supervisors with a statement of the cause for his action. This statement was entered of record in the proceedings of the said board of supervisors. Among the causes for the removal specified in the statement were acts of plaintiff and his associates in "willfully and knowingly appointing to positions in the health department of the said city and county persons not qualified for and not eligible to such positions and willfully and knowingly approving and auditing the salary demands of the said persons." The mayor then made an order appointing Arthur M. Sharp, Germain Pouchan, Frank J. Klimm, Thomas B. Roche, and Dennis J. Murray, members of the board of health, and certificates of appointment were delivered to said appointees. On January 31, 1910, the holders of the certificates from the mayor went to the office of the board of health, presented their credentials to the chief clerk, and demanded entry into the meeting room of the board. Finding the door locked, and being informed that the health officer alone had a key, they secured the services of a locksmith, who opened the door for them. No member of the board of health as it was constituted prior to January 31, 1910, was present while the members of the new board were gaining entrance to the meeting room. Four days later the complaint herein was filed.

[1] It is thoroughly settled that title to public office may not be tried in a suit for an injunction. Mr. High, in his work on Injunctions, says (4th Ed. § 1312): "No principle of the law of injunctions and perhaps no doctrine of equity jurisprudence, is more definitely fixed or more clearly established than that courts of equity will not interfere by injunction to determine questions concerning the appointment or election of public officers, or their title to office; such questions being of a purely legal nature, and cognizable only by courts of law. A court of equity will not permit itself to be made the forum for determining disputed questions of title to public offices, or for the trial of con-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tested elections, but will in all such cases leave the claimant of the office to pursue the statutory remedy, if there be such, or the common-law remedy by proceedings in the nature of a quo warranto." In White v. Berry, 171 U. S. 377, 18 Sup. Ct. 917, 921 (43 L. Ed. 199), Mr. Justice Harlan, speaking for the Supreme Court of the United States, quoted approvingly from the opinion in Sawyer's Case, 124 U. S. 223, 8 Sup. Ct. 482, 31 L. Ed. 402, as follows: "It is equally well settled that a court of equity has no jurisdiction over the appointment and removal of public officers, whether the power of removal is vested, as well as that of appointment, in executive or administrative boards, or officers, or is intrusted to a judicial tribunal. The jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised either by certiorari, error, or appeal, or by mandamus, prohibition, quo warranto, or information in the nature of a writ of quo warranto, according to the circumstances of the case, and the mode of procedure established by common law or by statute. No English case has been found of a bill for an injunction to restrain the appointment or removal of a municipal officer. But an information in the court of chancery for the regulation of Harrow School within its undoubted jurisdiction over public charities was dismissed, so far as it sought a removal of governors unlawfully elected; Sir William Grant saying: 'This court, I apprehend, has no jurisdiction with regard either to the election, or a motion of corporators of any description.' Attorney General v. Clarendon, 17 Ves. 488, 491. In the courts of the several states, the power of a court of equity to restrain by injunction the removal of a municipal officer has been denied in many well-considered cases; citing Tappen v. Gray, 3 Edw. Ch. [N. Y.] 450, reversed by Chancellor Walworth on appeal, 9 Paige [N. Y.] 507, 509, 512, whose decree was affirmed by the Court of Errors (7 Hill [N. Y.] 259); Hagner v. Heyberger, 7 Watts & S. [Pa.] 104 [42 Am. Dec. 220]; Updegraff v. Crans, 47 Pa. 103; Cochran v. McCleary, 22 Iowa, 75; Delahanty v. Warner, 75 Ill. 185 [20 Am. Rep. 237]; Sheridan v. Colvin, 78 Ill. 237; Beebe v. Robinson, 52 Ala. 66; and Moulton v. Reid, 54 Ala. 320." He also quoted with approval the language of Judge Lurton (who was at that time a circuit judge), in Morgan v. Nunn (C. C.) 84 Fed. 553, to the effect that: "A court of equity will not, by injunction, restrain an executive officer from making a wrongful removal of a subordinate appointee, nor restrain the appointment of another."

[2] But, while equity will not determine title to public office in a case of this kind, appellant invokes the rule that the possession of officers de facto will be protected by injunction pending a litigation in the nature of quo warranto to determine their title. He maintains that, although he and his associates are not in physical possession of the books, papers, and meeting place of the board of health, they are the de facto members of that body, and are entitled to be restored to that possession of which they were deprived by the trickery and intrusion of the men appointed by Mayor McCarthy.

[3] But the mere fact that possession of the place of business and indicia of an office was obtained by entrance in the absence of former holders, or even by force when they were present, does not of necessity entitle those persons thus dispossessed to reinstatement pending the determination of the legal title. Scott v. Sheehan, 145 Cal. 691, 79 Pac. 353; Brower v. Kantner, 190 Pa. 182, 43 Atl. 7. In the present case, the respondent members of the board of health are in possession of the office, exercising the functions thereof, under color of authority. It is immaterial, for the purposes of this discussion, whether or not the mayor may remove a municipal officer without a hearing, and thus create a vacancy. To decide that question would be determining the title to the office. The membership of the board of health of San Francisco is a "municipal affair" (People v. Williamson, 135 Cal. 415, 67 Pac. 504), and therefore, having proceeded under the provisions of the charter of the city and county of San Francisco, the mayor has bestowed upon his appointees a color of title, no matter what might hereafter be determined in a proper action regarding the right of the deposed officers to notice of the charges against them and a hearing thereon. The charter of the city and county of San Francisco vests in the mayor the power to appoint members of the board of health. Article 10, § 1. The members of the board being appointed by him may be removed for cause. Article 16, § 18. And the mayor seems to have followed the provisions of the charter with reference to notifying the board of supervisors of the cause of removal of an officer, and his statement of such cause seems to have been entered of record in the proceedings of the board in accordance with the charter. Article 16, § 20. Certain it is that the appointees must be recognized as persons acting under commissions issued by the proper authority, and as persons conducting the business of the board of health in the usual manner. They have color of authority, possession of the indicia of office, and they are serving the public as the board of health, having so served for several days before the appellant sought the intervention of a court of equity. That they are de facto officers admits of small doubt.

This is not a case where "two contending boards are simultaneously acting." Morton v. Broderick, 118 Cal. 485, 50 Pac. 644. In such a case title to the office de jure draws to it the possession de facto, which, as was said in the case last cited, "is but a concise expression of the rule that in mandamus, where conflicting boards of officers are acting simultaneously, each under a claim of right, since there cannot be two de facto boards or officers, that one alone will be recognized as the de facto board or officer which is acting at the time under the better apparent legal right." But here, as we have seen, the assertion of the appellant that he is a de facto officer is not based upon any claim that he and his associates have performed duties of a board of health since January 31, 1910. The case of Braidy v. Theritt, 17 Kan. 468, has been cited by appellant as supporting his theory. In that case an officer was granted a writ after he had been out of office 13 days. An analysis of that case, however, will show that it is really not opposed to the views here expressed. Theritt had been re-elected councilman, and had received his certificate. Braidy claimed the same office by appointment from the mayor, but held no certificate. When the latter presented himself at the meeting place of the council to claim his office, Theritt caused other councilmen to withdraw with him, intending that there should be no quorum for the transaction of business. The office being legislative, Braidy could perform its functions only by participating in a meeting of the legislative body. The court found that prior to Theritt's withdrawal Braidy had not exercised any of the duties of the office; that Theritt's withdrawal from the meeting was only for the purpose of preventing a quorum from assembling, not being in any sense an abandonment of his claim to the office; and that Theritt having the certificate of election was entitled to be considered still in possession of the office. Braidy, not having performed any of the functions of the office before Theritt's temporary absence, and having no color of title, was properly held to be neither an officer de facto nor de jure. In this case, however, the members last appointed to the board of health had been commissioned, had entered upon the duties of the office, and were holding its indicia, and were actually serving the public as members of the board of health when plaintiff first sought relief by injunction. They had actually taken part in the business of the board. We cannot escape the conclusion that even if they obtained their advantage by trickery, as appellant asserts, they were the de facto officers at the time relief by injunction against them was sought, and that therefore the writ prayed for was properly refused. Plaintiff had a plain, speedy, and adequate remedy in the statutory equivalent for proceedings in the nature of quo warranto. It follows that the conclusions reached by the learned chancellor who presided at the hearing in the superior court were correct, and the judgment is therefore affirmed.

We concur: SHAW, J.; HENSHAW, J.; LORIGAN, J.

SLOSS, J. I dissent. At a time when the plaintiff and his associates were lawfully occupying positions as members of the board of health, the mayor undertook to remove them and to appoint other persons in their places. While the fact is not stated in so many words, it appears clearly enough from the averments of the complaint that the mayor took this action without any notice to the incumbents, and without affording them any opportunity to be heard in their defense. On January 31, 1910, the persons appointed as successors went to the rooms occupied as the offices of the board of health. The plaintiff and his associates were not present, but demand was made of an inspector that such new appointees be admitted to the rooms of the board. It was found that the rooms were locked, whereupon, after unsuccessful efforts to gain entry through the window and by means of a fire escape, recourse was had to the services of a locksmith, who opened the door. The new appointees then took possession of the rooms and of all the official records and papers of said board. Two days thereafter, on February 2, 1910, the plaintiff verified the complaint herein, and the action was commenced on the 4th of February. The plaintiff and his associates never acquiesced in the attempt to remove them from office, and never abandoned their offices. On the contrary, they proceeded with all reasonable diligence to assert their rights to possession, and their intention to contest the legality of the mayor's action.

On these facts it seems clear to me that the plaintiff was entitled to the injunction which he sought. It is, of course, the established rule that a court of equity will not take jurisdiction of an action for the purpose of trying the title to public office. But it is also well settled that, where there is a bona fide contest between two persons, both claiming to be entitled to the same office, a court of equity will issue its injunction to protect the officer in possession against the interference of an adverse claimant, until the latter has established his title by appropriate proceedings at law. High on Injunctions (3d Ed.) § 1315; Brady v. Sweetland, 13 Kan. 41; Braidy v. Theritt, 17 Kan. 468; Guillotte v. Poincy, 41 La. Ann. 333, 6 South. 507, 5 L. R. A. 403; Goldman v. Gillespie, 43 La. Ann. 83, 8 South. 880; State v. Superior Court, 17 Wash. 12, 48 Pac. 741, 61 Am. St. Rep. 893; Reemelin v. Mosby, 47 Ohio St. 570, 26 N. E. 717; City of Huntington v. Cast, 149 Ind. 255, 48 N. E. 1025; Sullivan v. Haacke, 5 Ohio N. P. 26. The soundness of this proposition is not questioned in the main opinion. It is, however, stated that on the facts here shown the new appointees, rather than the plaintiff and his associates, were in possession of the office. I think this conclusion rests upon a mistaken view as to what constitutes possession of an office. An office is a franchise; it consists of the exercise of intangible rights and duties pertaining to its occupant; and possession of the office does not depend on the mere physical holding of the rooms and furniture ordinarily used in the performance of the functions of the office. Mead v. Treasurer, 36 Mich. 416; Lawrence v. Hanley, 84 Mich. 399, 47 N. W. 753; Brady v. Sweetland, supra; Braidy v. Theritt, supra; Sullivan v. Haacke, supra. Actual possession can be obtained from the occupant of an office by his surrender or abandonment of the office, or by his ouster in the course of legal proceedings, and in no other way. Oliver v. Jersey City, 63 N. J. Law, 653, 44 Atl. 709, 48 L. R. A. 412, 76 Am. St. Rep. 228; Mead v. Treasurer, supra; State v. Draper, 48 Mo. 213; Hallgren v. Campbell, 82 Mich. 255, 46 N. W. 381, 9 L. R. A. 408, 21 Am. St. Rep. 557; Braidy v. Theritt, supra; In re Cleveland, 51 N. J. Law, 311, 17 Atl. 772.

If the plaintiff and his associates had been in session as a board of health at the time of the entry of the persons assuming to act as their successors, and the latter had forcibly thrown them out of the rooms and installed themselves therein, it would hardly, I think, be claimed that possession of the office had at once passed from the old board to the new. I do not think the case is any different where, in the absence of the occupant, access to the rooms is obtained surreptitiously or, as in this case, by the use of such force as is involved in picking the lock of the door. "It would be a strange doctrine to announce," says the court in Braidy v. Theritt, supra, "that whenever an officer steps out of the place where he usually does business that any person who may choose to claim the office may at once step in, and become immediately an officer de facto. Such a short road to obtain a contested office has never yet been opened." A person asserting title to an office which he finds to be occupied and claimed by another should not be permitted to establish his disputed right by resort to the kind of means here employed. Nothing can be more unseemly or detrimental to the public interest than a struggle between contending claimants for the physical possession of rooms, documents, and records employed in the performance of the functions of a public office. Proceedings in the nature of quo warranto (Code Civ. Proc. §§ 803-810) furnish an adequate and the appropriate remedy for usurpation of office. This is, indeed, recognized by the majority opinion, but I think the court misapplies the doctrine in saying that this remedy was open to the *plaintiff*. In my view the plaintiff, being first in possession, and not having surrendered or abandoned his right, was entitled to the protection of the writ of injunction. The *defendants*, who were seeking to oust him, were the ones who should have been compelled to resort to proceedings in a court of law to establish their right. Scott v. Sheehan, 145 Cal. 661, 79 Pac. 353, should not be regarded as an authority supporting the position of the respondents here. The decision in that case was made immediately after the disputed question of title to the office had been finally adjudicated (Sheehan v. Scott, 145 Cal. 684, 79 Pac. 350), and the appeal from the order of injunction presented a moot question, or, as the court puts it, one "purely of academic interest." Under these circumstances, the finding of the trial court was sustained without a careful examination of the evidence.

I think the judgment should be reversed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.

On Petition for Rehearing.

SHAW, J. The appellant asks a rehearing of this case upon the ground that the decision and some remarks in the opinion conflict with the decision and opinion in Bannerman v. Boyle, 116 Pac. 732, decided June 8, 1911.

There is nothing inconsistent in the two decisions. They determine different questions upon different facts. In this case the title to the office is not, and could not be, in issue. The decision, in brief, is that if one is a de facto officer (that is, in actual peaceable possession of the office, claiming the right to hold it and regularly performing its duties), his title cannot be assailed by a suit in equity to enjoin him from doing so; nor will an injunction issue upon a suit by the true holder of the title to an office to restrain the usurper and others from removing the true holder, where it appears that the true holder was ousted, and the usurper was in peaceable and undisturbed possession at the time suit is begun, and for the four days next preceding. The decision in the Bannerman Case, upon the question on which it is supposed to conflict, was that, under the conditions there existing, a de jure officer who has been unlawfully ousted may compel payment of his salary by a suit in mandamus against the auditor, that in such mandamus suit the title of the plaintiff to the office may be put in issue and tried, and that, under the San Francisco charter, a member of the board of education cannot be removed by the mayor, except for good cause, and after he has been given a hearing as to the cause, or an opportunity to be heard thereon. The usurper was not a party in the Bannerman Case. Neither the auditor nor any authorized representative of the city or state is a party to the Barendt suit. The respective points decided in the two cases have no bearing on each other.

At the time these things took place, a removal without hearing of a San Francisco officer was generally believed to be lawful, under the supposed application of the decision of In re Carter, 141 Cal. 316, 74 Pac.

997, a case under the San Diego charter, to the provisions of the San Francisco charter. This indicates that Barendt's removal was not made in bad faith by the mayor, and that the persons appointed by him to fill the supposed vacancies believed they had the right of possession. The opposite inference would be drawn since the decision in the Bannerman Case that such removal cannot be made without a previous hearing. In view of the provisions of sections 75 and 76 of the Penal Code, making it a misdemeanor to willfully and knowingly intrude into an office to which the intruder has not been elected or lawfully appointed, and a felony for one to withhold from his successor an office after his term has expired, or to willfully and unlawfully withhold from any person entitled thereto any property, records, or papers belonging to the office, it is not likely that other attempts of this kind will occur in the future.

In explanation of the language of the opinion in this case, it is to be remarked that this case was first submitted and the opinion herein was written before the Bannerman Case was decided; otherwise some of the statements in the opinion might perhaps have been omitted as unnecessary to the discussion. Counsel misunderstand the effect of the remark in the opinion that "the mayor seems to have followed the provisions of the charter with respect to notifying the board of supervisors of the cause of removal of an officer, and his statement of such cause seems to have been entered of record in the proceedings of the board in accordance with the charter." These things were done regularly as the charter prescribes, but in the connection in which this passage occurs it does not mean that the removal was for that reason valid, without any previous hearing as to the cause. These facts were stated solely as foundation for the argument that these records, coupled with a certificate of appointment by the mayor, regular on its face, gave defendant, Sharp, color of title to the office.

[4-6] The decision does not leave the people or the ousted officer without civil remedies. Such officer may obtain his salary, as stated, or he may apply for leave to sue in quo warranto, which we must assume would be granted in all proper cases, thus giving a remedy for both the officer and the people. The people would also be entitled to protection by the auditor or treasurer withholding the salary of the office from the usurper, in which event the usurpation, if it should occur, would probably soon come to an end.

The petition for rehearing is denied.

We concur: LORIGAN, J.; MELVIN, J.; HENSHAW, J.

(160 Cal. 809)

CUTTEN v. McCARTHY, Mayor, et al. SOMERS v. SAME. HUNTINGTON v. SAME. (S. F. 5,511, 5,512, 5,513.)

(Supreme Court of California. Sept. 8, 1911. Rehearing Denied Oct. 7, 1911.)

In Bank. Appeal from Superior Court, City and County of San Francisco; George Sturtevant, Judge.

Suits by Joseph E. Cutten, by George B. Somers, and by Thomas W. Huntington against P. H. McCarthy, Mayor, and others. From decrees for defendants in each case, plaintiffs appeal. Affirmed.

Barclay Henley and Arthur H. Barendt, for appellants. Cleveland L. Dam, George Appell, and A. L. O'Grady, for respondents McCarthy and Sharp. Frank J. Murphy, for respondent Martin.

PER CURIAM. These cases being exactly similar in all particulars to Barendt v. McCarthy (S. F. No. 5,507) 118 Pac. 228, in which the opinion was filed this day, the judgment of the lower court in each of them is, upon authority of that case, affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.

SLOSS, J. I dissent, for the reasons stated in my dissenting opinion in Barendt v. McCarthy, this day filed.

(160 Cal. 792)

BOUCHARD v. ABRAHAMSEN et al. (S. F. 5,248.)

(Supreme Court of California. Sept. 25, 1911. Rehearing Denied Oct. 25, 1911.)

1. NAVIGABLE WATERS (§ 42*)—ISLANDS—RIGHTS OF RIPARIAN OWNERS.

Where defendant's patent granted under a survey bounded his land by the meander line of a navigable river, defendant's land extended only to the high-water mark, and an island or accumulation formed in the channel of the river did not belong to defendant, but was subject to Civ. Code, § 1016, providing that islands and accumulations formed in the bed of navigable streams belong to the state if there is no title or prescription to the contrary, and, even though it subsequently became attached to defendant's land, he could only claim to the point of the last channel between the island and his land.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 253-255; Dec. Dig. § 42.*]

2. NAVIGABLE WATERS (§ 42*)—NATURAL WATER COURSES—RIGHTS OF RIPARIAN OWNERS.

In an action involving title to land forming in a navigable river which defendant claimed was included in his patent to the mainland, and which plaintiff claimed was subject to Civ. Code, § 1016, declaring that all islands or accumulations of land formed in the beds of navigable streams belong to the state, an instruction charging the jury to find for defendant unless the land was an island was erroneous in failing to take account of the accumulations mentioned in the statute.

[Ed. Note.—For other cases, see Navigable Waters, Dec. Dig. § 42.*]

3. NAVIGABLE WATERS (§ 42*)—RIGHTS OF RIPARIAN OWNERS—INSTRUCTIONS.

In an action involving title to land formed in a navigable river which defendant claimed was included in his patent to the mainland,

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and which plaintiff claimed was subject to Civ. Code, § 1016, declaring that islands or accumulations of land formed in the beds of navigable streams belong to the state, an instruction charging the jury that if they found that this land was not an island, and was included within the meander line of defendant's property, their verdict should be for defendant, in connection with an instruction charging that to constitute an island in a river the same must be of permanent character, and not surrounded by water when the river was high, was erroneous, not only in directing the jury to consider the present condition of the island, when the controlling consideration was what was its nature at the time defendant acquired the mainland, but in incorrectly interpreting the statute.

[Ed. Note.—For other cases, see Navigable Waters, Dec. Dig. § 42.*]

4. NAVIGABLE WATERS (§ 37*)—LANDS UNDER WATER—PATENTS—CONSTRUCTION.

Where a patent to public land called for the meander line of a river as located in a survey made some years earlier, the patentee took only to the high-water mark described in the survey with such accretions as might have been added since.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201–227; Dec. Dig. § 37.*]

In Bank. Appeal from Superior Court, Humboldt County; Clifton H. Connick, Judge.

Action by Henry Bouchard against Jesse Abrahamsen and another. From a judgment for defendants, and an order denying his motion for new trial, plaintiff appeals. Reversed and remanded.

J. F. Quinn and L. F. Puter, for appellant. F. A. Cutler and Frank R. Sweasey, for respondents.

HENSHAW, J. Plaintiff brought this action in ejectment to recover from the defendants the possession of the western portion of what is known as Coonskin Island, situated on Lower Eel river, in the county of Humboldt. The complaint charged in two counts. The first alleged ownership, possession, right of possession, and ouster by defendants. The second rested upon possession and right of possession only, with ouster by defendants. The answer was by denial. The cause was tried before a jury, which rendered a general verdict in favor of the defendants. Plaintiff appeals from the judgment and from the order denying his motion for a new trial.

To the understanding of the legal contentions, it is proper to say that the evidence establishes without conflict that the land in controversy was originally formed in the navigable waters of Eel river about a mile and a half above its mouth by a drift or snag in the river channel. This drift, originally of small dimensions, checked the current and caused the deposit of detritus, thus gradually forming an island. As is usual in such cases, the accretions were for the most part added to the lower end, so that the river here running westerly the westerly end of this island gathered accretions and continued to grow. The island had its beginning in 1866. Eel river about this island is admittedly a navigable stream. The island was for years separated from the mainland by two channels. That to the south, though the narrower and shallower, was often used by sailing vessels in their river commerce. The river here is affected by the ocean tides, and at the time of the trial of this action, while there was a dispute in the testimony as to whether the channel between the south bank and the island was absolutely dry at low tide, it was undisputed that at other stages of the tide there was water in the channel from 100 feet to 150 yards in width. The island thus continued to grow until at the time of the trial it contained more than 21 acres of land. Plaintiff and defendant Andreason owned land upon the mainland south of the river; the bank of the river at high tide being the limit of their northerly boundaries. Their lands are contiguous, and the dividing line projected into the river and across the island would divide the latter into two unequal portions; the western portion being formed by the latest accretions. This is gravelly and unfit for cultivation, but possesses a value for fishing purposes. In 1903 defendant Andreason built a dividing fence across the island and took and continued to hold possession of this western part, asserting that it belonged to him by virtue of his patent to the shorelands from the state.

So far the evidence is without conflict, and, indeed, there is very little conflict between any parts of the evidence. Thus, it is shown by plaintiff without substantial conflict that in 1886 he purchased from the state the mainland opposite the eastern portion of the island, that he found the whole island unoccupied, that he took possession of the whole of it and proceeded to exercise and continued to exercise full dominion and control over all of it. He cleared it of brush and raised crops upon such part of it as was suitable for cultivation, and he built a fence running north and south through the island, which fence was constructed along the line of high tide and inclosed and protected the cultivable land from wandering cattle. The land outside of the fence was sandy and gravelly and not suitable for cultivation, and, moreover, it was impracticable to maintain a fence further westward than the line where he constructed his fence because it would be washed away by high water and the tides. He did, however, use the western portion in all suitable ways. There was a cabin upon it, and for years he rented the cabin with fishing privileges. He gathered the driftwood which settled upon the lower end, and prohibited others from taking the driftwood.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

When the cattle of defendant Abrahamsen (the tenant of defendant Andreason) wandered out to the island, as they occasionally did, he always caused them to be driven off. No one else ever exercised any acts of dominion or control over the island during these many years, though Abrahamsen and Andreason were both well aware of his possession and claim of right of possession, and, finally, plaintiff had the land surveyed, and from and including the years 1898 and 1899 and continuously thereafter it had been assessed to him and he had paid all taxes. The description and assessment covered the western portion of the island, the portion here in controversy.

The defendant Andreason testified that he had been in possession of the island since 1884, but from his subsequent evidence it is quite plain that this use of the word "possession" is his own conclusion, for that testimony is to the following effect: Witness had known the island since 1884 when he purchased the mainland from the state. He lived upon his land for about two years, when he leased it. During the time he was there, he never drove his cattle to the island, and, when they wandered over, he would bring them back. He did not take any interest in the island after he rented his place in 1886. He never cut a stick of wood on the island or sunk a hole in the ground prior to the time when he put up his fence in February, 1903. He never put any mark to show any dividing line between his land and Bouchard's and never had the island surveyed. Unless his patent to the mainland carried with it the western portion of the island, he had never paid any taxes upon the island. The evidence of Abrahamsen, Andreason's tenant, was to the effect that he had been a tenant and had had possession of Andreason's land for about 15 years. His cows went over onto the island whenever they were down by the river. He had no notice from Mr. Bouchard that the latter claimed the western end of the island. He knew of the cabin there, and he knew that it was occupied. Mr. Bouchard told him that he could not let any fishermen in the cabin, and he replied that he did not care. He knew that Bouchard had built the fence. Mr. Bouchard and the members of his family always drove off his cattle when they went onto the west end of the island. He never told them that he had the island under lease and had a right to have his cattle there. All that he told them was that when they drove his cattle off he did not want them "dogged"; that is, he did not want them forced to run. He never made a complaint about driving his cattle off other than to tell the boy he did not want his cows "dogged." He never drove any of his cattle over to the island. He did not look after the island and did not do any act upon the island. His landlord, Mr. Andreason, never took him over and put him in possession of the island. Whenever he saw his cattle upon the island he himself always drove them home.

[1] Defendant's additional evidence touching title is that he is the owner of the mainland embraced in swamp land survey 41, the northern boundary of which lands follow the meanderings of the south bank of the Eel river. Defendant's land by this survey and patent, of course, extends no further than high-water mark on the river. Heckman v. Swett, 99 Cal. 303, 33 Pac. 1099. Section 1016 of the Civil Code declares that "islands and accumulations of land formed in the beds of streams which are navigable belong to the state if there is no title or prescription to the contrary." Defendant's contention is that Coonskin Island is not an island belonging to the state within the meaning of this language, but (quoting from their brief) "that the waters of Eel river suddenly changed its channel and that this (Coonskin Island) was at best a sand bar extending from defendant Andreason's land, defendant's northern boundary forming the south bank of Eel river; that, as the meander line established by swamp and overflow survey 41 was coincident with the south bank of Eel river, the land in controversy was within this meander line, and, consequently, was a part of the lands patented; that Eel river always flowed north of Coonskin Island, and at no time did any portion of it flow in its natural course between said land and the upland of defendant; that there was a depression on the south side through which water ran only during an extreme high tide."

We have thus been at pains to set forth the evidence, not in consideration of the proposition that it is insufficient to justify the verdict of the jury since that question in the condition of the record is not before us, but because it is necessary that the evidence and varying contentions of counsel should be clearly understood when we come to review the instructions of the court which are complained of by appellant. Whatever may have been the condition of Coonskin Island at the time of the trial, no doubt can be entertained from the evidence that it was originally a true island formed in the channel of a navigable stream. There is no word of evidence "that the waters of Eel river suddenly changed its channel and thus made a sand bar." The testimony is overwhelming and is undisputed that it was formed as above described, and that it was an island at the time plaintiff acquired the mainland south of it. But, if by any conceivable interpretation of the evidence it could be said that it was not originally an island, still it was not a sand bar formed by a sudden change of channel "and extending out from defendant Andreason's land." If it was not a true island, the utmost that can be said is that it was an accumulation of land contemplated by section 1016 of the Civil Code original title to which belonged in the state. And, finally, it should be added that, if in the course of time and by the process of shoaling such island or accumulation did become attached to the mainland defendant's patent, calling for the meander line of the south bank of Eel river at high water would not and could not be stretched so as to include this land. Such meander lines upon the banks of streams subject their owners to loss by erosion and a corresponding gain by slow accretion. The utmost that defendant could claim in such a case would be an extension of his line to the point of the last vestage of the channel between the island and his land, the accretions of the island belonging to the island and the accretions upon the south bank belonging to the mainland. This, however, is a very different thing from claiming title to an island or to an accumulation because subsequent changes connect it with the mainland, and in this case, as we have said, even the connection with the mainland is in sharp dispute, the evidence of the defense at the utmost being to the proposition that at low tide there is such connection. Fillmore v. Jennings, 78 Cal. 635, 21 Pac. 536; Glassell v. Hansen, 135 Cal. 547, 67 Pac. 964; Buse v. Russell, 86 Mo. 209; Salem Imp. Co. v. McCourt, 26 Or. 93, 41 Pac. 1105; Hahn v. Dawson, 134 Mo. 581, 36 S. W. 233; Benne v. Miller, 149 Mo. 228, 50 S. W. 824; Bellefontaine Imp. Co. v. Niedringhaus, 181 Ill. 426, 55 N. E. 184, 72 Am. St. Rep. 269; Moore v. Farmer, 156 Mo. 33, 56 S. W. 493, 79 Am. St. Rep. 504; Holman v. Hodges, 112 Iowa, 714, 84 N. W. 950, 58 L. R. A. 673, 84 Am. St. Rep. 367.

The test of the true character of Coonskin Island is not what court or jury may find to be its present condition, but what was its form at the time the state parted with its title to the mainland? If at that time it was an island or an accumulation in waters admittedly navigable, then it belonged to the state and subsequent shoaling of the waters whereby a connection was made with the mainland would not operate to change or divest the original title. Again, it is equally well settled that the accretions to such an island or accumulation become part of the island or accumulation itself, and the possession of the island or the accumulation is a possession of such accretions. Bellefontaine Imp. Co. v. Niedringhaus, 181 Ill. 426, 55 N. E. 184, 72 Am. St. Rep. 269.

[2, 3] A just complaint made against the instructions given in this case is that the court refused to charge in the precise language of section 1016 of the Civil Code, and likewise failed to enlighten the jury upon the principle of law above adverted to, namely, that it was the condition of the land at the time the state parted with its title to the adjacent mainland and not at the time of the trial which determined its character. Thus instruction 20 is as follows: "If you find from the evidence that Eel river is a navigable stream and in which at the point where the land in dispute lies the tide ebbs and flows, and that said Eel river is the northern boundary line of defendant's land, then I charge you that, although said boundary line is one which may gradually and imperceptibly change, yet it became and is a certain and fixed boundary of defendant's land and up to which his legal title extends; and, if you find from the evidence that the land in controversy not being an island lies between the said meander line as established by that state survey and the southern bank or water line of Eel river, then I charge you that the defendant Andreason was the owner of said land and entitled to the possession of the same on the 15th day of February, 1903, unless you find from the evidence that he had in some manner become divested of the same." This instruction takes no account of the fact that the land, even if it were not an island, still if it were an accumulation would belong to the state, and would not be included in defendant's patent. But even more serious than this is the declaration that "if you find from the evidence that the land in controversy not being an island lies between the said meander line," etc. Here the jury was instructed that the character of the land at the time the state parted with its title to the mainland was not only not controlling, but was not to be considered, and that the present condition alone was to be regarded by them, and so if they found that it is not an island, and is included within the meander line, it belonged to defendant. The misleading character of this instruction is emphasized by the one next given, where the court charged that "to constitute an island in a river the same must be of a permanent character, not merely surrounded by water, when the river is high, but permanently surrounded by a channel of the river and not a sand bar subject to overflow by a rise in the river and connected with the land when the water is low." This instruction again directs the attention of the jury to the present condition of Coonskin Island when the controlling consideration is what was its nature at the time defendant acquired the riparian mainland. Land originally an island and formed in the bed of a navigable stream belongs to the state, but even if not originally an island, or if after originating as an island it ceases to be an island and becomes an accumulation, such land also belongs to the state, and an instruction to the effect that land not an island formed in the bed of a navigable stream does not belong to the state excludes such accumulation, and is therefore erroneous. Instructions touching accumulations were proffered by plaintiff, but, as has been said, were refused by the court.

[4] It was also error for the court to instruct that defendant would take by his patent to high-water mark as it existed at the date of the patent. He would take to the high-

water mark described in survey 41 made 10 years before his patent with such accretions as might have been added since. Glassell v. Hansen, supra; Buse v. Russell, supra; Salem Imp. Co. v. McCourt, 26 Or. 93, 41 Pac. 1105; Hahn v. Dawson, 134 Mo. 581, 36 S. W. 233.

For these reasons, the judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: MELVIN, J.; SHAW, J; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.

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161 Cal. 53

LAWYER v. LOS ANGELES PAC. CO.

(L. A. 2,622.)

(Supreme Court of California. Sept. 30, 1911.)

1. STREET RAILROADS (§ 117*)—OPERATION—CONTRIBUTORY NEGLIGENCE OF PERSON INJURED—PERSONS WALKING ON TRACKS.

On alighting from a street car, plaintiff started to walk down the track, there being no sidewalks, and heard a car following him, and saw the headlight. Being near the left track and out of danger from the right, he proceeded, and was struck by the car which, contrary to usual custom, was upon the left track. *Held* that, as it is not negligence per se to walk between the tracks of a street railway, and as plaintiff had a right to believe the cars would be operated in their usual way, he was not guilty of negligence as a matter of law.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239–257; Dec. Dig. § 117.*]

2. TRIAL (§ 165*) — NONSUIT — INFERENCES FROM EVIDENCE.

In determining the propriety of nonsuit at the close of plaintiff's case, the evidence most favorable to plaintiff must be accepted as true.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 374; Dec. Dig. § 165.*]

3. NEGLIGENCE (§ 5*)—ACTS CONSTITUTING NEGLIGENCE PER SE.

No act which the majority of men would do under similar circumstances, and which is usually done with safety, is negligence per se.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 7; Dec. Dig. § 5.*]

4. NEGLIGENCE (§ 136*)—TAKING CASE FROM JURY.

Where reasonable minds might draw different conclusions as to the question of negligence, it is one for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277–353; Dec. Dig. § 136.*]

5. EVIDENCE (§ 471*)—OPINION EVIDENCE—CONCLUSIONS.

In an action by a pedestrian run down by a street car, where he alleged that no bell or whistle was sounded, and the defendant denied that allegation, an objection was properly sustained to a question asking him if he would have heard any whistle or bell sounded within two blocks of where he was struck, as calling for the conclusion of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2159; Dec. Dig. § 471.*]

6. EVIDENCE (§ 471*)—OPINION EVIDENCE—CONCLUSIONS.

In an action by plaintiff, who was run down by a street car, a question as to whether, when the witness first saw plaintiff, he was in a position where the car would strike him was improper in calling for a conclusion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149–2185; Dec. Dig. § 471.*]

7. STREET RAILROADS (§ 113*)—OPERATION—INJURIES—ACTIONS—EVIDENCE.

In an action by plaintiff, who was run down while walking upon the tracks of a street railroad, testimony as to when the brakes were applied after striking plaintiff was immaterial, bearing neither upon the issue of the speed of the car, nor showing care not to injure plaintiff.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 229–238; Dec. Dig. § 113.*]

Department 2. Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by Thomas Lawyer against the Los Angeles Pacific Company. From a judgment for defendant and an order denying his motion for new trial, plaintiff appeals. Reversed.

Gray, Barker & Bowen and Allen, Van Dyke & Jutten, for appellant. Gurney E. Newlin, for respondent.

MELVIN, J. Plaintiff appeals from the judgment and from an order denying his motion for a new trial in his action for damages for personal injuries. Defendant's motion for nonsuit was granted, and we are called upon to determine whether or not the court erred in its action on said motion. The evidence in plaintiff's behalf showed that at the time of the injury he was walking between the tracks of the defendant corporation on Santa Monica avenue, in the county of Los Angeles. The hour was between 7 and 8 o'clock in the evening. Plaintiff left the car at Vermont avenue, and started westerly along Santa Monica avenue toward his home. After walking about four blocks, he came to a place where there was no sidewalk, and as the street was muddy he took a well-beaten path near defendant's south track, which he followed in its course beside the track for a distance of 150 feet, and then, still using the path, went across the south track to the space between the two tracks, where the beaten footway continued. In his account of the accident, plaintiff testified: "There was a street intersecting Santa Monica avenue from the north, and I had just passed, crossed that street on Santa Monica avenue, about 30 feet, when I saw a light flash on the north track, and I heard the car coming, and then stepped back to the south track, and I expected the car to run on the north track, so I stepped to the south. I stopped and looked around, facing the north, and looked to the east. Just happened to look around, and saw the car within 10 feet of me, and I made a quick dodge, but it came too fast. I could not dodge it. I dodged off towards the north track." The step of the car struck plaintiff, and he sustained very severe injuries. At the time of the accident, the rain was falling, the mud was deep, and the footpath between the tracks was the only convenient place for pedestrians. The space between the inner rails of the two tracks was about 9 feet in width, and in this strip were placed the poles from which the trolley wires were suspended. The car was running very rapidly at the time of the accident, and the bell had not been sounded, nor had the whistle been blown, while the car was traversing more than two blocks to the eastward of the point where plaintiff was struck. Contrary to custom, the car was being operated in a westerly direction on the south or left-hand track. Plaintiff's showing, therefore, is that he was proceeding along a beaten pathway between defendant's tracks; that defendant's car approached him from the rear without any sound of bell or whistle and moving contrary to custom on the left-hand track; that seeing the flash of the headlight on the track upon which the car proceeding in that direction was commonly operated he hastened to a place supposed by him to be a safe one, and which ordinarily would have placed him out of danger; and that he was then struck by the car, which was running very rapidly.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] Respondent concedes that plaintiff introduced at the trial sufficient evidence to make out a prima facie case of negligence on the part of the defendant in the operation of the car, but the granting of the motion for nonsuit is defended upon the ground that the evidence conclusively established such negligence on the part of plaintiff as contributed proximately to cause the accident. Appellant insists that the question whether or not he was guilty of contributory negligence was one of fact for the jury, and that under the evidence his conduct was not such that the court could say, as matter of law, that he was guilty of negligence. Being between the tracks of an electric railroad upon a public street is not negligence per se. The street is for the use of the public, although the car, which can be operated only on the track, has the better right to that part of the thoroughfare, to which pedestrians must yield when necessary. The rights of a company operating street cars are otherwise not superior to those of persons who may be walking on the street. See Shea v. Potrero & Bay View R. R. Co., 44 Cal. 428; Clark v. Bennett, 123 Cal. 279, 55 Pac. 908; Scott v. San Bernardino Valley Traction Co., 152 Cal. 610, 93 Pac. 677. The person walking upon that part of the street near the tracks of an electric railway has a right to believe that those in charge of the street cars will operate them in the usual manner, and will take the customary precautions. The rights and duties of the pedestrian and the motorman in a case like this are reciprocal, and the conduct of either must be considered in the light of all of the circumstances of the particular case in determining whether or not it amounted to negligence. Here the plaintiff had the right to expect that defendant's servant would sound the warning bell as the car approached, particularly because he had just passed a cross street. He naturally and properly expected that any west-bound car would be run according to custom on the north track. It is true that after plaintiff left the sidewalk, he saw a light in the direction of Vermont avenue, but it was more than 1,000 feet distant, and he could not tell whether it was the headlight of a car or a street lamp. Under such circumstances, it was not his duty to postpone his entry upon the path between the tracks until he became certain of the source of this light. His first intimation of the car's approach was the flashing of the headlight on the north track and the rumbling of the car. He was then near enough to the south track to be in danger from a car traveling on it, and out of the way of any car that might be moving on the north track. He walked about 10 feet after he saw the flash of the headlight, turned toward the north and east, and then saw the car almost upon him, approaching on the south track.

[2] There is some contradiction in his testimony regarding the number of feet traversed by him after he saw the gleam of the headlight, but we must take the version most favorable to plaintiff in determining the propriety of a nonsuit.

[3] Can we say that plaintiff's conduct under the circumstances disclosed by the evidence offered in his behalf amounted to negligence per se? No act "which the majority of men would do in the existing circumstances, and which we may presume is usually done in safety, is negligence per se." Scott v. San Bernardino Valley Traction Co., supra. Measured by this standard, we think that the action of the court below in granting the motion for nonsuit was improper.

[4] This, we think, is clearly a case covered by the rule that, "if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury." Johnson v. S. P. R. R. Co., 154 Cal. 295, 97 Pac. 525. Our attention has been called to the case of North Chicago St. R. R. Co. v. Irwin, 202 Ill. 347, 66 N. E. 1077, which is almost on all fours with the one at bar. There the essential facts were as follows: Plaintiff's decedent was riding a bicycle between the tracks of the railroad company, going in the same direction as the car. The hour was near midnight and the car, contrary to the usual custom, was running on the left-hand instead of the right-hand, track. The speed was from 12 to 15 miles an hour. When within 25 or 35 feet of the rider, the motorman sounded his gong, but did not slacken the speed of the car. The man on the bicycle turned to go from the space between the tracks upon the left-hand track, and was struck by the car and killed. In the opinion sustaining the denial of appellant corporation's motion for a peremptory verdict in its favor, this language, peculiarly

applicable to the matter we are here considering, is used: "Whether the motorman was in the exercise of ordinary care for the safety of persons who might be upon the street, or the appellee's testator guilty of contributory negligence, were properly regarded by the trial court as being questions of fact. There was no allegation in the declaration that propelling the car northward upon the westerly or south-bound track was an act of negligence, still the court did not err in permitting the appellee to prove the existence of the custom of running all north-bound cars on the east track and all south-bound cars on the west track. The existence of this custom entered into the consideration of the question whether the motorman was in the exercise of ordinary care in propelling the car northwards on the west track at such a rate of speed as 12 or 15 miles per hour, and also bore upon the question of the carefulness or negligence of the deceased in leaving the space between the tracks and going upon the west track, in order to be out of danger from a car moving northward."

[5] The plaintiff, who was a witness in his own behalf (after he had testified that no bell or whistle was sounded on the approaching car before it struck him), was asked the following question: "If any bell or whistle had been sounded within two blocks from where you were struck that night, could you have heard it?" The court sustained the objection upon the ground that a conclusion of the witness was called for. This ruling was correct. The answer contained a denial of the allegation in the complaint that no bell was sounded and no whistle was blown as the car approached plaintiff. One of the questions which, under the pleadings and proof, the jury would have been called upon to determine was this issue of fact. The question propounded to Mr. Lawyer was not within the rule announced in Raymond v. Glover, 122 Cal. 471, 55 Pac. 398. In that case a witness was permitted to testify that one person was within hearing of a remark made by another, on the ground that "nonprofessional witnesses are allowed to express opinions based on facts within their personal observation, when the facts cannot be so described as to enable another to draw any intelligent conclusion therefrom."

[6] The court properly refused to permit Miss Carrie Byers, a witness, to state whether or not, when she first observed Mr. Lawyer about 200 feet ahead of the car, he was in a position where the car would strike him. Obviously any declaration on that subject would be a conclusion drawn by her from the facts—a deduction which the jury might make, as well as the witness. However, on cross-examination, Miss Byers did testify without objection that plaintiff was "where he would be hit."

[7] The court did not err in sustaining the objection to the question propounded to witness Byers: "How long after Mr. Lawyer was struck was it before the brake was applied?" The speed of the car was a matter in issue, and there was some evidence regarding the distance the car moved after striking plaintiff. It therefore would have been proper to inquire at what *distance* from the point at which Mr. Lawyer was struck the brakes were applied, but we do not see how the length of time elapsing between the impact of the car against the man and the application of the brakes would be material.

No other suggested errors require attention. The judgment and order are reversed.

We concur HENSHAW, J.; LORIGAN, J.

161 Cal. 7

AITCHISON v. CARRUTHERS et al.

(L. A. 2,645.)

(Supreme Court of California. Sept. 26, 1911.)

1. VENDOR AND PURCHASER (§ 86*)—EXECUTORY CONTRACT—ABANDONMENT BY PURCHASER.

Plaintiff bought land for an orchard, paying therefor and taking title in himself, induced by assurances of C., resulting in the making by them of a contract, whereby C. was to pay plaintiff half the purchase price, and share in the profits and losses of the orchard, and the course of cultivation and management indicated by C. should be followed. *Held*, that the consideration being executory, so far as C. was concerned, and he never having paid anything, by way of service or otherwise, but having, on demand for payment, repudiated his agreement, and refused to pay, he by his repudiation lost all rights under the contract, so that, nothing having been done to re-establish them, title to the land was properly quieted in plaintiff.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 144–146; Dec. Dig. § 86.*]

2. EVIDENCE (§ 419*)—PAROL EVIDENCE—CONSIDERATION OF CONTRACT.

Parol evidence of the true consideration of a contract is admissible; it not tending to vary or defeat any of the conditions or covenants expressed in the writing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912–1928; Dec. Dig. § 419.*]

3. QUIETING TITLE (§ 47*)—FINDINGS OF CASH VALUE.

Defendant in an action to quiet title not being equitably entitled to any interest in the property, refusal to find its cash value is not error.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 95–97; Dec. Dig. § 47.*]

Department 2. Appeal from Superior Court, San Bernardino County; Wm. D. Dehy, Judge.

Action by William Aitchison against John H. Carruthers and others. From an adverse judgment and order, defendant Carroll Allen appeals. Affirmed.

W. G. Van Pelt, for appellant. Goodcell & Goodcell, for respondent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

HENSHAW, J. This action was to quiet title. Judgment passed for plaintiff, and from that judgment and from the order denying his motion for a new trial defendant Carroll Allen, trustee in bankruptcy of defendant John H. Carruthers, prosecutes this appeal.

[1] We think a brief narration of the facts leading up to this litigation will prove sufficient of themselves to dispose of appellant's contentions. Plaintiff purchased and paid the sum of $8,000 for a lemon grove, taking title in himself. He was measurably induced so to do by the assurances of defendant John H. Carruthers, which resulted in plaintiff and Carruthers entering into a contract whereby Carruthers was to pay plaintiff $4,000—one-half of the purchase price—and to share in the profits and losses of the orchard. Plaintiff not being a citrus orchardist and defendant Carruthers representing that he was, it was provided that in "general matters of cultivation and management the course mainly to be followed should be indicated by the said John H. Carruthers." This purchase was made on October 24, 1907. In due course plaintiff made demand upon Carruthers to pay the $4,000, manifestly the principal consideration for the agreement, and Carruthers repudiated his agreement and refused to pay. In August 1908, Carruthers was adjudged a bankrupt debtor, and defendant Carroll Allen was elected trustee of his bankrupt estate. Carruthers never paid any part of the purchase price of the land, even after demand, declined and refused to pay, and never paid anything else to the plaintiff by way of service or otherwise. The assignee in insolvency asserting a claim to some interest in the land, this action was brought. Even in his answer there is no offer to pay the $4,000 which his bankrupt had refused to pay, nor in any other way is it sought equitably to re-establish the rights under the contract which the bankrupt had lost by his repudiation of its obligations, but the assignee, who is the only one that answers (Carruthers and his wife suffering default), alleges merely that he "is willing for the benefit of said estate to assume the obligations imposed in said contract on the part of the said John H. Carruthers," and follows this with an averment that the land is worth $12,000, and asks that it be sold, and the surplus over $8,000, which is the full purchase price paid by plaintiff, be divided between plaintiff and the trustee.

We think, as above stated, that this presentation of the facts should relieve from the necessity of any argument upon them or upon the law pertinent to them. There was no partnership. Carruthers' right to participate in the profits of the land rested wholly upon executory considerations moving from him, the principal one of which was the payment of the $4,000. He refused to make this payment and thus repudiated his contract. It may be conceded that the agreement was based upon a sufficient consideration. Indeed, there is no controversy upon this point, but the consideration, as has been said, was executory so far as Carruthers was concerned, and he refused to perform it.

[2] There was no error in admitting the testimony of the plaintiff to show what the true consideration was since the plaintiff's testimony did not in any respect tend to vary or defeat any of the conditions or covenants expressed in the written instrument. Arnold v. Arnold, 137 Cal. 291, 70 Pac. 23.

[3] As defendant was not equitably entitled to any interest in the real property, it was not error for the court to refuse to make a finding fixing the cash value of the property.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

160 Cal. 788

PEOPLE v. AH SUN. (Cr. 1,650.)

(Supreme Court of California. Sept. 25, 1911.)

1. Homicide (§ 254*)—Trial—Evidence—Sufficiency.

In a prosecution for homicide, *held* that the evidence supported a conviction of murder in the second degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 533–538; Dec. Dig. § 254.*]

2. Criminal Law (§ 562*)—Evidence—Sufficiency—Degree of Proof.

To support a conviction, the evidence need not exclude every speculative doubt as to guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1263; Dec. Dig. § 562.*]

3. Names (§ 19*)—Jury Question.

Where an information charging murder called the deceased "Chin Hong," and witnesses spoke of him as "Chin Yong," the question of variance, if any, was one for the jury; the two names being so similar in sound.

[Ed. Note.—For other cases, see Names, Cent. Dig. § 15; Dec. Dig. § 19.*]

In Bank. Appeal from Superior Court, Santa Clara County; John E. Richards, Judge.

Ah Sun, charged herein as Ah Fook, was convicted of murder in the second degree, and he appeals. Affirmed.

John P. Fitzgerald, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

HENSHAW, J. The defendant was charged with the crime of murder. Upon trial he was convicted of murder in the second degree. He moved for a new trial. His motion was denied, and he was sentenced to imprisonment for the term of 15 years. From the order denying his motion for a new trial and from the judgment he appeals.

[1] The most serious question in the case,

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and the one upon which the justices of the Court of Appeals found themselves unable to agree, is whether or not the evidence is sufficient to sustain the verdict. The facts presented to the jury were the following: The deceased and defendant (both Chinamen) were laborers upon the Zuck ranch in the neighborhood of Gilroy. They were employed by Zuck through the medium of a "boss Chinaman" residing in Gilroy. They occupied a cabin upon the ranch and were engaged in hoeing beets. They worked together, apart from the other farm hands. While so living together in this cabin and doing their own cooking, they were not on amicable terms. They did not associate together in friendship. They went to and from their work separately and by different routes. Disagreements and quarrels were frequent, as evidenced by their loud wrangling voices. Their language, however, was Chinese, and was not understood by the white men on the place. But at least one cause of their dissension, as appeared from the testimony of Chinese witnesses, was over the matter of cooking. They had been in Zuck's employ for about three weeks, making occasional visits to the neighboring town of Gilroy, where their Chinese "boss" resided. Their work was not satisfactory, probably owing to the differences between them. On May 10, 1904, at about 8 o'clock in the evening, the defendant came to Zuck, stated that he was suffering from a severe toothache, that he wanted to go to Gilroy to have his tooth treated, and would not work the next day, but would the day following. This was on Monday evening. It was imperative that the beets should be hoed. The work was being neglected, and on Tuesday Zuck went to the town of Gilroy to get a note from the "boss Chinaman" instructing the two men either to work with more fidelity or to leave the place. He returned from Gilroy and went to their cabin about half past 5 or 6 o'clock in the afternoon to deliver to them the message, and found one of them, Chin Hong, dead upon the floor of the cabin, shockingly mutilated from the blows of an axe. The blood-stained axe itself, which had been used by the two Chinamen in cutting wood for their fire, was afterward found concealed near-by. Chin Hong had evidently been dead for some time. The defendant had disappeared, leaving his personal effects, blankets, clothes, etc., in the cabin. So far as known, he did not go to Gilroy, nor have his teeth treated. He was seen by two other Chinamen who had worked with him, who knew him, and who recognized and spoke to him, sitting upon the outside platform of a country store 20 or more miles away from Gilroy and on the main highway to the city of San Jose. He appeared tired, and, in answer to questions of his Chinese acquaintances, replied that he was looking for work. This was about mid-day of Tuesday, the day following the Monday evening upon which the prosecution declares the murder was committed. Upon the discovery of the crime search was made for the defendant, but he had disappeared. He could not be found in his usual haunts. So far as could be learned he did not communicate with his friends, and it was several years afterward that he was discovered and arrested in the city of San Jose. After his arrest he was confronted with certain Chinese witnesses who testified to knowing him and to having seen him in Gilroy. He vehemently denied ever having been in Gilroy.

By the appellant it is contended that all this amounts to mere circumstances of suspicion, that the evidence at most shows only unexplained flight, and that this, while a circumstance pointing to guilt, has never been held to be sufficient to uphold a conviction. But in fairness it must be answered that there is much more than the mere circumstance of unexplained flight. There is the evidence of the quarrels and of the hostility that existed between the two men. There is the abandonment by the defendant of his personal effects. There is the circumstance that the murder was committed with an axe which was in the possession of the Chinamen, and which was hidden by the murderer. There is the false statement to the employer about his desire to go to Gilroy to have a tooth treated. There is the statement that he would return to work, which he never did. There is his absence from his haunts and associates, and his vehement false denial after his arrest that he had ever been in Gilroy. It is, of course, within the bounds of possibility that the crime was committed by some other person, in the absence and without the knowledge of the defendant. But, if so, it leaves all of the statements and the whole course of conduct of the defendant unexplained and unexplainable; for there would then appear no reason why, as an innocent man, he should have lied; why he should not have returned for and taken his effects; why he should not have given notice to his employer and to his Chinese "boss" that he was going elsewhere to work, nor any reason why in seeking work he should have abandoned his personal belongings, so important to the laboring Chinaman; and, finally, there is no reason why he should have absented himself and should have made denial of his presence in Gilroy, which repeated presence was abundantly established by witnesses.

[2] The moral certainty which the law in its humanity exacts before upholding the conviction of a man charged with crime does not exclude every speculative and fanciful possibility, and it is only by the indulgence of such a possibility that it can be said that the evidence did not establish this defendant's guilt.

[3] In the information the name of the deceased is given as Chin Hong. Certain of the witnesses spoke of him, as appears by

the transcript, as "Chin Yong." The contention that this is a substantial variance, and that the two names refer to different human beings, with the resulting doubt as to whether in fact Chin Hong or Chin Yong was the victim of the murder, is not well founded. It is plain that the references were to one and the same person. Even if the doubt can be regarded as a serious one the answer is that it was a question of fact for the jury to answer, and it was resolved against the defendant and appellant's contention by their verdict. People v. Fick, 89 Cal. 149, 26 Pac. 759.

The judgment and order appealed from are therefore affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; MELVIN, J.; LORIGAN, J.; SLOSS, J.

160 Cal. 764

In re MILLER. (Cr. 1,703.)

(Supreme Court of California. Sept. 20, 1911.)

HABEAS CORPUS (§ 30*)—GROUNDS FOR RELIEF—UNLAWFUL IMPRISONMENT.

Where the prisoner was arrested upon a charge of violating one statute, and his conduct as set out in the complaint clearly showed a violation of another statute, the imprisonment was lawful, and he could not secure his liberty by habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. § 30.*]

In Bank. Petition of Miller, in behalf of L. Rogers, for writ of habeas corpus, to be directed against D. A. White, Chief of Police. Writ denied.

Frank J. Murphy and Charles N. Douglas, for petitioner.

PER CURIAM. **The writ was denied at the time the petition was presented, for the following reasons:** The prisoner was arrested upon a charge of violating the provisions of a new section of the Penal Code, numbered 330a, enacted April 21, 1911 (Stats. 1911, p. 951), making it a misdemeanor to keep or maintain any mechanical device, upon the result of the operation of which money or other valuable thing is staked or hazarded. The complaint upon which he was arrested seems to have been very carefully drawn with a view to showing that in this instance the method of operating the particular machine in question involved no possible risk of loss to the outsider, while it compelled the proprietor to part with three cigars for the net value of one. It shows, however, that by putting a price upon the cigars somewhat in excess of their value the operation of the machine would involve some hazard to the customer, and in the long run a probable gain to the proprietor over and above the profits of a legitimate business. The law, therefore, in its general operation may be found promotive of sound public policy, although in particular instances it may not thwart the benevolent intentions of more altruistic dealers. The serious question presented for consideration is the constitutionality of the act, or rather of those portions of section 330a which are alone applicable to the machine here described, and its method of operation; the contention being that they are not embraced in the title of the act, and are consequently invalid.

The material portion of the title reads as follows, "relating to gambling by the use of slot machines or card dice or other dice having more than six faces or bases each," and the complaint upon which the prisoner was arrested shows very clearly that his machine has no slot, and has no connection with card dice or dice of any kind.

Evidently there is here suggested a constitutional question of more or less difficulty; but we have not found it necessary to decide it in disposing of this petition. Conceding for the present the alleged infirmity of the statute of 1911 as applied to other devices than slot machines and dice with more than six faces, there still remain other and older statutes covering the facts alleged in this complaint. The prisoner's machine, operated as it is manifestly designed to operate, is nothing more nor less than a lottery, as defined in section 319 of the Penal Code, and by section 320 every person who contrives, prepares, or sets it up is guilty of a misdemeanor. And, so far as the lawfulness of the imprisonment is concerned, it is of no consequence that a violation of section 330a was charged in the complaint, instead of sections 319, 320, under which the facts bring the offense.

161 Cal. 10

In re MUNROE'S ESTATE. (L. A. 2,874.)

(Supreme Court of California. Sept. 26, 1911.)

1. EXECUTORS AND ADMINISTRATORS (§ 20*)—QUALIFICATION—WANT OF INTEGRITY—EVIDENCE.

Evidence of one's depravity *held* such as to sustain a finding of her want of integrity, disqualifying her as an executrix.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 20.*]

2. EXECUTORS AND ADMINISTRATORS (§ 24*)—ADMINISTRATOR WITH WILL ANNEXED—PUBLIC ADMINISTRATOR.

The executrix being incompetent, the public administrator is entitled to apply for letters of administration with the will annexed, under Code Civ. Proc. § 1350a, providing that, if the executor is incompetent, letters of administration with the will annexed must be issued as provided for in granting of letters in case of intestacy.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 132-140; Dec. Dig. § 24.*]

Department 2. Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

In the matter of the estate of B. L. A. Munroe, deceased. From an order, Ella J. Gates appeals. Affirmed.

Patterson Sprigg, for appellant. W. J. Mossholder and Marks P. Mossholder, for respondent.

MELVIN, J. This is an appeal by Ella J. Gates from an order whereby the superior court refused to appoint her executrix of the last will and testament of B. L. A. Munroe, deceased. Both Gates and the public administrator petitioned for letters and the latter was granted letters of administration.

Munroe died testate, devising a part of his real property and bequeathing all of his personal property to said Ella J. Gates. The will did not in terms mention an executrix, but the last sentence contained the words "Said Ella J. Gates to be without bonds." The will was admitted to probate, and the court ruled that the testator intended to nominate the woman as executrix without bonds. Thereupon the public administrator, P. J. Layne, presented objections and written opposition to the issuance of letters to her on the grounds of her incompetency by reason of her drunkenness and her want of integrity. The court found that she was not incompetent by reason of drunkenness, but that her want of integrity was established, and this latter ruling is the one against which appellant's counsel directs his principal attack.

[1] George Pringle, a police officer, testified that he had known Ella Gates for fifteen years; that during the five or six years preceding the time of his testifying he had frequently seen her in saloons drinking; that she, a negress, had for a time lived in a saloon with a white man in the lower part of the city of San Diego; and that every time she got drunk she would hire a horse and buggy, and would drive furiously through the streets. Another policeman testified that Ella Gates had lived with different negroes, and that at one time she resided with a white man. There was other testimony given by the mother of Ella Gates and by one Wright, who lived on the lower floor of the house in which she occupied a room on the upper floor, tending to show that she was at that time living with a man named Ramsey, who was not her husband. William H. Wetherbee, a police officer, testified that some years before the hearing Ella Gates had been arrested three times for vagrancy. Some of this testimony was contradicted by witnesses called on behalf of appellant, but we must here not weigh conflicting evidence, but determine whether or not that given on behalf of the respondent is sufficient to support the finding of want of integrity in Ella Gates. Undoubtedly mere immorality is not sufficient to justify a court's refusal to appoint as administrator or administratrix one who is duly nominated for such appointment by will. In re Bauquier, 88 Cal. 307, 26 Pac. 178, 532; Estate of Newman, 124 Cal. 693, 57 Pac. 686, 45 L. R. A. 780; Estate of Gordon, 142 Cal. 131, 75 Pac. 672. In the first-mentioned proceeding, it was held that the application of one nominated as an executor cannot be denied for want of integrity merely because petitioner has a claim against the estate. The second was one in which this court upheld the issuance of letters of administration to a widow who had contracted a bigamous marriage, and the opinion in the last-mentioned proceeding merely held that a petitioner for letters need not negative in his petition the existence of the disqualifications mentioned in section 1369 of the Code of Civil Procedure. In the matter before us, the disqualifying facts as presented by the witnesses called on behalf of the public administrator were much stronger than those which were reviewed in the proceedings cited above. Here, according to the testimony, the woman was not only immoral, but promiscuous; prone to disorderly conduct; once the consort of a man, who in spite of difference in race lived with her at a saloon "in the lower part" of the city; had been arrested several times for vagrancy; and was living at the time of the trial in meretricious relations with one Ramsey. Sometimes such a woman may be one of "integrity" in the usual affairs by business, and, if the court had granted her petition, perhaps the finding in her favor would not be disturbed. But when the court had her before it, and the judge, having listened to the testimony and having observed her demeanor, found from the evidence that her depravity as shown amounted to a want of integrity, we cannot say that there was no substantial evidence upon which to base such a finding.

[2] The public administrator was a person entitled to apply for appointment. The will was admitted to probate without objection, but the executrix named was found to be incompetent. This placed the matter in exactly the same position as if it were one of intestacy. Section 1350a, Code Civ. Proc. In such a case the public administrator is entitled to petition for letters of administration with the will annexed. Estate of McDonald, 118 Cal. 278, 50 Pac. 399.

The order from which the appeal is taken is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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160 Cal. 783

EDSON & FOULKE CO. et al. v. WINSELL et al. (Sac. 1,855.)

(Supreme Court of California. Sept. 25, 1911.)

1. Waters and Water Courses (§ 152*)—Irrigation Rights—Priority—Findings—Evidence.

In a suit to settle conflicting irrigation rights to the waters of a creek, evidence *held* to sustain findings that defendants had a prior right to 300 inches of the water of the creek, based on prescription and beneficial use, and that plaintiff's use of the waters of the creek was permissive, and in subordination to defendants' rights.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 152.*]

2. PRINCIPAL AND AGENT (§ 178*)—NOTICE TO AGENT—EVIDENCE.

Where, in an action to determine water rights, plaintiffs' ditch tender testified that he was in charge of the ditch for plaintiffs "as their agent, managing it for them," evidence that witness made requests of defendants for permission to use the water of the creek, and as to his declarations that he would only take the water under their license, was admissible to show notice to plaintiffs that defendants were maintaining adverse possession of the water, and refused to allow witness to take the water which plaintiffs claimed was their own.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 178.*]

3. WATERS AND WATER COURSES (§ 152*)—PRIORITY OF RIGHTS—ADVERSE CLAIM—EVIDENCE.

Where defendants claimed a prior right to the waters of a stream by adverse possession, evidence that on one occasion, when plaintiffs' ditch tender had turned the waters of the creek into plaintiffs' ditch, C., acting for defendants, immediately caused the waters to be turned back, and on meeting the ditch tender threatened him with violence if he ever interfered with the water again, and stated to him that if his employer wanted the water he should come up and arrange for it, to which the ditch tender apologized and promised never to interfere with the water again, was admissible as evidence of defendants' continued assertion of right made to an agent of the adverse claimant.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.*]

Department 2. Appeal from Superior Court, Siskiyou County, John F. Ellison, Judge.

Action by the Edson & Foulke Company and others against Leona J. Winsell and others. Judgment for plaintiffs for less than the relief demanded, and they appeal. Affirmed.

Gillis & Gillis, Taylor & Tebbe, and Jas. R. Tapscott, for appellants. Sweeny & Tillotson, Chas. A. Garter, W. A. Richardson, and Jas. D. Fairchild, for respondents.

HENSHAW, J. This action was brought to settle conflicting claims to the waters of Parks creek, a tributary of Shasta river, plaintiffs alleging their ownership of or their right to water from the Shasta river canal or Big Ditch, a canal originally carrying water for mining purposes, later for agricultural and domestic purposes. This canal took its waters from the Shasta river, carrying them down stream until it crossed Parks creek. The supply from the Shasta river was fed by a ditch which tapped the waters of Parks creek about a quarter of a mile above the point where the canal crossed the creek. This "lead" ditch carried the waters of Parks creek into the main canal, and thence on to the lands which it supplied. The defendants were owners of farming lands on Parks creek, which lands were irrigated by waters from the creek. The water system for supplying defendants' lands comprised one ditch above the lead ditch of plaintiffs and numerous other ditches below this lead ditch. Plaintiffs, in effect, conceded to defendants the right to the first 40 inches of the water in Parks creek, measured under a 4-inch pressure, and claimed for themselves all of the next 1,000 inches. They asserted title by appropriation through themselves and their predecessors, initiated more than 40 years before the commencement of the action. The complaint charged defendants with a disturbance of these rights and sought an injunction. Respondents denied the alleged or any interference with the rights of plaintiffs, joining issue upon all of these matters, and further asserted in themselves the right by prior appropriation to the first 600 inches of water flowing in Parks creek. They pleaded the right to the same amount of water by prescription, denied the use by plaintiffs of any part of this 600 inches excepting under their permission from time to time given. By cross-complaint a prescriptive right and title to the same amount of water was pleaded, which water it was alleged was and had been for many years beneficially employed by them for agricultural and domestic purposes. Under this cross-complaint, they sought affirmative relief. The cause was tried by the court without a jury and resulted in a judgment denying plaintiffs relief, and decreeing to defendants, against the plaintiffs, the right to take and use at all times the first 300 inches of the water of Parks creek. It further decreed to plaintiffs the right to take all in excess of 300 inches up to 1,040 inches, after which the parties were entitled to use any excess over this 1,040 inches in moieties. Following this judgment, plaintiffs moved for a new trial and have appealed from the order denying their motion.

[1] Their principal attack is directed against the findings declaring a prior right in defendants to 300 inches, based upon prescription and beneficial use, with further findings in the same connection, to the effect that the use of the waters of Parks creek by plaintiffs was permissive and in subordination to defendants' rights. But the evidence upon which these findings are based, though in conflict, is amply sufficient to sustain them. It would be unprofitable to review the testimony given witness by witness, and therefore, limiting the exposition to the general and essential features, it appears that defendants and their predecessors in interest had as early as 1856 completed the ditches and used the waters of Parks creek on their lands; that the capacity of these ditches continued to be the same as when first constructed; that the ditch above the intake of plaintiffs' lead ditch had a capacity itself alone of 370 inches, and the capacity of the lower ditches was at least

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

700 inches more; that the defendants always asserted a first right against plaintiffs to the waters of Parks creek, and vigorously resented any invasion of their rights to the water, and promptly restored the water to Parks creek, that it might flow to their ditches whenever interference by plaintiffs was known to them; that in times of high water all parties had an abundance, but, when Parks creek ran low, defendants always insisted upon the first right to all the water which they required; that their use thus certainly amounted to 300 inches; that at times the ditch tender of plaintiffs or their predecessors would ask permission to divert the waters of Parks creek into his ditch, and, if the defendants were not at that time requiring the water or all of it for their own use, they assented to such diversion, but always insisted upon and maintained their first right to that use. In view of the fact that the upper ditch above the intake of plaintiffs' lead ditch itself had a capacity of 370 inches, and that there can be no serious question as to the prior right of defendants to the continued use of the full capacity of that ditch, the award to them of 300 inches in the aggregate from all the ditches certainly comes well within the bounds set by the evidence.

[2] Complaint is made of many of the court's rulings in the reception and rejection of evidence. Some of these may be grouped and considered collectively. The most serious complaint is made over the admission of evidence touching the conduct of Hughlett who, appellants assert, was their ditch tender, and nothing more than a ditch tender. The obnoxious evidence went to requests made by Hughlett of the defendants for permission to use the water of Parks creek, and to his declarations to the effect that he would only take the water under their license. It is urged that this evidence was offered in an attempt to bind the principals by the declarations of an agent manifestly without authority or capacity to bind them, and numerous cases announcing this undisputed principle are cited. But the evidence was admissible without regard to the question whether or not the admissions of Hughlett could or would bind his principals. Indeed, it may freely be conceded that Hughlett's agency was not of such a character as would give his utterances any such force or effect. Hughlett, however, testified that he was in charge of the ditch for the plaintiffs "as their agent, managing it for them." Amongst his duties was that to see that the canal was supplied with the water belonging to it. In the assertion and maintenance of their hostile claim of title, it was not incumbent upon defendants to seek out the plaintiffs personally and challenge their right to the use of the water. They were maintaining open, notorious, hostile, and adverse possession against the plaintiffs when they refused to allow their accredited agent to take the water which they, the plaintiffs, claimed was their own. Certainly notice to this agent that he could not use the water was notice to his principals, since it was the very duty of the agent to see that he did get the water, and, upon failure, his duty to notify his principals of the cause. The mere submission by the agent to the asserted rights of defendants did not bind the plaintiffs in the sense that it amounted to a recognition of those rights by them, but it did bind the plaintiffs to the extent that the defendants were doing all that the law called upon them to do in the open declaration, assertion, and maintenance of their hostile right and title. When Hughlett, as the evidence is, came to the defendants, asking permission of them to use their waters in Parks creek, it was not incumbent upon the defendants to convey any other notice to the plaintiffs of the nature of their asserted claim. It matters not how lowly may be the position of the agent or servant of a company or corporation, if, within the limits of his assigned duty, he has notice, or is charged with notice of a particular matter or thing, appertaining to that duty that notice is notice to his principal. If the ditch which he was charged with tending should have given evidence of breaking away and flooding and devastating another man's land, it could not successfully be contended that the principals did not have this notice, whether actually conveyed to them or not, within a reasonable time after the agent himself had acquired the knowledge. Crowley v. Genesee Mining Co., 55 Cal. 273; Bundy v. Sierra Lumber Co., 149 Cal. 773, 87 Pac. 622; State ex rel. Cass County v. Missouri Pacific Ry. Co., 149 Mo. 104, 50 S. W. 279; Evansville, etc, R. R. Co. v. McKee, 99 Ind. 519, 50 Am. Rep. 102. For these reasons, and not because the request of Hughlett to be allowed to use the water of Parks creek in any other way bound the plaintiffs, the evidence touching the acts and conduct of Hughlett was admissible.

[3] Evidence was admitted of a conversation between A. J. Caldwell and Hughlett, and it is said that this evidence was improperly admitted as being self-serving declarations of a party in interest, upon the authority of Code Civ. Proc. § 1870, subd. 2, and such cases as Poorman v. Miller, 44 Cal. 270, Fischer v. Bergson, 49 Cal. 294, Hausman v. Hausling, 78 Cal. 283, 20 Pac. 570, and Bollinger v. Wright, 143 Cal. 292, 76 Pac. 1108. The evidence was to the effect that upon one occasion when Hughlett had turned the waters of Parks creek into plaintiffs' ditch, Caldwell immediately caused them to be turned back, and, meeting Hughlett, threatened him with violence if he ever interfered with the water again, and added: "If Edson wants that water in that ditch, you send him up there, but don't you or any other hired man go up there and meddle with that water." Hughlett apologized and promised never to interfere with the water again.

But this is not the self-serving declaration, evidence of which the law forbids. This is evidence of the continuous assertion of a right, the assertion being made to the agent of the adverse claimant. It was admissible.

No other of the rulings upon the admissibility of evidence seems to call for specific discussion, and, for the reasons given, the order appealed from is affirmed.

We concur: MELVIN, J.; LORIGAN, J.

160 Cal. 766

PEOPLE v. FLORES. (Cr. 1,646.)

(Supreme Court of California. Sept. 21, 1911.)

ABDUCTION (§ 1*) — OFFENSES — DEFENSES — STATUTE.

Where a girl of less than 18 years of age, who had been committed to an institution for incorrigible girls, escaped, and leaving her home became a streetwalker, remaining upon the streets six or seven weeks without any attempt being made by her parents to find her, accused, who procured her entrance into a bawdyhouse, was not guilty of a violation of Pen. Code, § 267, making it a crime for any person to take away any female under the age of 18 years from her father, mother, or guardian, without their consent, for the purpose of prostitution.

[Ed. Note.—For other cases, see Abduction, Cent. Dig. §§ 1–10; Dec. Dig. § 1.*]

In Bank. Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Tony Flores was convicted of abduction, and appeals. The Justices of the Court of Appeal being unable to agree, the case was transferred to the Supreme Court. Reversed.

James J. Van Hovenberg, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM. This appeal was submitted to the District Court of Appeal for the First appellate district, and the Justices thereof being unable to agree upon a judgment therein, the appeal, accompanied by the respective opinions of the Justices of that court, has been transferred to this court for determination.

The opinion written by Justice Cooper, then Presiding Justice of said District Court of Appeal, and concurred in by his associate Justice Kerrigan, is as follows:

"The defendant was accused by the information of the crime of abduction in having, on the 5th day of January, 1910, willfully and feloniously taken one Ruby Emerson, an unmarried female under the age of 18 years 'from and out of the custody of Rose Emerson, the mother of the said Ruby Emerson, without the consent and against the will of the said Rose Emerson, who then and there had the legal charge of the said Ruby Emerson.' The jury returned a verdict of guilty, and defendant was thereupon sentenced to a term of five years in the state prison, being the maximum punishment prescribed by the statute.

"It appears from the evidence that the girl Ruby Emerson was, at the time of the alleged taking, about 15 years of age. For some two years before, she had been in the habit of frequently running away from home. She had been in charge of the juvenile court, and had afterwards been committed to an institution for the care of incorrigible girls, from which place she had run away. She had not been at the home of her father and mother since the latter part of November, 1909, some six or seven weeks prior to the alleged abduction. It appears from the girl's own testimony that during this time and for several weeks she had been first at one rooming or lodging house in the city and county of San Francisco, and then at another, or, in her own language, she 'roomed every place,' and could not herself remember the names of the various places in which she had roomed. She also went under different names; among them being 'Ruby Walker,' 'Helen Walker,' and 'Helen Johnson.' It does not appear that during this time her father and mother had notified the public authorities, or made any attempt to find her. She had apparently made her escape from the institution to which she had been legally committed, and had abandoned her home, wandering on the streets at night, meeting strange men and taking them to her room, if she had one, and, if not, finding one temporarily. She testified that on January 4, 1910, she could not tell where she was living, because she did not know, but finally said that it was somewhere on Seventh street, in the city and county of San Francisco. She testified that about 7 o'clock on said last-named evening she met defendant at the corner of Seventh and Market streets, and there had a conversation with him and his companion, one William Carlin; that defendant told her he could get her a place to work in Oakland, and she promised to meet defendant and his companion at the ferry building the next morning for the purpose of going over to Oakland to find her a place to work; that she did meet defendant and his companion the next morning, and went with them across the bay to Oakland, stopping at Seventh street and Broadway at the railroad depot; that they then went into a restaurant, where defendant and Carlin had their breakfast, and from there to the station; that defendant and Carlin left her at the station while they went to see about getting her a place, and that they soon returned and informed her that she (in her own language) 'was hired,' and they told her to go down to 477 Sixth street and see the 'lady,' and that she did go. She testified that defendant told her he would get her work as a chambermaid, but in the same sentence she said that he told her to give an assumed name, and to tell the landlady that she was 20 years old, as she could not get work as a chambermaid unless she was 20. She accordingly gave an assumed name, and stated to the landlady that her age was 20. She does not appear to have made any inquiry as to chamber work, but dressed and went into the parlor with two other girls, who were inmates of the house, doing the same kind of work. She remained there about four weeks, and had a room where she received and entertained the men who patronized her according to the custom of the house. It does not appear that defendant knew the age of the girl, or that she had any father or mother living. He met her casually on the street, and offered to assist her to get regular employment in the line of business which she had chosen, and evidently at more remunerative wages. He did not solicit her, or inveigle her into a life of prostitution. His offered aid may have been, and probably was, in a spirit of kindness, if we can conceive of people in that business being kind to each other; the desire of both of them evidently being that she might have a fixed abode, where she could get more customers.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

"The main contention of defendant's counsel is that the evidence is not sufficient to support the verdict in this: That it entirely fails to show that 'defendant took the girl away from her mother,' as charged in the information, and we are constrained to so hold.

"In discussing this statute, we must bear in mind its object and purpose. The intention of the Legislature evidently was to prevent young girls being lured away from the care and control of their parents or legal guardians, for the purpose of leading immoral lives, or being made prostitutes. It was for the purpose of protecting young girls who, if not virtuous, were not abandoned, or beyond the hope of reform. It was never intended to apply to girls who had already abandoned their home, and who had already become common streetwalkers or prostitutes. The section of the Code upon which this prosecution is based reads as follows: 'Every person who takes away any female under the age of 18 years from her father, mother, guardian or other person having the legal charge of her person, without their consent, for the purpose of prostitution, is punishable by imprisonment in the state prison not exceeding five years, and a fine not exceeding one thousand dollars.' The section makes it a crime to take away any female under the age of 18 years from her father or mother or legal guardian, without their consent, for the purpose of prostitution, and this without reference to whether the girl is chaste or otherwise. If she is wayward or has lost her virtue, the statute still contemplates that she shall not be taken away from her father or mother, because their love and solicitude perchance may still reform her, or bring her to see the error of her ways. No one has the right to take such a young girl away from her father or mother without their consent. In the eyes of the law, she is an infant, and no stranger had the right to deprive the father or mother of her custody. But if a girl is not in charge of her father or mother or other person described in section 267, that section does not apply, but the case is governed by the preceding section, to wit, section 266, which reads as follows: 'Every person who inveigles or entices any unmarried female of previous chaste character, under the age of 18 years, into any house of ill fame, or of assignation, or elsewhere, for the purpose of prostitution, or to have illicit carnal connection with any man; and every person who aids or assists in such inveiglement or enticement; and every person who, by any false pretenses, false representation, or other fraudulent means, procures any female to have illicit carnal connection with any man, is punishable by imprisonment in the state prison not exceeding five years, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment.' This section deals with unmarried females under the age of 18, 'of previous chaste character,' who were not in the charge or custody of the father, mother, or legal guardian. The defendant could not have been convicted under this section, because the girl was not of previous chaste character, as evidently appears from her own testimony. Then, where a female who has lost her virtue, under the age of 18, and who has been abandoned, or who is not in the legal charge of any one, but a wanderer upon the town, is aided in being placed in a house of prostitution, no crime has been committed. No one would say from the evidence in this record that the defendant took the girl from her mother. The words mean the removal or separation of the girl from the parent or legal guardian. If the girl was not with her mother, or under the immediate control and custody of the mother, but living separate and apart from her, going from place to place of her own volition, not making her home with her mother, she was not 'taken from the mother.'

"The English statute (24 & 25 Victoria, c. 10, § 55) provides as follows: 'Whosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of 16 years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor.' The decisions in England on this statute are in accord with the construction herein given. It will be observed that the statute is similar to ours, except the age is 16, and the purpose need not be for prostitution. Instead of the words 'takes away from,' the English statute uses the words 'take or cause to be taken * * * out of the possession.' In the case of Reg. v. Primelt, 1 F. & F. 50, which was a prosecution under this section, the evidence showed that the girl was in the habit of going to dances and public houses, and was out occasionally late at night without any one to look after her, and without her mother's supervision. The Chief Justice directed the jury that, 'if they thought that the mother had by her consent countenanced her daughter in her lax course of life by permitting her to go out alone at night and to dance at public houses, this was not a case that came within the intent of the statute, but was one where what had occurred, though unknown to her, could not be held to have happened against her will.'

"In Reg. v. Mankletow, Dears. C. C. 152 (Spring Assizes, 1855), it was said: 'Supposing the girl to have abandoned her father's possession, and the prisoner then to take her away, it would not come within the statute. But supposing she conditionally abandoned the possession of her father, under the impression that the prisoner would be at a certain point to take her away, that would not be a determination of the father's possession.'

"It is said in Russell on Crime (International Ed.) vol. 3 (note to page 263), that upon the case of R. v. Meadows [1 Car. & K. 399] being cited, Jarvis, C. J., observed 'that the girl, by voluntarily going from her father's house, may have severed the possession of the father, and so could not be said to be taken out of the possession of her father.'

"The statute of New York is similar to ours, and uses the words 'shall take away any female under the age of 14 years from her father, mother, guardian or other person having the legal charge of her person.' In People v. Parshall, 6 Parker Cr. R. (N. Y.) 129, in discussing the statute, the court said: 'The remaining question is whether the second count in the indictment was sustained by evidence sufficient to be admitted to the jury. In considering this question, we are confined to the testimony of the female, Hannah Naughton, who was alleged to have been taken away, as the court below put the case to the jury solely upon her evidence, as applied to the second count. In my opinion, the evidence of the girl fell short in several respects of being sufficient to produce a conviction under that count, and first as to the taking away. The evidence of the girl does not show that she was taken away from any one according to her testimony. * * * And the testimony of the girl does not tend to show that there was any taking of her in the sense of the statute, which contemplates some positive act to get the female away from the person having the legal charge of her. Nothing of that kind appears.'

"In People v. Powellson [67 Cal. xx] 7 Pac. 35, the court said: 'The defendant was charged by indictment with taking from certain individuals having the legal charge of her person a female under the age of 18 years, for the purpose of prostitution, under section 267 of the Penal Code. There was no evidence that the infant was taken from the charge or custody of the persons named in the indictment. Judgment and order reversed, and cause remanded for a new trial.'

"The Attorney General relies upon People v. Cook, 61 Cal. 478, as supporting the contention that in contemplation of law a female under the age of 18 is in charge of her father, and that the taking was sufficient, even where the evidence shows that the girl had abandoned her home. The case does lend countenance to such contention, but an examination of it will show that the court in that case was discussing solely the question of a charge to the jury, to the effect that 'the father has by nature and by the law the legal charge of the persons of his children until they arrive at the age of majority, and that if the defendant took Rebecca from said charge, for the purpose of prostitution, it was immaterial whether the defendant knew that she had a father living, and it was equally immaterial whether the act was done with or without her consent.' The instruction might very well apply to a case where the girl had not abandoned her home, or was not living a separate and independent existence; but it will be observed that the court in the prevailing opinion does not discuss the question as to the sufficiency of the evidence. However, in a dissenting opinion written by Mr. Justice McKinstry, and concurred in by Mr. Justice Sharpstein, the learned justice said: 'I dissent. In my view, the crime defined in section 267 of the Penal Code is committed by one who "takes away" the infant from the actual charge or possession of her parent, guardian, or other person legally entitled to the charge of her person. See 9 Geo. IV, c. 31, § 20. It is not committed by one forming an immoral connection with a female who has already abandoned her home or fled from guardianship. * * * In the case before us, the female was not taken away from her father, or from Coleman, in whose employment she had been, or from any person having the legal charge of her. There is not the slightest pretense that the defendant induced her to leave the house of her father or of Coleman, or that he ever saw her until she had for a considerable period of time "been going about from place to place, sleeping in several different houses, and leading a dissolute and immoral life." However base and infamous the conduct of defendant, he can only be punished, under this information, if he has committed the crime described in section 267 of the Penal Code.'

"The case is not in point for another reason: Conceding that the father is the legal custodian of his minor child, the charge in this case is not a taking from the father, but from the mother. The father is the legal custodian, and even that custody had been taken away in this case and placed in an institution, to which the girl had been committed by the judgment of a court of competent jurisdiction.

"In this case, while the conduct of the defendant is not to be commended, and his mode of life shows that he associates with the lower strata of society, still we cannot affirm the judgment, unless the evidence shows that he has committed the crime charged in the information. We would not be justified in placing a construction upon this statute so as to hold the defendant, simply because he has been quilty of conduct of which we do not approve.

"The judgment and order are reversed."

The controlling question upon this appeal —the sufficiency of the evidence to support the verdict—is fully and clearly discussed in the foregoing opinion. The views and conclusion expressed therein upon that question are, we are satisfied, correct, and we adopt the foregoing opinion as the opinion of this court.

The judgment and order are reversed.

ANGELLOTTI, J., did not participate in this decision.

(161 Cal. 1)

SPICER v. HURLEY. (L. A. 2,577.)

(Supreme Court of California. Sept. 26, 1911. Rehearing Denied Oct. 25, 1911.)

1. Pleading (§ 122*)—Denial on Information and Belief—Effect.

A denial on information and belief by a seller of the allegations of the complaint of the buyer suing for the price paid as to the rescission of the contract of sale is insufficient, and the allegations stand admitted.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 249–252; Dec. Dig. § 122.*]

2. Trial (§ 396*) — Findings — Evidence— Sufficiency.

A finding which consists of declarations in the answer is not open to objection by defendant that there is no evidence justifying it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 935–938; Dec. Dig. § 396.*]

3. Patents (§ 196*)—Sale—Misrepresentation—Evidence—Sufficiency.

In an action for the price paid for an interest in patents issued, evidence *held* to justify a finding that the seller's representations that the patents were issued to him were untrue, and known by him to be untrue, justifying the seller in rescinding and in recovering the price paid.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 278; Dec. Dig. § 196.*]

4. Patents (§ 196*)—Sale—Rescission.

Where a seller contracted to sell an interest in a granted patent, and executed a bill of sale, the buyer, on discovering that the seller had not been granted a patent, and that his representations were false, could rescind by offering to return what he had received under the bill of sale and demanding the return of the money paid, and the fact that under the bill of sale the buyer acquired an interest recognized in equity did not preclude him from rescinding and recovering the price paid.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 196.*]

5. Patents (§ 196*)—Sales of Interest— "Patented."

Approval of an application for a patent is not the equivalent of a patent granted and issued within a contract for the sale of an interest in a patent granted and issued; the term "patented" meaning the actual issuance of a patent by the government.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 196.*

For other definitions, see Words and Phrases, vol. 6, p. 5235.]

6. Patents (§ 196*)—Sales of Interest— Rescission.

Under Civ. Code, § 1689, authorizing a party to a contract to rescind in specified cases, a buyer of an interest in patents granted to the seller may rescind on discovering the false representations of the seller and learning that the patents have not been granted, and recover the price paid; and the fact that subsequent to the rescission and the action patents have been actually granted does not affect the buyer's rights.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 196.*]

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by S. F. Spicer against J. W. Hurley. From a judgment for plaintiff, defendant appeals. Affirmed.

Long & Sweek, Amend & Amend, and F. A. Knight, for appellant. Taylor & Forgy, Frederick S. Lyon, and G. M. Spicer, for respondent.

LORIGAN, J. The complaint in this action sets forth four different causes of action, the first of which was abandoned on the trial and no further reference need be made to it.

The facts stated in the complaint, applicable generally to the other three causes of action, were that plaintiff and defendant entered into an agreement whereby defendant for the sum of $15,000 cash to be paid him by plaintiff was to convey to him certain interests in two patents claimed by defendant to have been granted to him by the United States government, one being for "the Hurley adjustable reversible ratchet wrench," the other for the "Hurley meat tenderer machine," and that the $15,000 cash was to be paid principally as the consideration for the improved wrench; that on November 17, 1908, pursuant to said agreement, plaintiff paid to defendant $15,000 in cash, and in consideration therefor defendant executed to plaintiff two bills of sale, one purporting to convey to plaintiff "an undivided one-sixteenth interest in and to the patent right to 'the Hurley adjustable reversible ratchet wrench,' No. 411,530, granted by the United States government under the laws relating to patents," the other purporting to convey an undivided interest in the "Hurley meat tenderer machine"; that on November 24, 1908, plaintiff discovered that no patent at all had been granted defendant for any wrench, and that plaintiff had acquired nothing under said bill of sale respecting the same; that there was at the time of the execution of said bill of sale no patent in existence upon "the Hurley adjustable reversible ratchet wrench," and that no patent had at that time been granted by the United States government under the patent laws for such a wrench. In addition to these allegations, common to all the causes of action, the second cause of action charged a total failure of consideration; the third, a partial failure of consideration in a material respect (Civ. Code, § 1689); the fourth charged fraud and deceit. It was further alleged that a prompt rescission of said agreement to purchase and a tender back of all that plaintiff had received from defendant was made by him on November 24, 1908.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] These allegations as to rescission were denied on information and belief. This was an entirely insufficient denial and these allegations therefore stood admitted. A trial was had on the second, third and fourth causes of action. No question was made as to the payment of the consideration by plaintiff for the execution of the bill of sale.

The court found the following facts:

"(2) That plaintiff was induced to pay said consideration to defendant by the representations thereby and theretofore made to plaintiff by defendant for the purpose of inducing said plaintiff to pay said consideration and enter into said agreement to and with defendant, which representations were as follows: 'That letters patent of the United States numbered 411,530 had been duly allowed and granted to him (said defendant) by the United States government on a certain article, to wit, the "Hurley adjustable reversible ratchet wrench"'; 'that said patent had been duly allowed and granted'; 'that he (said defendant) was the true and lawful owner of a one-sixteenth ($^1/_{16}$) in the entire United States patent right thereto'; 'that he (said defendant) could sell, transfer, and assign the said one-sixteenth ($^1/_{16}$) interest to plaintiff, and that he could vest the full title to said one-sixteenth ($^1/_{16}$) interest in said patent rights in plaintiff."

"(3) That said representations made by the defendant as aforesaid were not true and that defendant knew them to be untrue; that the letters patent of the United States numbered 411,530 were not granted to defendant and defendant never, at any time, had any interest therein; that said patent No. 411,530 was not granted for an article known as the 'Hurley wrench,' or for any wrench, or any improvements on any wrench whatever, but was granted to one William H. Pyott on September 24, 1889, for an 'improvement in automatic stop mechanism for steam engines,' and said patent was expired at and before the said November 17, 1908; that no patent of the United States at or before the making of said representations by defendant, or before the commencement of this action, or the filing of defendant's answer herein, had ever been granted or issued for said article known as the 'Hurley wrench,' or for any invention of or improvements made by defendant in wrenches, and said defendant was not, at said times, the owner of any patent rights in said wrench whatever."

It was further found that the bill of sale purporting to convey to plaintiff an interest in a patent for the "Hurley adjustable reversible ratchet wrench" did not vest in plaintiff a full or any interest in said or any patent or any patent rights whatever, and by said instrument did not sell, assign or transfer to plaintiff anything of value whatever, that the consideration for which plaintiff had paid the $15,000 had failed, and that plaintiff had promptly rescinded the contract and demanded the repayment of his money.

The conclusion of law was that plaintiff was entitled to recover the entire consideration of $15,000 paid to the defendant and judgment was entered accordingly. Defendant appeals from the judgment and from an order denying his motion for a new trial.

[2] Appellant attacks finding 2 on the ground that there was no evidence that he ever stated to plaintiff that letters patent of the United States government had been issued to defendant for the wrench. But this claim of appellant is absolutely without merit because the recitals in the finding respecting this matter consist of declarations in the answer of defendant where he directly averred that he had made all the representations which are contained in the finding, among others, alleging "that the defendant represented to plaintiff that letters patent of the United States numbered 411,530 had been duly allowed and granted to him by the United States government on a certain article known as the 'Hurley wrench.'"

[3] Appellant also challenges finding 3 as not being supported by the evidence, because (to state it as it is contained in the specifications) the execution of the bill of sale would vest in plaintiff all the rights purporting to be conveyed by defendant, and did transfer everything it purported to convey. But the evidence clearly shows that defendant did not convey to or vest in plaintiff any right which it purported to do. It purported to vest him with an interest in a patent right for the Hurley wrench which had been granted to defendant, but the evidence clearly shows that no such patent had been granted to him. The attack which appellant directs against this finding is based on what he claims was the uncontradicted evidence in the case. Upon the trial defendant introduced evidence by which he

sought to prove that in his negotiations with the plaintiff for a sale of the patent for his improved wrench he had explained fully to him that he had not been actually granted a patent for the wrench, but only that his application therefor had been allowed by the Patent Office, and that he did not want to have the patent issued until he had secured foreign rights thereto; that when the bill of sale for an interest in the patent for the wrench was executed, although it called for a sale of an interest in the patent therefor granted by the United States what was meant thereby, and so fully understood by plaintiff was, that a patent had only been allowed; that for all legal purposes a sale of an interest in an allowed patent was precisely the same thing as the sale of an interest in a granted patent. Appellant claims that the evidence upon these matters was uncontradicted. This is obviously untrue because the plaintiff testified that there were no such statements made or such an understanding.

What the defendant did establish was, in fact, that no patent had been granted or issued to him, but that in July, 1908, he had received from the United States Patent Office a notification that his application (application No. 411,530) for a patent for an improvement in wrenches had been examined and allowed; that a final fee of $20 must be paid and the letters patent bear date of a date not later than six months from the time of the present notice of allowance; that, if the final fee was not paid within that period, the patent would be withheld, and the only relief of applicant would be a renewal of the application with additional fees under section 4897 of the Revised Statutes (U. S. Comp. St. 1901, p. 3386), that at the time of the rescission by plaintiff defendant had not yet paid the final fee, and did not do so until December 17, 1908, and was then notified by the department that a patent would issue January 12, 1909. So that the contention of the appellant that plaintiff was informed of the true situation as to the patent must be disregarded, not only from the conflict of the evidence on the subject, but because of the admission in his answer that he did not only represent to plaintiff—"that letters patent had been duly allowed and granted to him by the United States government" on the Hurley wrench, but that he further represented "that he was the true and lawful owner of a one-sixteenth interest in the entire United States patent thereto," when in truth the facts were that no patent had been issued or granted to him either at the time when the rescission was made, or even when his verified answer in this case was filed.

[4] Having shown that the objections to the findings are untenable, and that the facts are as found by the court, there is little necessity for further consideration of this matter. Defendant contracted with plaintiff and agreed to sell and convey to him an interest in a granted patent, and executed a bill of sale purporting to do so. After the sale was consummated, plaintiff discovered that defendant had not been granted such patent; that his representations to that effect were false, and gave prompt notice of rescission offering to return whatever of value he had received under the bill of sale and demanded a return of the money paid by him as a consideration for the purchase. That the plaintiff under these facts, clearly proven, was entitled to recover cannot be doubted. It is no answer to say that under the bill of sale plaintiff acquired an assignment of an interest in the patent, that equity recognizes such an assignment of an interest in patents before issuance, and that such assignments carry with them corresponding rights in any patent which is subsequently issued. Defendant did not sell to plaintiff, and plaintiff was not buying, equitable rights which might fail utterly if the patent was not ultimately granted, and which, even if it was granted, plaintiff might be compelled to legalize by a lawsuit. He was purchasing legal rights and interests in a granted patent and he acquired no such interests under the bill of sale because the defendant had none to convey. Such right as the defendant had at that time to the issuance of a patent after the approval of his application was unvested and inchoate. It was conditioned not only upon his compliance with the requirements of the Patent Office in the matter of the payment of fees, but was conditioned also upon the right of the government after further consideration to reject the application and withhold the patent, which it might do if an interference or a protest were filed showing an infringement of an existing patent.

[5] It is quite evident, therefore, that the approval of an application for a patent is not the equivalent of a patent granted and issued. "The term 'patented' does not mean the preliminary proceedings, but the actual issuance of the patent under the seal of the government speaking the exercise of sovereign will investing the patentee with the grant of a monopoly." Edison, etc., v. Waring E. Co. (C. C.) 59 Fed. 358.

[6] Neither is it of any moment to say that subsequent to the rescission and the bringing of this action to enforce rescission a patent for the wrench was actually granted to defendant. The rights of the parties are governed by the conditions which existed when the rescission was made and were fixed by the rescission, for the rescission, if legally made (and it is not only established but admitted here that it was), "extinguished" the contract. Civ. Code § 1678; Wilcox v. Lattin, 93 Cal. 595, 29 Pac. 226; Smith v. Blandin, 133 Cal. 441, 65 Pac. 894.

The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; MELVIN, J.

161 Cal. 20

HART v. TABER et al. (L. A. 2,695.)

(Supreme Court of California. Sept. 26, 1911. Rehearing Denied Oct. 25, 1911.)

HOMESTEAD (§ 143*)—WIDOW'S HOMESTEAD RIGHT—TIME OF VESTING.

Since the homestead vests in the widow absolutely at her husband's death, a subsequent order of distribution, distributing one-half of the homestead estate to her and one-half to the children, was void and did not affect her homestead right, and hence, in the absence of equitable estoppel, it cannot be subjected to a lien for a judgment on a note executed by the widow after the order of distribution.

[Ed. Note.—For other cases, see Homestead, Dec. Dig. § 143.*]

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Irene May Hart against J. H. Taber and another. From a judgment for defendants and an order denying a motion for a new trial, plaintiff appeals. Reversed, with directions to render judgment for plaintiff.

Powers & Holland, for appellant. Lee Gates, W. S. Allen, and Taylor & Forgy, for respondents.

MELVIN, J. The sheriff of Los Angeles county, one of the respondents herein, sought to sell under execution the interest of Irene May Hart in certain real property following a judgment obtained on a promissory note executed by said Hart in favor of Taber. Plaintiff claiming a homestead interest in the property as the widow of John Curry obtained a temporary injunction restraining the defendants from selling it, but after a trial of the action the superior court dissolved the injunction, found that Taber's judgment against plaintiff was a lien on the premises, and adjudged the levy of execution valid. The plaintiff appeals from the judgment and from an order denying her motion for a new trial.

There is no dispute regarding the facts. John Curry died intestate in 1904. Prior to that time plaintiff, then the wife of said John Curry and living with her husband on lot 50 of Westlake Park tract in the city of Los Angeles, which was community property, executed and caused to be recorded a declaration of homestead upon the said premises. This homestead was in existence at the time of John Curry's death. Plaintiff was appointed administratrix of her deceased husband's estate, and in December, 1905, a decree was entered distributing said property appraised as part of the estate, one-half to plaintiff and one-half to the two children of the intestate. Respondents concede that at the death of her husband plaintiff had a valid homestead on the property in question, and there is no denial that under section 1265 of the Civil Code and section 1474 of the Code of Civil Procedure the title vested in her without administration. The questions involved in this appeal, therefore, all arise out of her subsequent conduct and the decree of distribution above mentioned. In 1907, more than a year after distribution of the estate of John Curry, deceased, the plaintiff executed to Taber a note upon which he subsequently obtained the judgment that he seeks to satisfy by sale under execution of her interest in this property. The court concluded that the order settling the final account and for distribution in the matter of the estate of John Curry deceased, "was an adjudication by a court of competent jurisdiction of the subject-matter and of the person of the plaintiff herein, and said decree is conclusive upon the plaintiff herein as to the interest in said real property to which she was and is entitled." There was a further conclusion of law to the effect that by said order plaintiff was "estopped to claim said real property or any part thereof as a homestead or to claim any part of the same as owner except the undivided one-half part thereof."

We think that both of these conclusions were erroneous. The homestead vested absolutely in plaintiff upon the death of her husband. An order subsequently made by the probate court setting it aside to her and her children as a homestead would have been of no effect. See Saddlemire v. Stockton Sav. & Loan Soc., 144 Cal. 651, 79 Pac. 381; Estate of Fath, 132 Cal. 610, 64 Pac. 995, and cases therein cited. And upon like principle an order of distribution did not take away her homestead right, because the court was without jurisdiction to make the order. Respondents cite Blair v. Hazzard, 158 Cal. 726, 112 Pac. 298, and similar cases, holding that "a decree of distribution is a muniment of title of the highest value," and argue that they were justified in depending upon the decree in the estate of Curry as settling plaintiff's title to the property and defining its extent. The answer to this is that a valid homestead is also a high muniment of title, and that this is not an action by which they assert title to property, but only the right to foreclose an alleged lien. In Ions v. Harbison, 112 Cal. 264, 44 Pac. 572, which is the principal dependence of respondents, the property of the estate had been sold in pursuance of an order issued upon the prayer of the administrator, who failed to divulge his homestead interest. It was held that the jurisdiction of the probate court could not be questioned by one who, knowing all of the facts, took the quitclaim deed of the administrator, and sought under it to attack the judgment collaterally—that as the administrator himself had created a record which could not, on appeal, disclose the extent of his homestead claim, his grantee could not question the judgment made without the court's knowledge of the homestead right. But here we have quite a different state of facts. No fraud nor misrepresentation is attributed to plaintiff nor do respondents assert that the note (which bore interest at the rate of five per cent. per month) was accepted upon the faith and credit of Mrs. Hart's title to the real property here involved. Neither upon the doctrine of admitted jurisdiction of the probate court nor the principle of estoppel in pais was appellant precluded from asserting her homestead right, and such cases as Ions v. Harbison, supra, and Raggio v. Palmtag, 155 Cal. 799, 103 Pac. 312, have no application, but the principles announced in Saddlemire v. Stockton Sav. & Loan Soc., supra, and kindred cases should govern here.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The judgment is reversed, with instructions to the superior court to enter judgment for plaintiff in accordance with the principles herein expressed.

We concur: HENSHAW, J.; LORIGAN, J.

(160 Cal. 774)

GRANT v. BANNISTER et al. (Sac. 1,814.)

(Supreme Court of California. Sept. 25, 1911. Rehearing Denied Oct. 25, 1911.)

1. PARTNERSHIP (§ 336*)—ACCOUNTING—SUFFICIENCY OF EVIDENCE.
Evidence in a partnership accounting *held* to sustain a finding that a certain stone quarry was not partnership property, but was owned by the partners as tenants in common.
[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 336.*]

2. DEEDS (§ 101*)—CONSTRUCTION OF PARTIES.
A deed indefinite in its terms may be made definite by the practical construction of the parties.
[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 233; Dec. Dig. § 101.*]

3. PARTNERSHIP (§ 68*)—CONVEYANCES.
A deed executed to partners individually prima facie vests in them undivided interests as tenants in common.
[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 101–111; Dec. Dig. § 68.*]

4. PARTNERSHIP (§ 336*)—ACCOUNTING—SUFFICIENCY OF EVIDENCE.
Evidence in a partnership accounting *held* to sustain a finding that the partnership affairs were adjusted and the partnership discontinued long before the commencement of the accounting.
[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 336.*]

Department 2. Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by William Grant against W. D. Bannister and another. From an order denying a motion for new trial after judgment for defendants, plaintiff appeals. Affirmed.

Edmund Tauszky, John F. Davis, and R. P. Henshall, for appellant. R. H. Countryman and J. B. Curtin, for respondents.

HENSHAW, J. This action was brought for a partnership accounting and a division of the partnership assets. Judgment passed for defendants, plaintiff moved for a new trial, and from the order denying this motion, but not from the judgment, he appeals. The attention of this court is not directed to any alleged errors of law occurring during the progress of the trial, but the consideration upon appeal is limited to a contention against the sufficiency of the evidence to justify the findings.

Oral negotiations between the parties resulted in their entering into articles of copartnership for the general purposes of quarrying, working, buying, and selling building stone, but for the especial purpose of so quarrying, working, and selling marble from the Gold Spring Marble Mining claim in Tuolumne county, Cal. The partnership was to continue for the term of 10 years under the directions of the defendant partners, Bannister and Hearfield. Plaintiff was to cause to be conveyed the Gold Spring Marble Mining claim, with its water rights, to the partners in the proportions of "one-half undivided" to himself, "one-quarter undivided" to Bannister, and "one-quarter undivided" to Hearfield. The two defendant partners were to pay to plaintiff $1,000, and to expend in the improvement of the quarry, in the erection of a plant, and in the carrying on of the business the sum of $16,500 within two years. Bannister was to "devote his entire time and services to the business," receiving no compensation therefor. Hearfield was to "devote his time and services" between the business of the Columbia Marble Company and the business of the firm of Hearfield, Bannister & Co., and was to receive no compensation for his services to the marble company. The profits were to be divided, one-half to plaintiff, and one-quarter each to the defendants. The losses were to be borne in the same proportion. The services to be rendered by the defendant partners is expressed as the "main inducement and consideration" for the formation of the partnership; the money contributions being described as "very secondary." If, after the expiration of two years, plaintiff desired to sell, the defendants "shall have the right to purchase by paying to the plaintiff the sum of $20,000." And, finally, it was provided: "At the expiration of the period of partnership the party of the first part shall be the owner of one-half of the property, and assets of the business, and the party of the second part the owner of one-fourth thereof, and the party of the third part the owner of one-fourth thereof, unless the interests of the parties hereto shall be changed by sales and purchases or effected by overdrafts, and that if at any time the interests of the parties hereto are changed by purchases or sales, the interest of said parties in profits and losses shall be changed accordingly." The owner of the Gold Spring Marble claim made a conveyance to these partners of the property "in the proportion of one-half undivided to said William Grant, one-quarter undivided to said David Hearfield, and one-quarter undivided to said William D. Bannister." The deed declared that: "This conveyance is made by said party of the first part to said parties of the second part hereto in accordance and compliance with the terms and conditions of certain articles of copartnership made and entered into this day by and between said parties of the second part and to enable said William Grant (son of the party of the first part hereto) to comply with and perform the conditions contained in said articles of copartnership by and on the part of said William Grant."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The defendant partners contributed the money called for by the articles of copartnership, and devoted their time and services to its conduct and management, but the business proved unprofitable. Two years and more passed, and plaintiff sold his undivided half of the quarry, following which an accounting was had of the partnership affairs, resulting in the payment by plaintiff of the amount found due from him. No business at all, or business of no consequence, was ever afterward transacted. The articles of copartnership were entered into in August, 1891, and by their terms were to continue in force for 10 years. Indeed, the attempt to quarry and market the marble had ceased prior to the date of this sale, which was in 1898, for in 1897 a lease for 10 years of the quarry was made by the partnership to third persons. The lessees, however, paid but one year's rent and the lease was allowed to lapse. This action was brought on July 31, 1900, about 18 months after plaintiff's sale of his interest in the quarry and the settlement of the partnership accounts.

His contention is that under the articles of copartnership the term of the copartnership was to be for full 10 years, during which time the defendant partners were to devote their services to the copartnership in the manner above indicated. That the articles of copartnership recited that these services were the moving consideration for the agreement, and that one of these partners, just before the execution of the articles, furnished to plaintiff a memorandum as follows:

Amount of money to be put in.	17,500
2nd part's time)) $300 per month 3rd part's time) = 3 3,600.00 per annum 7% =	51,428
	$68,928

That this memorandum gave evidence, in accordance with the declarations of the agreement, that the services of the two defendant partners were considered of great value; that the Gold Spring Marble Mining claim was conveyed to the Columbia Marble Company as a copartnership; that, notwithstanding the sale by plaintiff of his interest in this property, the remaining moiety still remained the property of the partnership, and that a proper adjustment and settlement of accounts would take the value of this undivided one-half into consideration, in connection with the fact that the defendants had not rendered the services contemplated, and that a true adjustment of the relations, accounts, and affairs of the copartners would be upon this basis.

The court's findings, however, were to the following effect: That the Gold Spring Marble Mining claim or quarry was not the property of the partnership, but was conveyed to and owned by the parties to the action as tenants in common, in the proportion of one-half to the plaintiff and one-quarter each to the defendants; that there was no agreement as to the value of defendants' services upon the basis of $300 per month; that after the conveyance by plaintiff of his one-half interest in the marble claim, plaintiff and defendants by mutual consent dissolved their partnership, and a full, fair, and final accounting and settlement was thereupon had between them. If these findings are supported, there is an end to the controversy.

Considering the finding of the court touching the services which the defendants were to render, and their value, it is found that in the preliminary negotiations between them for the partnership, it was estimated that the services to be rendered by each of the defendants would be worth $150 per month, but that no agreement was entered into that such should be the cash valuation of such services, or with reference to a cash equivalent of such services; nor was any amount agreed upon or fixed as the equivalent for such services and money in case said services were not rendered; nor was there any agreement between them with reference to the value of the marble quarry property; nor was the sum of $100,000, or any other sum, at any time recognized or agreed to by the parties as the value or valuation of the quarry property. Plaintiff's contention was that the quarry property was of the estimated value of $100,000; that against this the defendants were to put into the business $17,500 in cash and $51,428 upon the basis of $300 a month for their services, continuing over the period of 10 years, making the not disproportionate amount of $68,928, which they were to apply as an offset to the value of the quarry, and that at the end of 10 years, and only at the end of 10 years, were they to own the assigned one-fourth interests in the quarry. The evidence against this contention and in support of the finding is, however, that the plaintiff, who was a lawyer, being anxious to enlist the defendants, who were practical business men, in the operation of the quarry and in the conduct of a marble business, first offered to sell them the quarry for $25,000 cash, failing which he proposed articles of copartnership to last for two years, the defendants to supply the necessary money and devote their time and services, the one at the quarry, the other in San Francisco, in the product and sale of the stone. Defendants objected that the two years' time was altogether too short to justify them in the investment of so large an amount of money, and estimated, moreover, that the services which they would be expected to render would represent in value at least $150 a month each. It was in the course of this discussion that the figures above quoted were made. The two-year proposition was rejected and the 10 years finally agreed upon. The evidence of the defendant partners agrees that the articles of copartnership entered into never contemplated the valuation of their services for any other purpose than that indicated; that the contention was never made by the plaintiff, or by any one else on his behalf, that any part of the consideration for the quarter interest in the quarry which each received was the services to be rendered by them, and they both positively asserted that there was never at any time any agreement by which their services were to be measured, figured, or adjusted upon that or any other basis. The partnership business failing to be profitable, and plaintiff being in debt to the partnership, the other partners having advanced more even than the moneys called for, plaintiff undertook to accomplish the sale of his interest in the quarry, agreeing to settle his accounts with the partnership after such sale. The contemplated sale by plaintiff was to Crooks and Jarboe of his undivided one-half interest for the sum of $50,000. If it be argued that this established a value for the whole quarry of $100,000, the answer is not alone from the testimony of the defendants that it was originally offered to them for $25,000, but it is found also in the partnership articles. By those articles, if plaintiff was minded to sell his interest, the defendants had the right to purchase it by paying therefor the sum of $20,000. In contemplation of the $50,000 sale, they could have exercised this option, and themselves sold the half interest, instead of assenting to the sale which they thus permitted plaintiff to make.

[1] The finding to the effect that plaintiff and defendants owned the quarry as tenants in common in the indicated proportions, and that the quarry was not the property of the partnership, is sought to be overcome by the language of the partnership articles, by the terms of the deed, and by the testimony of the plaintiff. Against this is the testimony of the defendants, and the whole course and conduct, writings, and declarations of the plaintiff himself are at variance with this contention. The utmost that can be said for the deed is that it in terms conveys to the grantees as tenants in common, but declares that it is made "in fulfillment of the partnership agreement." It has been said that under the construction given by the court defendants' titles were not conditioned, either upon the value or the continuance of their services. The partnership proved unprofitable; a continuance of their services would but have involved the partners still further in debt; plaintiff was owing moneys to the partnership; the business had been discontinued; a lease had been made of the quarry itself—substantially the only thing within the contemplation of the partnership business; and, finally, when the lease lapsed, plaintiff made a sale of his interest in the quarry, which the grantees of that interest testified they considered meant the substitution of themselves in the place of plaintiff in the business, and included whatever interest in the personal property plaintiff might possess. To this brief statement may be added that the testimony of the defendant partners is to the effect that they also considered that plaintiff was eliminating himself from the partnership by this sale and the subsequent accounting and settlement which was had. But if it be conceded that doubt exists of the true construction of this deed, as to whether it conveyed the interests in common or in partnership (Civ. Code, § 682), then the construction put upon it by the parties themselves affords the surest and most certain test of their own understanding. True this understanding would not control the rights of creditors or outside parties, but it is controlling as between the parties themselves, and no outside interests are here involved.

[2] It is well settled that a deed or contract indefinite in terms may be made definite and certain by the practical construction of the parties to it. 1 Warvelle, Vendors, pp. 367, 375; Mulford v. Le Franc, 26 Cal. 108; Hastings v. Stark, 36 Cal. 126; Truett v. Adams, 66 Cal. 222, 5 Pac. 96; Mittau v. Roddan, 149 Cal. 14, 84 Pac. 145, 6 L. R. A. (N. S.) 275. Says this court in Widbur v. Washburn, 47 Cal. 67: "The parties have themselves so construed the deed by their subsequent acts, and there is no reasonable ground to doubt that this is the correct interpretation of it." In Hill v. McKay, 94 Cal. 20, 29 Pac. 410, it is said: "When the meaning of the language of a contract is doubtful, the acts of the parties done under it afford one of the most reliable clues to the intention of the parties." Plaintiff's own testimony forces the conclusion that he himself construed the deed as did his defendant partners. Noticing but a few matters so demonstrating: The consent to the sale made by plaintiff to Crooks and Jarboe of his one-half interest was prepared by plaintiff. It does not purport to assent to the sale of partnership property, but is a "consent to the sale by said William Grant of his undivided one-

half interest in said lands and property." Plaintiff's deed to Crooks and Jarboe is a deed to "an undivided one-half interest of, in, and to that certain lot, piece, or parcel of land," etc. This deed is made by plaintiff alone, not in the name of the partnership, and does not purport to convey partnership property. The agreement for the conveyance entered into by plaintiff with Crooks and Jarboe for the sale of his undivided one-half, and signed by plaintiff, declares that plaintiff will convey to the other parties an undivided one-half of the marble quarry property, "which property was acquired by the party of the first part and David Hearfield and W. D. Bannister, and is now owned by said Grant, Hearfield, and Bannister in the proportions of one-half to said party of the first part, and one-fourth each to the said Hearfield and Bannister." An agreement entered into between the three partners in reference to the water rights conveyed as appurtenant to the quarry contained the recital that Grant, Hearfield, and Bannister "were the owners as tenants in common in the proportion of one-half to Grant and one-fourth each to Hearfield and Bannister of that certain property known as the marble quarry, with its water rights and appurtenances."

[3] Plaintiff, as has been said, is a lawyer, with knowledge of the meaning of the terms used, and throughout all of the record of their transactions there is no suggestion that he considered that the title to the property rested in the partnership, or that it was other than property held by the partners as tenants in common, and used for partnership purposes. This, of course, is in accordance with the general construction of instruments where a deed of realty to partners individually, if unexplained, vests in them undivided interests as tenants in common. Hardenbergh v. Bacon, 33 Cal. 356; Greenwood v. Marvin, 111 N. Y. 423, 19 N. E. 228; Thompson v. Bowman, 73 U. S. 317, 18 L. Ed. 736. And, indeed, it is no unusual thing that property be used for partnership purposes and not belong to the partnership. It may belong either to a third person, to one of the partners, or to the partners as tenants in common. Hendy v. March, 75 Cal. 566, 17 Pac. 702; Humes v. Higman, 145 Ala. 215, 40 South. 128; Robinson, etc., v. Miller, 153 Ill. 244, 38 N. E. 1078, 27 L. R. A. 449, 46 Am. St. Rep. 883; Lindsay v. Rice, 103 Mich. 28, 61 N. W. 271; Neill v. Shamburg, 158 Pa. 263, 27 Atl. 992.

[4] The third and last finding here necessary to consider is to the effect that the partnership affairs were adjusted, settled, and the partnership discontinued long prior to the commencement of this action. No serious attack is made upon this finding. It is abundantly supported, first, by the written agreement under which the defendants assented to plaintiff's sale of his interest in the property. That agreement recited that subsequent to the sale "William Grant and ourselves will adjust all accounts arising from the transaction of the business of said firm, and that William Grant will personally account and pay over to us any moneys that may be found due on such settlement of accounts." Such an account and settlement were actually had, and plaintiff paid over some $2,500 found to be due from him. The accounts were made up by a disinterested expert of the partners' joint selection. It was considered as a final adjustment and accounting. The only thing shown upon this trial, which could be considered as overlooked or unsettled items, were expenditures made by plaintiff, and aggregating about $210—more than offset by expenditures proved to have been made by defendants and not accounted for, aggregating $315. The items and the amounts were themselves too trifling to support any claim for a new or additional accounting.

For which reasons the order appealed from is affirmed.

We concur: MELVIN, J; LORIGAN, J.

161 Cal. 59

RANDALL v. WASHINGTON et al.

(L. A. 2,627.)

(Supreme Court of California. Oct. 3, 1911. Rehearing Denied Nov. 1, 1911.)

HUSBAND AND WIFE (§ 131*)—WIFE'S SEPARATE PROPERTY—PRESUMPTION.

Where a married woman acquired title to real estate by deed of grant duly recorded and for a valuable consideration, the disputable presumption that the property vested in the first grantee as her separate property becomes a conclusive presumption in favor of the title of a purchaser from her in good faith and for a valuable and adequate consideration.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 471–483; Dec. Dig. § 131.*]

Department 2. Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by M. Randall against Jane Washington and husband to quiet title. Judgment for defendants, and plaintiff appeals. Affirmed.

M. Randall, in pro. per. Chas. S. Darden, for respondents.

PER CURIAM. This action was brought to quiet title to realty. Plaintiff's title was acquired by deed from Lemuel Donaldson and Delcia Donaldson, his wife, of date May 1, 1908. Defendants' title comes from a deed of the wife Delcia alone. Delcia Donaldson, such are the facts and the findings, acquired title to the property from the Golden State Realty Company by deed of March 3, 1906. The deed was a deed of grant for a valuable consideration, and was duly recorded. Title thus stood of record in Delcia Donaldson for a year and ten months, when on December 6, 1907, she conveyed the property for a valuable consideration to the defendant Jane Washington. The court further found that Jane Washington took title in good faith and for a valuable and adequate consideration.

The disputable presumption that title to the land in question vested in Delcia Donaldson as her separate property thus became a conclusive presumption in favor of the defendant Jane Washington, and the court rendered its judgment accordingly. Upon this appeal a successful effort is made to show that the property was in fact acquired by the earnings of the husband, Lemuel Donaldson; but no success attends the effort of appellant's counsel to show, and no evidence supports his statement to the effect, that defendant was not a purchaser in good faith and for a valuable consideration.

The judgment and order appealed from are therefore affirmed.

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161 Cal. 42

ABBOTT v. 76 LAND & WATER CO.

(S. F. 5,475.)

(Supreme Court of California. Sept. 28, 1911. Rehearing Denied Oct. 28, 1911.)

1. SPECIFIC PERFORMANCE (§ 129*)—INCIDENTAL RELIEF—DAMAGES FOR DELAY.

In an action for specific performance, the court may award any legal damages suffered by delay in performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 420–423; Dec. Dig. § 129.*]

2. JUDGMENT (§ 593*)—RES JUDICATA—SPLITTING CAUSES OF ACTION — CONTRACTS TO CONVEY.

Under the rule that an entire claim arising under contract or tort cannot be made the subject of several suits for damages, one who elected to sue for specific performance of an agreement to convey, instead of for damages for the breach, was bound to recover incidentally thereto all his damages from delay in conveying, so that the decree for specific performance barred a subsequent action for damages from the delay.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1108; Dec. Dig. § 593.*]

3. JUDGMENT (§ 593*)—RES JUDICATA.

If the contract claim sued on is entire, the fact that all the items of damage cannot be proved when suit is brought, or that all the damage has not been suffered, will not authorize a second action to recover such items of damage.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1108; Dec. Dig. § 593.*]

4. JUDGMENT (§ 602*) — RES JUDICATA—SUCCESSIVE CAUSES OF ACTION.

Where a breach of contract is continuous, a judgment for damages accruing before the commencement of the action does not bar a second action for damages subsequently accruing, in view of Code Civ. Proc. § 1047, providing that successive actions may be maintained upon the same contract whenever, after the former action, a new cause of action arises therefrom.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1117; Dec. Dig. § 602.*]

5. JUDGMENT (§ 602*)—RES JUDICATA—SUCCESSIVE ACTIONS—CONTINUING BREACH OF CONTRACT.

A continuing breach of contract, within the rule permitting a subsequent action for damages accruing after judgment in a prior action, where the breach is continuing, necessarily implies a continuing duty; and there can be no continuing breach of a contract to sell realty, so as to make the rule applicable.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1117; Dec. Dig. § 602.*]

6. LIS PENDENS (§ 22*)—EFFECT OF FILING—PURCHASERS PENDING SUIT.

Where a lis pendens was filed at the commencement of actions for specific performance of agreements to convey land with irrigation rights, any sale of the land or water rights pending the action would be subject to plaintiff's rights therein.

[Ed. Note.—For other cases, see Lis Pendens, Cent. Dig. §§ 31, 34–37; Dec. Dig. § 22.*]

7. WATERS AND WATER COURSES (§ 156*)—RESERVATIONS—WATER RIGHTS.

A deed conveyed a system of water ditches, and "such right to use the water of K. river in said ditches as" the grantor "now possesses," and further provided that there was "saved and reserved" from the operation of the conveyance so much of the water now owned by the grantor as would enable it to fulfill any contracts for the supply of water which it had theretofore made, and the grantee covenanted to keep the ditches in such repair as would enable the grantor to perform the service required by such contracts. *Held*, that there was no transfer of any water rights to which others were there entitled under contract with the grantor.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 156.*]

Department 1. Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by L. E. Abbott against the 76 Land & Water Company. From a judgment for defendant and an order denying a new trial, plaintiff appeals. Affirmed.

O. L. Abbott and S. J. Hinds, for appellant. L. L. Cory and W. S. Goodfellow & Eells, for respondent.

ANGELLOTTI, J. This is an appeal from a judgment in favor of defendant, and from an order denying plaintiff's motion for a new trial, in an action brought to recover $134,145, with interest.

The second amended complaint stated four alleged causes of action, all of which have been assigned to this plaintiff by the original owners. The first is a sample of all. One O. L. Abbott was, on October 1, 1887, the equitable owner of 320 acres of land, and of "320 inches of water, miner's measurement, incident thereto, constant and permanent flow from the canal of defendant." Defendant held the legal title as trustee for said Abbott, with the duty resting on it to convey the same to said Abbott on receipt of payment for said property. On said date Abbott offered to pay such price, and demanded a conveyance. Defendant denied said right on the part of Abbott until March 4, 1892, when it accepted payment, and executed to Abbott a grant deed of said land and water. This deed contained an express covenant that the land and its appurtenant water were free and clear of all incumbrance by the grantor, and also a statement that the deed was executed in compliance with a decree of the superior court of Fresno county, given February 21, 1890. On or about July 1, 1890, defendant has sold to the Alta Irrigation District 2,680 inches of water, including said 320 inches of water, for $410,000. Abbott has demanded a delivery of said water, but defendant has not delivered or been able to deliver the same to him. On October 1, 1887, the land, with said water incident thereto, was worth $16,000, and Abbott was to pay only $4,800 therefor. Defendant withheld the legal title for the purpose of gaining the difference of $11,200. While defendant withheld the legal title, the property became worth $24,000. If the legal title had not been so withheld, Abbott would have sold said land for its highest market value, namely, $24,000. While it was so withheld, the land depreciated in value until at the time of the conveyance it was worth only $9,600, by reason of all which Abbott was damaged in the sum of $14,400. Defendant received from the Alta Irrigation District for Abbott's 320 inches of water $49,953, which it withholds from him, to his damage in that amount. No damage, other than that heretofore specified, is alleged. It is to be observed that no claim was made that there was any damage arising from withholding the use and possession of the land and the appurtenant water right. The allegations of the complaint are consistent with the theory that Abbott was in possession of the land at the commencement of the action and at all times thereafter, and the court expressly found that at the commencement of the action Abbott was in actual possession of such land and the appurtenant water right. The second cause of action was one on behalf of S. B. Abbott, the third on behalf of Tom Tyner, and the fourth on behalf of John H. Shipe; all being substantially the same as that on behalf of O. L. Abbott.

The allegations of facts showing damage by reason of the retention of the legal title to the land were denied by the answer, as also were the allegations as to a sale to the Alta Irrigation District of the water incident to such land, and the allegations as to any demand for the water and inability and refusal on the part of defendant to furnish the same. That defendant withheld said title for the purpose of gaining the difference of $11,200 was also denied.

It was further alleged, as a special defense to each cause of action, that long prior to the commencement of this action, the plaintiff's assignor commenced and prosecuted to final judgment on the merits an action against defendant, in which action all matters relating to the alleged depreciation and other matters set forth in the complaint in this action could and should have been litigated.

In relation to the claim of plaintiff's assignor as to the land, the trial court found as to each cause of action as follows: Such assignor entered into possession of the land in the year 1885, under a written lease given by defendant, for the term of one year from October 1, 1885. By this lease it was provided that the lessee should have the privilege of purchasing the demised premises at any time before October 1, 1886, at a specified price. On or about October 1, 1886, the claimant accepted a new lease for one year, commencing on said date, but such lease contained no provision authorizing the lessee to purchase the property. In September, 1887, plaintiff's assignor claimed the right under his lease to purchase the land at the price specified in the 1885 lease, and defendant denied such right. Plaintiff's assignor having tendered the price so specified and made his demand for a deed, and such demand being refused, an action for the specific performance of the alleged contract of purchase and sale was commenced by plaintiff's assignor against the defendant in the year 1889. The facts found negative completely the idea of any bad faith on the part of defendant in withholding the legal title. In February, 1890, a judgment was given by the superior court in such action in favor of plaintiff's assignor, adjudging the existence of the alleged right, and directing the execution of a deed upon payment of the specified price before a specified date (October 1, 1890). An appeal was taken by defendant to this court, and in January, 1891, the judgment was affirmed by this court. Abbott v. 76 Land & Water Co., 87 Cal. 323, 25 Pac. 693. No tender of the specified price having been made by plaintiff's assignor after judgment and prior to October 1, 1890, defendant claimed that his right under such decree had lapsed and still refused to execute the deed. Thereupon it was cited by the superior court for contempt, and adjudged guilty thereof. A proceeding in certiorari was then instituted in this court to review the action of the superior court in such contempt matter, and in February, 1892, judgment was given, affirming the order of the superior court (76 Land & Water Co. v. Superior Court, 93 Cal. 139, 28 Pac. 813), and on March 4, 1892, as already stated, defendant complied with such decree by executing its deed. (The alleged depreciation in value in the land occurred subsequent to the commencement of the action, and, as we understand, subsequent to the rendition of judgment by the superior court in the specific performance action.) At the time of the original breach of its contract to sell by defendant, no damages were sustained by plaintiff's assignor, and he then elected to avail himself of the remedy by specific performance, and not to avail himself of an action at law to recover damages for such breach. It was further found that such delay as occurred between the time of such breach and the execution of the deed was caused by this litigation, and the necessary delay of the courts in adjudicating the rights of the parties.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

In relation to the claim of plaintiff's assignor as to the water, the court found as follows: The water right was appurtenant to the land, and had no separate existence therefrom. Plaintiff's assignor was in the actual possession of the land, with the appurtenant water right at the time of the commencement of the action. In the sale and conveyance by defendant to the Alta Irrigation District, there was an exception or reservation of all water belonging to plaintiff's assignor. At all times, plaintiff's assignor was able to take and receive all water required by him in connection with said land, and defendant has never been unable to deliver the same to him.

As to both land and water, the court found that no damage was sustained. Also that, if any damage was sustained, the same was caused by the delay of litigation, and was also in its nature remote and speculative damage, not otherwise recoverable at law.

It was further found that the land with its appurtenant water right became the property of the Sacremento Bank, a corporation, by sale under a trust deed given to secure a loan.

[1] So far as the land was concerned, it cannot be disputed that the findings above referred to are fully sustained by the evidence. In view of the facts thus shown, we know of no rule of law that authorizes a recovery in this action of the damage alleged in regard thereto. Certainly no authority has been cited by plaintiff that would sustain such a recovery. The sole cause of the damages alleged was defendant's breach of its contract to sell the land to plaintiff's assignor. The breach occurred in the year 1887, and was, as said by counsel for defendant, "a total breach and repudiation of the contract." The defendant claimed in good faith, and with apparently much ground for its claim, that the contract relied on by plaintiff's assignor did not entitle him to purchase the land. Be this as it may, the contract, so far as it related to the matter of the sale of the land, was single and entire. The total abandonment or breach thereof by defendant gave plaintiff's assignor but a single cause of action, and this single cause of action could not be so split as to afford warrant for two or more actions. It is true that the vendee had an election of remedies. He might have brought an action to recover such damages as were caused him by the breach; or he might, as he did, bring his action for specific enforcement of the contract, and in such action obtain, not only the specific enforcement of his contract, but also such damages as he was lawfully entitled to; for it is thoroughly settled that a court of equity, taking jurisdiction for the purpose of specifically enforcing a contract, takes full jurisdiction of all the rights of the parties, whether legal or equitable, and may award such legal damages as the vendee may have suffered by reason of the delay in performance. See 2 Warvelle on Vendors, § 958; 36 Cyc. 753.

[2] But, under elementary principles, he was bound to obtain all his relief on account of the breach in one action, and could not recover part in one and part in another. If he had brought his action at law for damages, thereby treating the contract as at an end, a judgment therein awarding him damages would have been conclusive on him as to the

amount of damages sustained by reason of the breach, and a bar to any action for further damage on account thereof. Resorting as he did to an action in equity to compel specific performance of the contract, instead of an action at law for damages, the decree in his favor of the court having the power to give him all relief that he was entitled to on account of the breach is likewise conclusive, and a bar to any subsequent action for relief based on the same contract. This is the necessary result of the application of the well-settled principle that an entire claim, arising either upon a contract or from a wrong, cannot be divided and made the subject of several suits. [3] In such a case, it is no warrant for a second action that the party may not be able to actually prove in the first action all the items of the demand, or that all the damage may not then have been actually suffered. He is bound to prove in the first action, not only such damage as has been actually suffered, but also such prospective damage by reason of the breach as he may be legally entitled to; for the judgment he recovers in such action will be a conclusive adjudication as to the total damage on account of the breach. See generally, on this subject, 1 Sutherland on Damages (3d Ed.) §§ 106, 108, 112, 113, 120.

[4] Appellant's claim for a contrary rule in this case must necessarily be that defendant's breach was what is known in the law as a continuous breach, continuing from the first repudiation of the contract to the day of the execution of the deed, and giving rise to new causes of action as long as it continues. Of course, in such a case, a judgment for damages accruing prior to the commencement of the action is not a bar to an action for damages accruing subsequently, for the claim for such damages is a new cause of action. This is recognized by section 1047, Code of Civil Procedure, but the rule there stated has no application to actions for additional damages on account of some particular breach involved in a former action. See note to section 106 of Sutherland on Damages.

[5] But a continuous breach necessarily implies a continuous duty, such as the duty imposed by a stipulation to keep certain premises in repair during a specified term. There can be no such thing in the case of the absolute repudiation by the vendor of a contract for the sale of real estate. In the latter case there is a single breach, complete at the time of such repudiation, and a single and entire cause of action at once accrues. And it is especially true in such a case that a decree of specific performance of the contract of sale is a bar to any further relief based on the claim of the breach; for, as we have said, an action for specific performance necessarily involves, not only the question of such performance, but also all claims for compensation and damage on account of the delay in performance.

In the case of Warner v. Bacon, 8 Gray (Mass.) 397, 69 Am. Dec. 253, which is practically the only case relied on by appellant, the first action was not one for specific performance, but an action at law for damages for the withholding of a deed to which the plaintiff was entitled under a contract of exchange. The plaintiff was allowed to maintain a second action for damages accruing after the commencement of the first action for a continued withholding of such deed from that time to the date when the deed was executed. The court did not appear to deny that, where a contract is entirely broken and repudiated, there is but a single breach and a single cause of action, but, taking the case as one in which it appeared that the agreement had "hitherto been treated by both parties as an open and continuing agreement," held that the facts showed "only a temporary withholding of the plaintiff's rights," for which damages could be recovered in any action only to the time of the action commenced, and that as to damages subsequently accruing, by reason of a continuance of the withholding, a new cause of action existed. Whether this decision was correct or not is unimportant here, in view of the fact that an action for specific performance of a contract for the sale of lands involves the adjustment of all matters in dispute relating to such contract, including claims for compensation and damages for delay in the performance adjudged up to the very date of such performance. But the decision cannot be taken as warranting a conclusion that, upon such facts as appear in this case, there was anything, other than a single and entire breach, complete at the time of the commencement of the action for specific performance, on account of which only one action could be maintained.

In Fish v. Folley, 6 Hill (N. Y.) 54, it was held, in accord with the rule we have discussed, that, where the defendant had covenanted that plaintiff should have a continual supply of water for his mill from a dam, and subsequently totally failed to perform for nine years, and plaintiff brought an action for the breach and recovered damages sustained by him to that time, the judgment was a bar to a second action arising from subsequent failure to perform, on the theory that, although the covenant was a continuing one in one sense, it was an entire contract, and a total breach put an end to it, and gave plaintiff the right to sue for an equivalent in damages.

In accord with the views we have stated, it has been held that the continued withholding of stocks or bonds after the bringing of action to enforce their delivery, pending the litigation and up to the time of the enforcement of the decree, is not a new wrong, redressible by a new action, but is simply a continuation of the original wrong, for which the only redress given by the law must be had in the original action, and that consequently a second action would not lie for the damage due to depreciation in the value of the stocks or bonds occurring between the time of the commencement of the first action and the determination of such action on appeal. See Bracken v. Atlantic Trust Co., 167 N. Y. 510, 60 N. E. 772, 82 Am. St. Rep. 731; Commerce Exchange Natl. Bank v. Blye, 123 N. Y. 132, 25 N. E. 208. In the case last cited the court said: "The complaint discloses a single tort, which has formed the subject of an action and been redressed by a judgment therein. It alleges no new or separate demand, but simply a continuance of the refusal to obey it, after judgment and pending the appeals therefrom. If the defendant's continued possession during that interval was a wrong at all, it was not new or separate, but a continuance of that sued upon, and dependent upon the demand proved in that action. At the most, the complaint shows an extension of the damages beyond the date of the trial judgment, and growing out of the delay, inseparable from the defendant's right of appeal, and so we are required to say, if we affirm this judgment, either that the damages flowing from a single wrong may be divided into two parts, and each part form the subject of a separate action, or that the exercise by the defendant of the right of appeal upon the precise terms and conditions dictated by the law constitutes a new and illegal detention of the property in controversy. The first proposition is, of course, inadmissible, and the judgment must stand, if at all, upon the second; and that necessarily involves a conclusion that the appeals taken, by reason of the delay which they occasioned, constituted a new detention and a new wrong, for which a separate action could be maintained. Neither reason nor authority justify that conclusion."

That a decree of specific performance of a contract for the conveyance of real estate is a bar to any subsequent action by the vendee for damages on account of the breach of such contract is held in Head v. Meloney, 111 Pa. St. 99, 2 Atl. 195, and Thompson v. Myrick, 24 Minn. 4. In the Pennsylvania case it is said, among other things, that, as is plain, the suit for the specific performance was "an action upon the contract in its entirety"; and it was substantially held that the decree in such a case must be taken as a complete and final adjudication of the rights of the parties growing out of said contract.

From what we have said, it is manifest, we think, as was found by the trial court, that, so far as the land is concerned, all the rights and remedies of plaintiff's assignors here sought to be enforced were merged in and exhausted by the specific performance action.

[6] In regard to the water, plaintiff's only claim was for the proceeds of the alleged sale by defendant to the Alta Irrigation District, during the pendency of the specific performance action, of the water belonging to his assignors. In regard to the water, in addition to the facts already specified, the trial court found that in the sale and conveyance to the Alta Irrigation District there was not included any of the waters or water rights claimed by any of such assignors, and that defendant did not sell to such district any water or water rights to which plaintiff's assignors were entitled, or receive from such district any money for any water subject to said contract. It further found that at the time of the commencement of each of the specific performance actions, except that of S. B. Abbott (involving 80 acres and 80 inches of water), a notice of lis pendens was duly filed. This finding as to the filing of lis pendens is not attacked. It is manifest, as said by respondent, that, in view of this finding, no sale made pending the action could prejudice or affect the rights of any of plaintiff's assignors, except S. B. Abbott, to obtain the land and water.

[7] But we think that the court was correct in its conclusion that the sale to the district was expressly made subject to the contracts of plaintiff's assignors, and that all their rights under their contracts were expressly reserved and excepted from the effect of the conveyance. The conveyance was for the express consideration of $410,000, represented by bonds of the district, and conveyed the system of water ditches owned by it, "and such right to use the water of Kings river in said ditches as said party of the first part now possesses." It provided further: "There is also saved and reserved from the operation and effect of this conveyance so much of the water now owned by the party of the first part, or to which it is entitled, as shall be sufficient to enable the party of the first part thereto to carry out and fulfill any and all contracts for the supply of water which it has hitherto made with any person or persons, corporation or corporations, * * * and there is also saved and reserved from the operation and effect of this conveyance the right to take from said canals and ditches so much of the water flowing therein as is hereby reserved as shall be necessary to carry out the said contracts and all of them, until all of said contracts be released or in some manner extinguished." The grantee also covenanted that it would keep the canals and ditches conveyed to it in such repair as would enable them to perform the service required by said contracts. Manifestly the intent of these provisions was to except from the effect of the conveyance so much of the water and water rights as was necessary to enable the grantor to comply with any and all valid contracts theretofore made by it involving the furnishing of water, and the imposition upon the grantee of the burden of maintaining the ditches in such condition that the

rights of the parties under such contracts would not be impaired. If this be so, there was no transfer of any of the water or water rights belonging to any of plaintiff's assignors, and none of the consideration received by the defendant from the Alta Irrigation District can be considered proceeds of the sale of property belonging to any of such assignors. The findings of the court on this branch of the case are amply sustained by the evidence. No other damage in regard to the water or water rights was alleged; plaintiff seeking simply the proceeds of the alleged sale of the water of his assignors.

It is claimed that the court failed to find on certain issues, but an examination of the objections in this behalf shows that where there was any such failure the issue was immaterial, in view of our conclusions upon the matters discussed in this opinion. We find no other matter requiring discussion.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; SLOSS, J.

161 Cal. 61

LAURICELLA et ux. v. LAURICELLA.

(S. F. 5,291.)

(Supreme Court of California. Oct. 3, 1911. Rehearing Denied Nov. 1, 1911.)

1. Trusts (§ 92½*)—Constructive Trust—Parol Agreement—Statutes.

Civ. Code, § 2217, defines an involuntary trust as one created by operation of law, and section 2224 declares that one who gains a thing by fraud, violation of a trust, or other wrongful act is an involuntary trustee for the benefit of the person who would otherwise have had it. Section 847 provides that uses and trusts in relation to real property are only those specified in that title, which includes sections 852 and 857. Section 852 limits trusts to those created or declared by writing, signed by the trustee, by conveyance to the trustee, or by operation of law. Section 857 is entitled "For what purposes express trusts may be created," and specifies four different classes distinguished by the different purposes to be accomplished. *Held*, that sections 847, 857, relate to express trusts only, and do not preclude the establishment and enforcement of a constructive trust for a grantee's refusal to perform a parol agreement to convey part of the property conveyed to her to plaintiffs.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 141; Dec. Dig. § 92½.*]

2. Trusts (§ 96*)—Constructive Trust—Public Policy.

The enforcement of a constructive trust is not against public policy, where the effect is to indirectly carry out a parol trust to convey land.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 148; Dec. Dig. § 96.*]

3. Trusts (§ 92*)—Certainty—Statutes—Application.

Civ. Code, § 2221, providing that, subject to the provisions of section 852, a voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor indicating with reasonable certainty an intention to create a trust, and the subject, purpose, and beneficiary, has no application to a constructive trust, but relates to express trusts only.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 92.*]

4. Trusts (§ 103*)—Wife's Agreement to Hold Property—Estoppel.

Civ. Code, § 172, provides that a husband cannot make a gift of community property or convey the same, without a valuable consideration, except with the wife's consent, and section 1386, subd. 2, and section 1402, declare that on the death of a husband, without issue, community property vests three-fourths in surviving widow, and one-fourth in the husband's surviving father and mother. *Held* that, where a husband conveyed community property to his wife on her parol agreement to convey one-half to his parents on his death, her acceptance of the deed carried with it an acceptance of the trust, and she, having claimed the entire property under the deed, was estopped to deny its validity as to the one-fourth of the property because it was community.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 154; Dec. Dig. § 103.*]

5. Estoppel (§ 113*)—Pleading—Necessity.

Where a husband conveyed community property to his wife on her parol agreement to convey at his death one-half to his parents, and in their suit to enforce such agreement as a constructive trust the allegation in her answer that the property was acquired after the marriage, and was therefore community property, authorized plaintiffs to rely on defendant's estoppel to claim that the deed was valid as a conveyance to her, and invalid as to the condition on which it was executed, without pleading it specially.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 303; Dec. Dig. § 113.*]

6. Appeal and Error (§ 961*)—Discretion of Court—Review—Exclusion of Witness.

Refusal of the trial court to compel the exclusion of plaintiff's son while plaintiff was giving his deposition before a notary, even if permitted by Code Civ. Proc. § 2043, in the court's discretion, will not be held ground for reversing a judgment for plaintiff, in the absence of a showing of an abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3839, 3840; Dec. Dig. § 961.*]

7. Evidence (§ 273*)—Statements as to Title.

In a suit to enforce a constructive trust as to certain land conveyed by a husband to his wife on her oral promise to convey one-half to plaintiffs on the husband's death, statements made by the husband to defendant, in the presence of witnesses, a few weeks after the execution of the deed, reciting the substance of the agreement and her repetition of the promise, were competent against her.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1108–1120; Dec. Dig. § 273;* Trusts, Cent. Dig. § 132.]

8. Witnesses (§ 414*)—Corroboration—Admissions—Defendant.

In a suit to enforce a constructive trust against a widow concerning property conveyed to her by her husband, her admissions, made after her husband's death, concerning the terms of the trust agreement, were competent in corroboration of the other witnesses as to what took place between her and her husband when the conveyance was made to her, and immediately before it.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1287, 1288; Dec. Dig. § 414.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

In Bank. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Suit by Guiseppe Lauricella and wife against Marina Lauricella, to establish and enforce a constructive trust in land. From a judgment for plaintiffs and from an order denying a new trial, defendant appeals. Affirmed.

Geo. C. Sargent (Jos. F. Cavagnaro, of counsel), for appellant. James C. Sims and J. A. Spinetti, for respondents.

SHAW, J. This is an action to establish and enforce an alleged constructive trust in land. Judgment was given for plaintiffs. Defendant moved for a new trial, and the motion was denied. Defendant has appealed from the judgment and from the order denying a new trial.

The facts, as stated in the findings, are as follows: Domenico Lauricella, on July 11, 1906, was the owner of the two parcels of land in question. The plaintiffs were, respectively, his father and mother. The defendant was his wife. He had no children. On the day mentioned, he conveyed said lands, by deed absolute on its face, to his wife, in reliance upon an oral agreement between them that she would hold the same in trust for him during his lifetime, and that upon his death she would hold one half thereof as her own property, and would convey the other half to his father and mother, in equal shares. This conveyance was made in reliance upon her devotion and fidelity to him, as his wife, and in the belief that she would faithfully execute the trust stated, as she agreed to do, and but for her said promise the conveyance would not have been made. There was no other consideration for the conveyance. Domenico died intestate on September 10, 1906, leaving his said father, mother, and wife surviving. Thereupon the father and mother demanded of the wife, Marina, a conveyance of one-half of said lands, which was refused, whereupon they began this action.

[1] The defendant earnestly contends that the evidence does not sustain the findings. It is unnecessary to discuss this objection at length. A perusal of the evidence has satisfied us that the evidence is sufficient.

[2] The main contention in support of the appeal is that the facts found do not show a valid trust under the laws of this state. The argument in this behalf is that, under the provisions of sections 847 and 857 of the Civil Code, no express trust in real estate can be created, having for its object the conveyance of such real estate by the trustee to a third person; that the trust here attempted to be enforced is a trust for the specific and sole purpose of having Marina Lauricella, as trustee, convey one-half of the real estate to the plaintiffs; that this is clearly an express trust to convey, not permitted by said sections of the Code, and, being contrary to the declared policy of the law, must be held void; and that for the same reason it is not enforceable even as a constructive trust, or a trust created by operation of law.

It was held by this court, in Estate of Fair, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70, that an express trust, created by will or other writing, vesting the title to land in trustees, upon the trust that it shall be by them conveyed to third persons named in the instrument, is void under the aforesaid sections of the Code. This decision has been repeatedly followed, and must now be considered as the settled law of the state. Estate of Sanford, 136 Cal. 98, 68 Pac. 494; Estate of Pichoir, 139 Cal. 685, 73 Pac. 606; McCurdy v. Otto, 140 Cal. 51, 73 Pac. 748; Hofsas v. Cummings, 141 Cal. 527, 75 Pac. 110; Estate of Dixon, 143 Cal. 513, 77 Pac. 412. If the trust here asserted came within the principle of these decisions, or was one which fell within the scope of sections 847 and 857, unquestionably we should be compelled to say that it is void.

Defendant concedes that under the previous decisions of this court in Nordholt v. Nordholt, 87 Cal. 552, 26 Pac. 599, 22 Am. St. Rep. 268, Hayne v. Hermann, 97 Cal. 260, 32 Pac. 171, Simons v. Bedell, 122 Cal. 341, 55 Pac. 3, 68 Am. St. Rep. 35, and Cooney v. Glynn, 157 Cal. 587, 108 Pac. 506, the facts found would be sufficient to establish a trust by operation of law, which could be enforced by the father and mother of Domenico, as beneficiaries thereof. She claims, however, that those cases, except Cooney v. Glynn, were decided before the decision in Estate of Fair, supra, had established the proposition that an express trust to convey land was void, that in none of them was the exact point here presented discussed or considered, and that the effect of the decision in the Fair Case is to overthrow the previously established rule, so far as it allowed the enforcement of constructive trusts founded upon a parol agreement to convey to a third person as beneficiary of the donor. This theory, if allowed to prevail, would go much farther, and would destroy a large class of constructive trusts heretofore deemed to be authorized by the principles of equity jurisprudence. In a large number of cases of this class, the grantor is himself the beneficiary, and the trust arises from the refusal of the grantee to perform a parol promise, given and received in the confidence induced by confidential relations, to reconvey to the grantor. Brison v. Brison, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189, Id., 90 Cal. 323, 27 Pac. 186, Adams v. Lambard, 80 Cal. 426, 22 Pac. 180, Alaniz v. Casenave, 91 Cal. 43, 27 Pac. 521, Hays v. Gloster, 88 Cal. 560, 26 Pac. 367, Butler v. Hyland, 89 Cal. 575, 26 Pac. 1108, and Jones v. Jones, 140 Cal. 587, 74 Pac. 143, are instances in which constructive trusts of this character have been recognized and enforced. If the contention of the defendant were sound, the result would be that all these cases as well as those first above cited, must be deemed erroneous. A great number of similar cases could be cited from other jurisdictions. Many of them will be found in the notes in 1 Perry on Trusts, § 181, and 3 Pom. Eq. Jur. §§ 1053, 1054, and 1055. Perry states the doctrine thus: "Courts of equity will not only interfere in cases of fraud to set aside acts done, but they will also, if acts have by fraud been prevented from being done, interfere, and treat the case exactly as if the acts had been done; and this they will do by converting the party who has committed the fraud, and profited by it, into a trustee for the *party in whose favor the act would otherwise have been done.*" That the conduct of the wife in this case, in accepting the deed upon her promise to convey to the plaintiffs, and thereafter refusing to fulfill that promise, constitutes at least constructive fraud sufficient to create the trust is fully shown by the discussion of that subject in Brison v. Brison, 75 Cal. 529, 17 Pac. 689, 7 Am. St. Rep. 189, and in the second appeal of the same case in 90 Cal. 329, 336, 27 Pac. 186.

When we consider the several provisions of the Civil Code on the subject together, as we must in order to arrive at their true meaning, it appears clear that the provisions of sections 847 and 857, which were declared by the decision in the Fair Case to forbid an express trust to convey land to a third person, have no application to trusts created by operation of law. Section 847 declares that "uses and trusts in relation to real property are those only which are specified in this title." Section 852 provides that no valid trust can be treated, except (1) by a writing executed by the trustee; (2) by the conveyance to the trustee; or (3) "by operation of law." The first two of these modes constitute the means whereby all express trusts in land are created. Section 857 deals only with express trusts. The headline states its subject as follows: "For what purposes express trusts may be created." The section first declares that "express trusts may be created for any of the following purposes." It then specifies four classes of express trusts distinguished by the different purposes to be accomplished. This section, in connection with section 847, gave rise to the doctrine of the Fair Case that express trusts to convey are not permitted. But, when the three sections are considered together, it is seen that section 857 refers directly to the first and second clauses of section 852, and not to the third clause, and hence that it is intended to apply to and limit the creation of express trusts in writing, and was not to be applied to trusts created by operation of law. The Fair Case and all the decisions following it were instances of endeavors to enforce express trusts attempted to be created by writing. None of them involves a trust created by operation of law, or purports to declare any rule concerning such trusts. The subject of involuntary trusts, defined as a trust created by operation of law (section 2217), usually called constructive trusts, is again dealt with in section 2224 of the Civil Code. Its provisions show clearly that trusts by operation of law are left untouched by sections 847 and 857, and clauses 1 and 2 of section 852. Section 2224 describes the involuntary trust comprehensively as follows: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person *who would otherwise have had it.*" If the intention had been to prevent involuntary trusts where the violation of an express promise to convey constitutes the foundation—the fraud by which the thing is gained—the last clause should have been written, "for the benefit of the person *from whom it was gained.*" As it stands, it means the person who would have had it, but for the fraud or other wrongful act whereby it was gained. In cases of involuntary trusts, such as that here involved, the fraud consists of the betrayal of confidence by refusing to carry out the parol trust induced by that confidence. Brison v. Brison, 90 Cal. 335, 27 Pac. 186. If the confidence by which the thing was gained had not been betrayed, the person to whom the promise ran, the one who was to receive it ultimately, would be the "person who would otherwise have had it." It necessarily follows that the mere fact that the broken promise, constituting one of the elements whereby an involuntary trust is created, is a promise to convey land, either to the original owner or to a third person, is not a valid objection to the recognition and enforcement of such involuntary trust at the suit of the person who was intended by the donor to be the beneficiary. No conditions, other than those stated in section 2224, are necessary. If those conditions exist, the involuntary trust arises, although the transaction was entirely oral, and consequently void as an express trust under sections 852, 1091, and 1624, and although the means of gaining the thing was the making of an oral or written promise to convey to some other person, or reconvey to the donor.

[3] There is no real force in the argument that the enforcement of an involuntary trust is against public policy, where the effect is to indirectly carry out a trust to convey. The same argument was in early times earnestly made against the recognition of any trust created in parol; it being, as was contended, a violation of the statute of frauds, forbidding the creation of an express trust in land, other than by writing, and the mak-

ing of agreements to convey or conveyances of land, except by writing. The exception in favor of trusts by operation of law is universally held to exclude from the operation of these statutes of fraud all "trusts which arise from fraud, actual or constructive, or, as they are termed, constructive trusts." Brison v. Brison, 75 Cal. 527, 17 Pac. 689, 7 Am. St. Rep. 189; De Mallagh v. De Mallagh, 77 Cal. 128, 19 Pac. 256; Broder v. Conklin, 77 Cal. 337, 19 Pac. 513; Kimball v. Tripp, 136 Cal. 634, 69 Pac. 428. The principle of these decisions is applicable to the case at bar. Express trusts to convey are forbidden for reasons similar to those which led to the statutory prohibition of express trusts created by parol and the conveyance of land, except by writing; that is, to prevent confusion, uncertainty, frauds, and concealments, as well as perjuries, in relation to the disposition of real property. Estate of Fair, 132 Cal. 527, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70. The public policy which led to the inhibition of express trusts to convey is no more stringent or important than that which led to the other statutes mentioned. Neither is tainted with inherent immorality, and neither involves a forbidden use of property. The same exception in favor of involuntary trusts, which are instituted to prevent frauds, should be allowed as in the conveyances of trusts in parol, and for like reasons.

There is a line of cases on which the appellant relies which we think are easily distinguishable from the case at bar. O'Hara's Will, 95 N. Y. 403, 47 Am. Rep. 53, Amherst College v. Ritch, 151 N. Y. 282, 45 N. E. 876, 37 L. R. A. 305, and Edson v. Bartow, 154 N. Y. 215, 48 N. E. 541, are cases of this kind. In these decisions the rule is established that where the agreement of the person against whom the involuntary trust is to be enforced is to convey the property to a charity which the law forbids, or to apply it to uses which the law does not permit, or which are contrary to good morals, a court of equity will not specifically enforce the agreement to do the forbidden thing, nor suffer it to be done, but will declare the conveyance to the trustee void absolutely, and enforce a trust in the property for the benefit of the donor, or his heirs at law. The statute forbidding the creation of express trusts in writing to convey to another the subject of the trust is, as we have stated, based on considerations of convenience in the mere disposition of property, and has no relation to the kind of use it is to be applied to, or to the public policy against certain charities, or to considerations of morality. It is to be classed with the statute of frauds, and, as has been said with respect to the latter, it should not be made the means for the perpetration of a fraud.

[4] The defendant cites Wittfield v. Forster, 124 Cal. 418, 57 Pac. 219, to the effect that, in order to be valid, a declaration of trust must be reasonably certain as to the purposes of the trust, and suggests that this trust is uncertain, because nothing appears in regard to what was to be done with the property in Domenico's lifetime, referring also to section 2221 of the Civil Code. This section and the case cited relate exclusively to the requirements as to express trusts created by writing and otherwise valid under section 857. They have no application to involuntary trusts. The latter are governed by the well-known rule that they must be established by clear and convincing evidence.

[5] The court found that one of the parcels of land was acquired by Domenico during his marriage with the defendant, and that it was their community property. Section 172 of the Civil Code provides that the husband cannot make a gift of the community property, or convey the same without a valuable consideration, unless the wife, in writing, consents thereto. The defendant claims that this prevents the creation of a constructive trust through or by means of a voluntary deed of the community property by the husband to the wife. In this case this puts the wife in the position of claiming a quarter interest in this parcel under the husband's deed, because said deed is void. The husband having died childless, leaving his father and mother surviving, if this deed is void, the law would vest in the wife three-fourths of this parcel, one-half in virtue of her community right, and one-fourth by descent as of separate estate, while the remaining fourth would go to the father and mother. Civ. Code, § 1402; section 1386, subd. 2. She can claim the last-mentioned fourth only under this deed, and, in view of the conclusions hereinbefore stated, only upon the ground that the deed is ineffectual to convey anything. If she accepts the grant at all, she must take it with the burden and upon the trust, by means of which she received it. Her claim of the entire estate under the deed constitutes an effectual estoppel to prevent her from asserting in the same breath that the deed is invalid as to one-fourth. White v. Stevenson, 144 Cal. 112, 77 Pac. 828.

She is estopped by her conduct from claiming the other one-fourth interest as well. Although her husband had not power to make a gift of any part of the community property without her written consent, yet he had the power, without her consent, to make a will giving one-half of it to his father and mother. Civ. Code, § 1402. The facts are that Domenico was in poor health, and was intending to depart for Italy in hope of recovery, and he desired to make some provision for his father and mother, in case he did not return. He could at that time have made a will giving them one-half of this parcel. Instead of making the provision by that method, he chose to rely upon his wife, and transferred it to her upon her promise to carry out his wishes by transferring it to them after his death. To this, with presumed knowledge of his power to do it by will, she agreed. It does not lie in her mouth to say now that if she had then refused to consent he would not have made the same provision by will. And having then, by her consent, prevented the making of the disposition by way of devise, she is clearly estopped, now when death has ended his powers, to say that the arrangement made with her consent shall not be carried out, because it was not within his power then to carry it out in that mode, without her consent in writing.

[6] Her allegation in her answer that it was acquired after the marriage, and therefore community property, authorizes the plaintiffs to rely on the estoppel in regard to that claim, without pleading it specially. Code Civ. Proc. § 462; White v. Stevenson, supra; Fox v. Tay, 89 Cal. 344, 24 Pac. 855, 26 Pac. 897, 23 Am. St. Rep. 474; Moore v. Copp, 119 Cal. 432, 51 Pac. 630.

The evidence is sufficient to sustain the finding that the deed was not made to hinder, delay, or defraud creditors.

Some objections to procedure are made by defendant's counsel, which we will briefly consider.

[7] When a witness is testifying, the court may, in its discretion, exclude any or all other witnesses, except in certain cases. Code Civ. Proc. § 2043. For the purposes of this case, we may assume that the court may direct the officer who is taking depositions to exclude other persons, while a witness is testifying before him. But, if so, an abuse of discretion must be shown, and substantial prejudice must appear probable, to justify an appellate court in reversing a judgment on the merits, because of a ruling refusing to direct such exclusion. The court below refused to compel the exclusion of the son of the plaintiff Guiseppe Lauricella, while Guiseppe was giving his deposition before a notary, prior to the trial. The record does not show an abuse of discretion in making the ruling.

[8] The statements made by Domenico, the grantor, to the defendant, in the presence of Joseph Lauricella and Grazia Scafida, respectively, a few weeks after the execution of the deed, stating in substance the terms of the original promise on which it was made to her, and her repetition of the promise, were competent as evidence against her. They were evidently referring to what had occurred between them as an inducement for the execution of the deed, and they were not then making a new agreement. See Cooney v. Glynn, supra. The admissions of the defendant, made after the death of her husband, were to the same effect, and were competent as evidence in corroboration of the other witnesses as to what took place between her and her husband when the deed was made, and immediately before it.

These comprise all the points that we deem it necessary to mention. We find no error in the rulings and decision of the court below.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.; LORIGAN, J.

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161 Cal. 71

In re BAZZURO'S ESTATE.

BAZZURO v. CROCE.

(S. F. 5,837.)

(Supreme Court of California. Oct. 4, 1911.)

1. CONSTITUTIONAL LAW (§ 93*) — VESTED RIGHTS.

The intestate, who died in 1879, held a mortgage which the first administrator foreclosed, buying in the lot at the sale and taking the title in himself as administrator, so as to raise a trust in favor of the heirs. St. 1893, p. 212, amending Code Civ. Proc. §§ 1536, 1545, provided that the real estate of a decedent might be sold, if for the best interest of the heirs; and section 1523 provides for the sale of personalty when for the best interests of the estate. *Held*, as the property of the heirs in this lot was originally personalty, subject to sale when for the best interest of the estate, and the conversion of the property to realty did not relieve it of that burden, a sale under the act of 1893 did not deprive the heirs of any vested interest in the property.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 93.*]

2. JUDGMENT (§ 725*) — CONCLUSIVENESS — MATTERS CONCLUDED.

Under Code Civ. Proc. § 1452, providing that after the expiration of the time for presentation of claims the administrator cannot recover possession of real estate from the heir, unless such property is necessary to pay debts, expenses, or legacies, a judgment in favor of an heir in possession, finding that the administrator should not recover possession for the payment of expenses or debts, is not conclusive against the administrator's right to sell for the payment of expenses; the judgment not being a finding that a sale was unnecessary; and the statute not making the recovery of possession a prerequisite to the sale.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 725.*]

3. EXECUTORS AND ADMINISTRATORS (§ 349*)—RES JUDICATA—MATTERS CONCLUDED—ORDER FOR SALE OF LAND TO PAY DEBTS.

The question whether a former judgment, refusing to permit an administrator to recover possession of land from an heir, that it might be sold to pay debts and expenses of administration, was conclusive against the right of the administrator to sell to pay expenses, being a matter which could be raised on the application for leave to sell, is concluded by the order for the sale, where no appeal is taken, and cannot be litigated on the hearing of the return of sale.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 349.*]

4. JUDICIAL SALES (§ 31*)—CONFIRMATION—DISCRETION.

The confirmation of a judicial sale rests in the sound discretion of the trial court, with a view to the best interest of those interested in the proceeds.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 59–67; Dec. Dig. § 31.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. APPEAL AND ERROR (§ 983*)—REVIEW—DISCRETION OF LOWER COURT—POWER TO REVIEW—ABUSE.

The confirmation of a judicial sale resting in the discretion of the trial court, its action is final on appeal, unless an abuse appears.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3880; Dec. Dig. § 983.*]

6. EXECUTORS AND ADMINISTRATORS (§ 375*)—ADMINISTRATION SALE OF LAND—CONFIRMATION.

Where there was a cloud upon the real property of a decedent, which might have been removed by suit, and the property, when sold to pay expenses of administration brought less than one-sixth of its real value, the confirmation of the sale, without an attempt to clear the title, was an abuse of discretion.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1529–1538; Dec. Dig. § 375.*]

7. EXECUTORS AND ADMINISTRATORS (§ 376*)—ADMINISTRATION SALE OF LAND—CONFIRMATION—WHO MAY OBJECT.

An infant interested in the property of a decedent may object to the confirmation of an administration sale of the real property upon the ground of inadequacy of price, even though the infant's claim of title to such property causes the low price.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1539–1542; Dec. Dig. § 376.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

In the matter of the estate of Francesco Bazzuro, the administrator, in pursuance of a previous order, sold certain real estate, and, from an order confirming the sale, Anna Rose Mary Bazzuro appeals. Reversed.

D. Freidenrich, for appellant. J. J. Mazza and W. E. White, for respondent.

SHAW, J. This is an appeal from an order confirming a sale of real estate, made by the administrator of the estate of the decedent in pursuance of a previous order of sale.

The appellant is a niece of the decedent, and is entitled to a share of his estate. She opposed the confirmation on the ground that the real estate, a lot in San Francisco, was not subject to sale by the administrator, and that the price for which it was sold was grossly inadequate.

[1] One ground on which the sale was asked and ordered was that it was for the best interests of the heirs of the decedent that such sale should be made, because of the fact that some of them lived in Italy and others in San Francisco. The fact that it was for the advantage and best interests of the heirs that a sale of real property should be had was made a ground of sale, in 1893, by an amendment of sections 1536 and 1545 of the Code of Civil Procedure (Stats. 1893, p. 212). Francesco Bazzuro died intestate in 1879. In 1893 the title to the real and personal property of which he died seised had already vested in his heirs. At the time it so vested, the probate court had no power in administration proceedings to order a sale of real property owned by the deceased at his death, for this cause: The amendment of 1893 was prospective only in effect, and it has been held that it does not authorize a sale for this cause of real estate, or interests therein, held by the decedent at his death, where such death occurred prior to the enactment of the amendment. Estate of Freud, 131 Cal. 667, 63 Pac. 1080, 82 Am. St. Rep. 407; Estate of Packer, 125 Cal. 396, 58 Pac. 59, 73 Am. St. Rep. 58; Brenham v. Story, 39 Cal. 179. It is argued from these decisions that the sale, so far as it was based on this ground, was a nullity. The basis and reason for these decisions was that the title had vested in the heirs before the law was enacted, and that, because of constitutional limitations to legislative power over vested rights, such title could not be impaired or burdened by subsequent legislation imposing burdens not before existing. At the time of his death, Bazzuro had no interest in this lot. He held a note and mortgage thereon, executed by one Castagnini. This mortgage was foreclosed by the first administrator of his estate (his brother Giuseppe, since dead), who bought the lot at the foreclosure sale and obtained thereon a deed therefor, conveying it to him as such administrator. The record title still remains in that condition. Hence the title to the lot did not vest in the heirs at the death of the decedent, nor at all. It vested in Giuseppe, the administrator. Christy v. Fisher, 58 Cal. 256; Bonds v. Hickman, 32 Cal. 202. Such interest as the heirs have in it vested in them at the time the deed to Giuseppe was made, and it is in the nature of a trust for their benefit, growing out of the fact that the personal property of the estate was used in payment for it. Civ. Code, § 853. The title to this interest originally vested in them at the death of the decedent as personal property. It was then subject to sale as personal assets, under section 1523, Code of Civil Procedure, if such sale was for the best interests of the estate, whether necessary to pay debts or not. The subsequent proceedings of the administrator, whereby it was converted into real estate and title vested in him, did not relieve it of this burden, and the amendment of 1893, imposing the same burden, did not impair such interest as the heirs have in the lot. So far as that kind of property is concerned, the amendment did not impair vested rights.

[2, 3] Upon the hearing of the return of sale, it was shown that in 1907 the present administrator brought suit against the appellant and her mother, Mary Bazzuro, to recover possession of this lot, on the ground that the possession of the lot by the administrator and the sale thereof were necessary

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to pay the expenses of administration. The court found that the debts had all been paid by the former administrator, and that possession of the lot by the administrator was not necessary for the payment of the expenses of administration, or for distribution. Upon that finding, it concluded and adjudged that said plaintiff should not recover possession, and that he take nothing by the suit. It is claimed that this failure to obtain possession divests the administrator and the court of the power to sell. This claim is based on section 1452, Code of Civil Procedure, providing that after the expiration of the time for presentation of claims, the administrator cannot recover possession of the heir, unless he proves that such property or possession is necessary to pay debts, expenses, or legacies, or for distribution. There are several answers to this claim. First, the judgment does not declare that a sale is unnecessary, but only that possession by the administrator is unnecessary, for the payment of debts and expenses. Second, there is nothing in section 1452, properly construed, that makes such possession a necessary prerequisite to an administrator's sale. It does not purport to limit or affect the power of the court to order a sale. Third, these questions, granting the contention, were properly justiciable upon the hearing and making of the order of sale, and they were then in effect adjudicated. That order was appealable. No appeal therefrom having been taken, it has become final. The questions cannot be reopened and again litigated upon the hearing of the return of sale.

[4] The present administrator has received personal assets of the estate of the value of $262.50, and there are no other assets, except this lot. The expense of administration is estimated at $732.50. The lot is worth $2,000. It was sold at the administrator's sale for $300. The return of sale states that, in view of the fact that the administrator could not execute a deed conveying perfect title to the lot, this sum was not disproportionate to its value. All these facts were established or admitted upon the hearing of the objections to the confirmation of the sale.

[5, 6] The appellant claims that, under these circumstances, it was the imperative duty of the court to refuse confirmation, and direct a postponement of the sale until the title of the estate to the lot should be perfected or defeated in a suit for that purpose. Upon general principles, the court, in confirming a sale of property, should exercise a sound discretion, with a view to the best interests of those who are or may be interested in the proceeds. "According to the principles of a court of chancery, a trust or power to sell real estate should not be exercised while there is a cloud over the title affecting its value, or the land is held adversely." Estate of Ricaud, 57 Cal. 421; 2 Perry on Trusts (5th Ed.) § 602ee. It being a matter of discretion, the action of the trial court must stand on appeal, unless an abuse of that discretion appears. We think such abuse does appear from the facts shown in this case. The property sold for less than one-sixth of its real value, because of defects in the title, which, so far as appears, could have been removed by a suit for that purpose. If the title were not in doubt, the presumption is that it would sell for the actual value. There was a claim of adverse possession, it is true, but the nature of the claim and the trust relations of Giuseppe Bazzuro and his heirs who make the claim were such that doubt is cast upon it. Some effort at least should be made to establish the title, before allowing the property to go at such a sacrifice. The court should have directed suit to that end, and, in the meantime, refused confirmation.

[7] The appellant is a successor to Rosa Bazzuro, mother and sole heir of Francesco Bazzuro. As such she is interested in having the lot sold for its full value, if it is sold at all, since in that event she will receive a share in the surplus over expenses of administration. If the present sale is completed, there will be no surplus, and she will receive nothing. The fact that her claim of title is the cause of the low bid does not estop her from objecting to its confirmation. She is a minor. There is nothing indicating that her claim of title is made in bad faith, even if such bad faith can be imputed to her during minority. She has a legal right to assert that claim. If it is successful, she will secure her interest in the lot. If it is unfounded, she will then have her share of the proceeds of a sale at full value after the title is adjudicated. Justice to all parties claiming interests requires that the title and the right of the administrator to sell be determined before a sale is made. In that event, if the administrator succeeds, the other heirs may obtain something; whereas, if the present sale were confirmed, their rights would be sacrificed, in order to allow the buyer to speculate on his chances of obtaining possession and title by a subsequent action.

The order is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

161 Cal. 93

NOTTHOFF v. LOS ANGELES GAS & ELECTRIC CO. (L. A. 2.381.)

(Supreme Court of California. Oct. 5, 1911.)

1. Master and Servant (§ 221*)—Assumption of Risk.

The rule that a servant who knows of the unsafe condition of the premises on which he is working assumes the risks incident to the employment is subject to the exception that, where a servant notifies the master of a special risk, and objects to continuing the work under existing conditions, and is induced to continue by a promise to remove the danger within a reasonable time, he does not assume the risk during such time.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 638–647; Dec. Dig. § 221.*]

2. MASTER AND SERVANT (§ 260*)—ASSUMPTION OF RISK—PLEADINGS.

A complaint, in an action for injuries to a servant, which alleges that prior to the accident the servant notified the master of a special risk due to an exposed hole, that the master promised to cover the same and that plaintiff, relying on the promise, continued in the employment, shows that the servant did not assume the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 844–848; Dec. Dig. § 260.*]

3. MASTER AND SERVANT (§ 221*)—ASSUMPTION OF RISK—EVIDENCE.

A servant, to invoke the benefit of the rule that a servant who continues in the employment after the master has promised to remove a danger complained of does not assume the risk, must show a complaint and increased risk, and that the master promised to remove the danger, and that the promise induced the servant to remain; but he need not show that he stated, in exact words, that he apprehended danger to himself by reason of defects, or that he stated that he would leave the service unless the defects were remedied.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 638–647; Dec. Dig. § 221.*]

4. MASTER AND SERVANT (§ 288*)—ASSUMPTION OF RISK—QUESTION FOR JURY.

Whether a servant complaining of a dangerous condition complained on his own account, as well as on behalf of men working under him, so that by continuing in the employment on the promise of the master to remove the danger he did not assume the risk, *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 288.*]

5. MASTER AND SERVANT (§ 288*)—ASSUMPTION OF RISK—QUESTIONS FOR COURT AND JURY.

Whether, in complaining of a dangerous condition, a servant is making it in apprehension of danger to himself is a question of intent, determined from the language and conduct of the parties, construed in the light of the facts, and where they show conclusively that the complaint was made without apprehension of danger to himself the question of assumption of risk is for the court; but otherwise the question is for the jury.

[Ed. Note.—For other cases, see Master and Dec. Dig. § 288.*]

6. TRIAL (§ 142*)—NONSUIT—WHEN AUTHORIZED.

Where different inferences may be drawn from the evidence, it is error to grant a nonsuit.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 337; Dec. Dig. § 142.*]

7. MASTER AND SERVANT (§ 264*)—ASSUMPTION OF RISK—EVIDENCE.

Where a servant suing for a personal injury alleged that he complained of dangers, and that he continued in the employment in reliance of the promise of the master to remove them, he could show that he continued in the employment, relying on the promise of the master's superintendent to remove the dangers.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 264.*]

8. MASTER AND SERVANT (§ 233*)—CONTRIBUTORY NEGLIGENCE.

Where the way adopted by a servant was the customary way taken by the men, and the only convenient and practical way, because of temporary physical conditions, the servant was not guilty of contributory negligence in not taking a safer way.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 681, 684–686, 701–742; Dec. Dig. § 233.*]

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Henry Notthoff against the Los Angeles Gas & Electric Company. From a judgment of nonsuit, plaintiff appeals. Reversed.

Smith, Miller & Phelps, for appellant. Gibson, Trask, Dunn & Crutcher, Le Roy M. Edwards, Wm. A. Chenery, and N. S. Sterry, for respondent.

LORIGAN, J. This is an action to recover damages for personal injuries.

The trial court granted a nonsuit at the close of the evidence of plaintiff, and from the judgment entered thereon and an order denying his motion for a new trial, plaintiff appealed.

This appeal was first heard before the District Court of Appeal for the Second appellate district, where the judgment was affirmed, and on application therefor a further hearing in this court was granted.

The principal question presented on the appeal is relative to the correctness of the ruling of the trial court, granting the nonsuit.

Plaintiff was an experienced engineer, 44 years of age, and at the time of the accident, which occurred on July 5, 1907, was and for some time prior thereto had been the chief engineer in charge of the electric station of defendant. Connected with the engine room at this station was a pump room constructed below the level of the ground, the floor of which room inclined to the corner thereof, where a cement pit, known as a sump hole, was located. There were other sump holes in the pump room, but the one to which the evidence in the case was particularly directed was the one near the corner of the pump room. The purpose of this pit was to receive the waste or overflow of hot water which escaped from the water heaters located in this room and used in connection with the boilers. At times the quantity and temperature of the water which escaped from the heaters was such that it filled this sump hole with boiling hot water. A small pump was connected with this pit, which ordinarily afforded a means of emptying it by pumping the water out. On the day of the accident, plaintiff was engaged in the installation of a thermometer in the suction pump which forced the water from the heaters to the boilers. In doing this work, it became necessary to temporarily shut down the heaters, three in number. During the progress of the work and before it was completed, a large quantity of hot water escaped from the heaters, which, owing to the fact that the pump connected with the sump hole was necessarily stopped, filled the hole and covered the floor. Upon the thermometer being installed, two of the heaters were turned on and the suction pump started. The sump hole was located between the south wall and the third heater, and owing to the fact that the floor was covered with hot water it was necessary to walk upon bricks which had been laid upon the edge of the sump hole in order to reach the valve, the opening of which was necessary to start the third heater. Plaintiff directed one of the men under him to turn on the third heater. The man reported to plaintiff that he was unable to do so, owing to the fact that the wrench given him for the purpose was too small; whereupon plaintiff himself took a wrench and turned the valve which started the heater. In returning, plaintiff stepped upon the loose bricks laid along the edge of the sump hole and in some way slipped and fell into the pit, which at the time was filled with hot water, whereby he received the injuries which resulted in the damage which he claims to have sustained. There was other machinery requiring men to go around this sump hole. The corner was dark; there were no artificial lights, and the windows were located in such a position that light would not fall from them in the direction of the sump hole; and at the time of the accident the plaintiff and the other employés were hurrying as much as possible to do the work in which they were engaged, as the time therefor was very limited. The evidence shows that at the time of the accident, and for a long time prior thereto, plaintiff was and had been familiar with the existence and location of this pit. He was present when it was constructed; he was aware of its unprotected condition, and knew that it was uncovered and filled with hot water.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Plaintiff based his right to recover in this action on the ground, as alleged in his complaint, that prior to the accident he notified the defendant of the special risk due to the unprotected condition of the sump hole, "and that the defendant, upon being informed by the plaintiff of the exposed condition of said sump hole, promised plaintiff to cover and repair the same, and that the plaintiff, relying upon and because of said promise, continued said employment."

[1] The general rule is that, where an employé has full knowledge of the unsafe condition of the premises upon which he is working, he is deemed to assume the special risk incident to the employment under such conditions. De Forest v. Jewett, 88 N. Y. 264; Week v. Fremont Mill Co., 3 Wash. St. 629, 29 Pac. 215; Bush v. Wood, 8 Cal. App. 647, 97 Pac. 709; St. Louis Cordage Co. v. Miller, 126 Fed. 495, 61 C. C. A. 477, 63 L. R. A. 551. Upon this general rule is ingrafted a well-established exception that, where "an employé notifies the master of a special risk, and objects to continuing the work under the existing conditions, and is induced to continue such work by a promise to remove the danger within a reasonable time, then for such time the employé is not presumed to assume such risk." Beach on Contributory Negligence, § 372; Hough v. Texas & Pac. R. R. Co., 100 U. S. 213, 25 L. Ed. 612; Anderson v. Seropian, 147 Cal. 201, 81 Pac. 521.

[2] The allegation of the complaint above referred to brought the case of the plaintiff within the exception to the general rule, and the question presented on this appeal is, Was the evidence produced by plaintiff at the close of his case sufficient to sustain it?

In support of this allegation, plaintiff testified as follows: "I informed him [the superintendent] of the exposed condition of this sump hole, and all others, on several occasions. I said some of the men came to me and told me that those holes were dangerous and ought to be covered up; and I went to my boss, the superintendent, Miller, and spoke about it. The Court: I thought you were telling what you said to him? A. I told Mr. Miller some of the men were complaining of the dangerous condition of those holes, and if they demanded them to be covered up, for the safety of those men, I would be in favor of having them covered up at once. The Court: What did you say to Mr. Miller, other than what you have already stated, if anything? A. I believe I said I would be highly in favor if these holes would be made permanently safe, so further complaint would not be received. Q. Do you think that is all you said? A. My time being limited, I believe that was all I said. Mr. Miller said he would take the matter up at once, and have them covered up permanently with material that would not burn, so that they would not have to be disturbed again. This was about a week before the accident happened. I had a conversation prior to that time about the matter—maybe two or three weeks—and told him practically the same thing. Q. That is, when you say 'practically the same,' you told him that some of the men told you they thought the holes ought to be covered up? A. Yes, sir. Q. And that you told them you would speak to Mr. Miller about it; did you tell him that? A. Yes, sir. Those two conversations were the only conversations I ever had with him on that point. Mr. Miller said to me that he would take the matter up at once, and have those holes covered up with material that would be allowed to be left there. Q. Did you say anything at that time about being afraid yourself? A. No, sir; I did not. My business did not bring me in close vicinity of those holes much. Mr. Miller came to me, and told me that the president of the company had been down there on inspection, and discovered all these holes covered up with wooden planks. He told Mr. Miller those planks had to come out at once, or some one would lose his job. Mr. Miller came to me, and told me I would have to take those planks off of those holes; uncover the holes. I asked Mr. Miller to give me authority to leave those planks there, because the men were everlastingly complaining. Q. Were you afraid of falling in? A. Yes, sir. Mr. Miller said he had no authority to, and he could not give permission to leave those planks over the holes. Then I gave orders to three men, being close by me, to go down below and uncover those holes, taking those planks out and carrying them out in the yard. I told him it was very dangerous; that if they would not allow us to keep the holes covered up with wooden planks to give us some material to cover them up with that would not burn. Mr. Miller answered that he would take the matter up at once, and have the holes fixed, so that there would be no further trouble on that point. He said he would take the matter up at once, but he did not have them fixed up until I got hurt. I knew the one I fell into had not been fixed. Q. You had been by there; you passed that sump hole probably every day? A. No, sir; never before in my life. Q. Was that [the occasion of the injury] the first time you had ever passed it? A. Yes, sir." The foregoing presents the evidence upon which the trial court granted the nonsuit, holding, as did the District Court of Appeal, that it conclusively showed that the complaint of plaintiff to the defendant concerning the dangerous condition of the sump holes was not made in his own behalf, but solely on account of the men employed under him, and hence did not bring him within the exception to the general rule, which only applies in favor of an employé who himself complains of the danger, or in favor of those in whose behalf the complaint is made.

[3] There can be no question but, under the great weight of authority, in order that an employé may invoke the benefit of the exception to the general rule heretofore stated, there must not only be a complaint on the part of the employé himself of the defects or dangers arising in the employment and increasing the risk of continuing therein, but there must be a promise, either express or implied, made to him by his employer, that he will obviate the defect or remove the danger, and which promise induced the employé to remain, and upon which he acted. Bailey on Master's Liability for Injury to Servants, p. 212. So that, if in an attempt to establish a case within the exception the evidence clearly fails to show that a complaint was made by the employé on his own behalf, and a promise made to him to remove the defect, or if from such evidence as is presented in the case no reasonable inference could be drawn by a jury that a complaint on his own behalf was made, it is proper to refuse to submit the case to them, and a nonsuit should be granted.

In the matter at bar, there is no question but that the evidence showed a promise to obviate the danger arising from the uncovered condition of the sump holes; the sole question being as to whether the evidence was sufficient to show that the complaints respecting their dangerous condition were made by plaintiff on his own behalf, as well as on behalf of the men working under him; or, if the evidence does not show that he made explicit complaint on his own account, were all the facts and circumstances surrounding and accompanying the complaints which were made sufficient to warrant an inference on the part of the jury that he was complaining, not only on behalf of the men, but on his own behalf as well, and was it so understood by defendant?

[4] The trial court in granting the nonsuit, and the District Court of Appeal in affirming the judgment thereon, were of the opinion that the evidence not only did not directly establish the fact that plaintiff was complaining of danger in his own behalf, but that no reasonable inference could be drawn from any of the evidence in the case that he was. In this respect, upon a careful consideration by us of the evidence, we are of the opinion that both the superior court and the District Court of Appeal were in error in their view respecting the effect of it, at least to the extent of holding that it was insufficient to warrant any reasonable inference on the part of a jury that any complaint of the dangerous condition of the sump holes was so intended to be presented by plaintiff on his own account, as well as on behalf of the men.

In Labatt on Master and Servant, it is said: "When complaining of defective instrumentalities or machinery, it is not necessary that the servant shall state in exact words that he apprehends danger to himself by reason of the defects, nor need there be a formal notification that he will leave the service, unless the defects be remedied or repaired. It is sufficient if, from the circumstances of the case, it can be fairly inferred that the servant is complaining on his own account, and that he was induced to continue in the service by reason of the promise." In Rothenberger v. Northwestern Con. Milling Co., 57 Minn. 461, 59 N. W. 531, the court uses this language: "It is true that the plaintiff, when complaining of the gearing into which his hand was afterward drawn, did not notify defendants' head millwright or foreman that, unless coverings were put upon the exposed and dangerous machinery, he should quit defendants' employ; nor did he say in so many words that he apprehended danger to himself; but positive assertions and statements of this character are not absolutely necessary. According to the best-considered cases, the real question to be determined is whether, under the circumstances as they appear in each case, the master had a right to believe, and did believe, that the servant intended to waive his objection to the defect of which he has complained. This is a question of fact, not of law, and consequently for the jury, at least if not entirely free from doubt."

Examining the evidence under these rules, there was, by reason of the exposed condition of the sump holes, a present continuing danger of injury to any of the employés of defendant who had occasion to work in their vicinity, including the plaintiff. It may be conceded that there was greater danger therefrom to be apprehended by the employés working under plaintiff than by plaintiff himself, whose duties, as he testified, did not call him to the vicinity of this sump hole much, though he apprehended therefrom danger to himself. Under these circumstances, he made complaint to the superintendent of defendant of this dangerous condition, which the superintendent fully recognized as existing, and promised to remedy; a dangerous condition which he must be presumed to have known involved peril to all—the plaintiff, as well as the men under him—whose duties called or might call them to work about these sump holes. On the occasions when plaintiff spoke to the superintendent upon the subject, it is true that he said the men were complaining about the danger, and that he did not directly refer to any apprehension of danger on his own account. But the fact that in complaining of the danger he stated that the men were making complaints warranted no conclusive inference that he was complaining solely on account of the men, and not on his own account as well. It was his duty to the company and to the men who were under him, when danger existed, to call attention to it, with a view to its removal; and it would only be natural, at least the jury might so infer, that in making complaint of such a danger common to all whose duties required them to work about the sump holes—himself, as well as the men—that he should refer particularly to the complaints made by the men, as representing the greater number exposed to the danger, and whose safety required its removal, rather than to any danger apprehended by himself. His exposure to danger, while it existed, was not as great as that to which the men were exposed. Their greater danger would be the prominent matter in his mind in making the complaints, and in doing so he would naturally refer to these complaints as explanatory of the reason why he was endeavoring to have the danger removed. So that, taking into consideration the fact that in making his complaint to the superintendent he referred only to complaints of the danger which the men were making, there is nothing in that circumstance which warranted a conclusive inference that the plaintiff intended to convey the impression that he did not desire the danger to be removed on his own account, but solely on behalf of the men; there was nothing in the language used by plaintiff on the different occasions when he made the complaints to the superintendent which necessarily indicated that the sole reason why he made them was because the men were apprehensive of danger, but that as far as he was concerned, he was willing to assume the risk.

Now, as we say, while the mere circumstance that the plaintiff ostensibly complained of the danger in behalf of the men, taken into consideration with the other circumstances attending the making of the complaints to which we have referred, warranted no conclusive inference that he was not complaining also on his own account, and hence would not justify an order granting a nonsuit, it is quite apparent, we think, when all the facts and circumstances in evidence are considered, that the question whether the plaintiff intended also to complain of the danger in his own behalf, and whether defendant so understood it, were questions solely for the determination of the jury. These facts and circumstances, in addition to those already stated, are not many, but they are important.

The testimony of plaintiff is not very clear as to the sequence of events; that is, when the conversations between him and the superintendent occurred, where reference was made of the complaints by the men. It appears that the sump holes had been covered with wooden planks, and were so covered at the time when the president, on an inspection of the premises, peremptorily ordered the covers removed, and the superintendent instructed plaintiff to do so. Notwithstanding this order, plaintiff endeavored to prevail on the superintendent to have them left there, which was refused. In regard to this matter, plaintiff testified: "I told him it was very dangerous; that if they would not allow us to keep the holes covered up with wooden planks to give us some material to cover them up with that would not burn up." It must have been after this conversation that the plaintiff spoke to the superintendent of the continuing danger, and mentioned the complaints of the men, because it could only be after the wooden covers were removed that there would be any occasion for complaint, yet at the very time that the order for the removal of the covers was given, and after an endeavor to persuade the superintendent to allow them to remain, and when no occasion had yet arisen for any complaint by the men, we find the plaintiff declaring to the superintendent that it was "very dangerous" to leave these holes uncovered, and if they would not "allow us" to keep the holes covered with the wooden planks to "give us" some material to cover them up with that would not burn. Whatever may be said about inferences to be deduced from the statement of plaintiff, relative to the men complaining of the dangerous condition of the sump holes, which must obviously have been made after the planks were removed, certainly the statement made by the plaintiff immediately above referred to, and at the time when the planks were removed, or about to be removed, was sufficient to require the determination of whether the use of the expression "us" embraced a complaint respecting the dangerous position in behalf of plaintiff, as well as that of the men under him.

[5, 6] Other suggestions in this same line might be made under the evidence, but it is unnecessary to do so, as what we have said sufficiently indicates that the condition of the evidence in the case was not such that the court, as matter of law, could declare that no other conclusion or inference could be drawn from it than that the plaintiff had not complained of the danger on his own account, but solely on account of the men under him, and that, as far as he was concerned, he assumed the risk of the increased danger in the employment. On the contrary, the condition of the evidence was such that, whether his complaint was solely on behalf of the men, or included as well himself, was a question of fact for the jury. Whether in complaining of a dangerous condition the employé is making it in an apprehension of danger to himself or not is always a question of intention, and, as in cases of this character the rule is well settled that in making such complaint no formal notification or explicit statement of the apprehension of danger to the employé himself is necessary, the intention with which he complains is to be determined from the language and conduct of the parties to the complaint, construed in the light of the circumstances under which the complaint is made. If these show conclusively that the complaint was made by the employé without apprehension of danger to himself, a question of law for the court is presented. If, upon the other hand, under the evidence, different conclusions on the subject or different inferences might be drawn, a question of fact is presented to be submitted to the jury. In this case, as there was room for different inferences to be drawn under the evidence, it was error for the trial court to take the case from the jury and grant a nonsuit.

[7] Complaint is made by appellant of many rulings of the court as to the admission of evidence. These rulings were correct, save that the court should have allowed the appellant to show, as he endeavored to do, that he continued in the employment of defendant, relying on the promises of the superintendent to remove the danger from the exposed sump holes by having them covered up. This was competent evidence; in fact, it was necessary, in addition to proof of complaint of their condition by plaintiff and promise by defendant to remove the danger, for him to also prove reliance on the promise to remove it, and that he continued in the employment in reliance on it. It is only proper to say in this connection that the rulings of the trial court in rejecting proof of these matters were based on the view that the evidence then before the court did not show any complaint made by plaintiff on his own behalf; and hence, in the then aspect of the case, this evidence was immaterial.

[8] On behalf of respondent, it is urged that, even if there was sufficient evidence in the case from which a jury might be warranted in finding that the plaintiff was complaining of the dangerous condition of the sump holes on his own account, and hence the nonsuit was not warranted on the assumption by the court that there was no proof of this fact, still the evidence conclusively showed that the plaintiff was guilty of contributory negligence in going along the edge of the sump hole to adjust the valve on the heater near it. The claim is that there were two safer and more convenient ways to approach the valve; one by going under the heater; the other by going around the northern end of the heater, and doing so. It may be conceded that under ordinary conditions this would be true; but the evidence in this case shows that going around the sump hole was one of the ways and the customary way taken by the men to reach the valve, and at the time of the accident was the only convenient and practical way which could be taken, because the floor around and under the heater to which the valve was attached was covered with hot water.

The judgment and order appealed from are reversed.

We concur: HENSHAW, J.; MELVIN, J.; ANGELLOTTI, J.; SLOSS, J.; SHAW, J.

(160 Cal. 671)

COATS v. COATS. (S. F. 5,415.)

(Supreme Court of California. Sept. 7, 1911. On Petition for Rehearing, Oct. 7, 1911.)

1. MARRIAGE (§ 63*) — ANNULMENT — RIGHTS TO PROPERTY ACQUIRED DURING MARRIAGE.

On annulment of a marriage for physical incapacity of the woman, she, having entered into the marriage in good faith, believing she was physically capable, and continued in that belief, is entitled to such a division of the property accumulated by the efforts of both parties during the marriage as she would have been entitled to in community property, had the marriage not been subject to annulment, and been dissolved by divorce or death of the husband, so that it is immaterial that the bulk of it was acquired when her services in its accumulation were of no monetary value.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 138; Dec. Dig. § 63.*]

2. APPEAL AND ERROR (§ 864*) — REVIEW — FINDINGS OF FACT.

A finding of fact is not open to attack on appeal on the judgment roll alone.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1766, 3439; Dec. Dig. § 864.*]

3. JUDGMENT (§ 736*)—RES JUDICATA.

No question of property rights having been presented by the pleadings in a suit to annul a marriage, the judgment of annulment therein, making or attempting to make no disposition of property, is not a bar to an action for determination of the rights to and division of the property accumulated by the parties during the marriage.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1264, 1265; Dec. Dig. § 736.*]

4. APPEAL AND ERROR (§ 909*)—ABSENCE OF FINDINGS—PRESUMPTION.

Though there is no finding on an issue of waiver raised by the answer, yet, the judgment for plaintiff being supported by the findings made, it must be presumed, in the absence of a contrary showing in the record, that there was no evidence which would have sustained a finding for defendant on such issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3675; Dec. Dig. § 909.*]

On Rehearing.

5. MARRIAGE (§ 63*)—ANNULMENT—DIVISION OF PROPERTY ACQUIRED DURING MARRIAGE.

The amount of the property, accumulated by the efforts of the parties during continuance of their marriage, which is to be allotted to the woman on annulment of the marriage for her physical incapacity is not necessarily half of it, but is to be determined by the exercise of the sound discretion of the trial court.

[Ed. Note.—For other cases, see Marriage, Dec. Dig. § 63.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Ida H. Coats against Lee B. Coats. Judgment for plaintiff, and defendant appeals. Affirmed.

Charles H. Garoutte, Sullivan & Sullivan, Theo. J. Roche, and Walter H. Linforth, for appellant. Cushing, Grant & Cushing, F. E. Johnston, H. L. Johnston, and L. E. Johnston, for respondent.

SLOSS, J. The plaintiff and the defendant intermarried in November, 1887. In January, 1906, the defendant, Lee B. Coats, obtained a judgment annulling the marriage, on the ground of the physical incapacity of the plaintiff, Ida H. Coats. After such judgment had become final, this action was commenced to obtain a division of the property which had been accumulated by the parties during the existence of the marriage. The court below gave the plaintiff judgment for $10,000. From this judgment, the defendant appeals. The appeal is taken on the judgment roll alone.

The findings are as follows: The plaintiff and the defendant intermarried in the county of Tulare, on or about the 26th day of November, 1887, and lived together thereafter continuously until on or about the 9th day of January, 1906. On or about said 9th day of January, 1906, the defendant herein, Lee B. Coats, commenced an action in the superior court of Los Angeles county to annul his marriage with the plaintiff herein upon the sole ground that said Ida H. Coats was at the time of their marriage physically incapable of entering into the marriage state. that such incapacity had continued until the time of the filing of the complaint in said annulment suit, and that the same was incurable. On the 16th day of January, 1906, the said court duly gave and made its judgment and decree, annulling the marriage upon said ground of incapacity. The plaintiff entered into said marriage relation in the full belief, in good faith, that she was physically capable of marrying, and she continued in good faith in said belief for more than 18 years thereafter, and up to the date of the filing of the complaint in said action for annulment. During the existence of said marriage relation between plaintiff and defendant, there was accumulated a large amount of property. The efforts of both plaintiff and defendant were devoted constantly and at all times during said marriage to the best interests of each other in the accumulation of said property. At the time of the marriage, the defendant was engaged in farming, in partnership with his brother, in Tulare county, Cal., and the said partnership at that time owned personal property in which the defendant had an interest worth not to exceed $3,000. Prior to the marriage, the defendant owned an undivided interest in a 160-acre tract of land in Tulare county. With the exception of his interest in the partnership and in this tract, the defendant owned no property at the time of the marriage with the plaintiff. For ten years after the marriage, the plaintiff and the defendant were engaged in farming the land referred to, and other lands, which were rented by defendant jointly with his brother, or individually. During this period, the defendant conducted the farming operations, and the plaintiff did the housekeeping, cooked for the defendant's employés, and performed all the other duties of a housewife. She also assisted in conducting the farm. In 1897 the defendant entered into partnership with one Bricker, in the business of buying and selling horses and mules. Until 1901 the plaintiff remained upon the farm and continued to perform the duties hereinbefore detailed. In 1901 the plaintiff, at the defendant's request, went to Los Angeles, and thereafter lived with defendant at hotels or in apartments in San Francisco and in Los Angeles, as directed by defendant, until on or about the 16th day of January, 1906. During this time she did all that was required of her by defendant in the way of services and in the accumulation of property; but after the year 1900 the services rendered by her in the accumulation of property were, from a monetary standpoint, of no pecuniary value. The services so rendered by plaintiff were rendered by her solely because of the relations existing between her and the defendant as found by the court, and not otherwise.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

After the marriage of the parties, a large amount of property was accumulated, and was lost in several ventures through no fault of plaintiff or defendant. In the year 1901, the defendant was practically without any property, other than his interest in the land first above mentioned and his interest in the partnership of Bricker & Coats. This partnership interest was of the value of about $2,500, and was accumulated after the said marriage. With these exceptions, all of the property owned by him at the time of the annulment of the marriage was acquired subsequent to the year 1900. At the time of the annulment of the marriage, to wit, on the 16th day of January, 1906, the defendant and Bricker owned personal property to the value of $139,905.31. The interest of the defendant, Coats, therein was an undivided one-half, amounting in value to $69,952.65. Said property was so owned free and clear of incumbrance, and neither the partnership nor Coats was then indebted. Subsequent to the decree of annulment, Coats drew from the partnership moneys amounting to over $88,000. The defendant's interest in the remaining property of the partnership is of the value of $37,337.50. All of the property which the defendant now has, and all of the money drawn by him from the partnership since January 16, 1906, was acquired or is the proceeds and accumulations of property which was acquired during the married life of plaintiff and defendant. There is a further finding that no disposition of said property, or any property, was made or attempted to be made in or by the decree of annulment, and that no question concerning the same, or any property, was presented by the pleadings for determination in said annulment suit, or considered therein. The plaintiff, it is found, has not received any part or portion of the said property. She has no property of her own, and is without means.

The conclusion of law drawn from these facts is that the plaintiff is entitled to a judgment against the defendant in the sum of $10,000, and for her costs.

[1] Passing, for the moment, the consideration of certain subsidiary problems which arise on the particular facts found, this appeal presents for determination, primarily, the question whether a woman, who has in good faith entered into a marriage which may be avoided at the instance of the other party, is entitled, upon or after annulment, to any participation in the property which has been accumulated by the efforts of both parties during the existence of the supposed marriage, and while she in good faith believed that such marriage was valid. The mere statement of the question would seem to be sufficient to require an answer in the affirmative. To say that the woman in such case, even though she may be penniless and unable to earn a living, is to receive nothing, while the man with whom she lived and labored in the belief that she was his wife, shall take and hold whatever he and she have acquired, would be contrary to the most elementary conceptions of fairness and justice. This marriage was not void in the extreme sense. Estate of Gregorson, 116 Pac. 60. The defendant had the right to attack it, and to have it annulled, but, in the absence of such attack, it was good as against everybody. Third parties could not question its validity in any way, and even the husband himself was bound by it, until and unless he undertook to set it aside by means of an action for annulment.

The argument of appellant in this connection is that, while a voidable marriage is valid, unless annulled, yet, where there has been a decree of annulment, the decree determines that no marriage ever existed, and renders it void ab initio. Accordingly, upon the making of the decree, the children become illegitimate (except for statutory provisions, like section 84 of our Civil Code), and property rights of either party, in so far as they depend upon marriage, are at an end. There is ample authority supporting the proposition that the effect of a decree of nullity is to declare that the marriage was void from the beginning. 2 Nelson, Div. & Sep. § 566; 1 Bish. Mar., Div. & Sep. §§ 259, 277, 1596; 26 Cyc. 919, 920; 19 A. & E. Enc. L. 1220; Matter of Eichhoff, 101 Cal. 600, 36 Pac. 11; Chase v. Chase, 55 Me. 21. So, too, it is generally held that when a marriage is annulled property rights dependent upon the existence of the marriage, such as dower and curtesy, are terminated and annulled. 19 A. & E. Enc. L. 1221; Chase v. Chase, supra; Price v. Price, 124 N. Y. 589, 27 N. E. 383, 12 L. R. A. 359. But these decisions, and others cited by the appellant, deal with the rights of one of the parties in property owned by the other. An interest in such property, dependent solely upon marriage, cannot exist after an adjudication that there has been no marriage. If, as is suggested by the appellant, the annulment is to be treated as analogous to a rescission, it should properly enough be accompanied by a restoration to the parties of what they respectively had before marriage, and what they would have had in the absence of a marriage.

Here, however, the question is a different one. The controversy is, not over the property owned by the defendant prior to marriage, or acquired by him alone thereafter, but has to do with the acquisitions of the two parties after marriage, and before annulment. If both have contributed to such acquisitions, each has an interest which did not exist at the time of the marriage. The status quo could not be restored upon annulment, without making some provision for the equitable division of this property. In the absence of fraud or other ground affecting the right to claim relief, there can be no good reason for saying that either party should, by reason of the annulment, be vested with title to all of the property acquired during the existence of the supposed marriage.

"A void marriage ordinarily confers no rights upon either of the parties in respect to the property of the other, such as would be conferred if the marriage were valid. As to property accumulated during the existence of the relation, however, quite a different question is presented." Note to Deeds v. Strode, 96 Am. St. Rep. 272. Thus, in Fuller v. Fuller, 33 Kan. 582, 7 Pac. 241, the court said that, "in all judicial separations of persons who have lived together as husband and wife, a fair and equitable division of their property should be had." It is true that this expression was not necessary to the decision, but the principle declared was afterwards applied by the same court in Werner v. Werner, 59 Kan. 399, 53 Pac. 127, 41 L. R. A. 349, 68 Am. St. Rep. 372. In that case the trial court, in annulling a marriage on the ground that the wife had a former husband living, had awarded to her one-half of the property accumulated through the joint efforts of the parties while they were living together as husband and wife. The judgment was affirmed on appeal. A similar ruling was made in Buckley v. Buckley, 50 Wash. 213, 96 Pac. 1079, 126 Am. St. Rep. 900, where, upon annulment of a marriage, the wife was awarded a one-fourth interest in the real property of the husband. In Texas, too, the courts have, in several cases, reached similar results. Carroll v. Carroll, 20 Tex. 732; Morgan v. Morgan, 1 Tex. Civ. App. 315, 21 S. W. 154; Lawson v. Lawson, 30 Tex. Civ. App. 43, 69 S. W. 246; Barkley v. Dumke, 99 Tex. 150, 87 S. W. 1147; F. W. & R. G. R. Co. v. Robertson (Tex. Civ. App.) 121 S. W. 202.

The decision of this court in Jackson v. Jackson, 94 Cal. 446, 462, 463, 29 Pac. 957, while not perhaps a direct authority on the point under discussion, has persuasive weight in support of the views already expressed. There the court, in annulling a marriage voidable under section 61 of the Civil Code, allotted to the husband one-half of property which he had theretofore deeded to the wife under conditions entitling him to disaffirm the transfer for fraud. The property in question was apparently acquired after marriage, and is referred to in the opinion of the court as community property. The appeal was by the wife, and she did not, so far as is shown, question the propriety of making a division, in some way, of such property. But in the concurring opinion of Justice Harrison, in which Justice Paterson concurred, this language is used: "It may be conceded that the parties to this action entered into the contract of marriage under such circumstances that it was valid to all intents and purposes until annulled by decree of the court; but the fact that the defendant had at that date a former wife living, from whom he had not been divorced, gave to the plaintiff the right to have the marriage annulled upon the discovery of such fact. Civ. Code, § 82, subd. 2. Upon its dissolution, there would arise the same equitable grounds for an equal division of the property that had been acquired by the parties during the existence of the relation of husband and wife as would exist upon the dissolution of any valid contract of marriage for a cause other than adultery or extreme cruelty."

We think the sentence last quoted, although not binding as a declaration of a majority of the justices, lays down the just rule to be applied in cases of this character. Even though it may be true that, strictly speaking, there is no "community property" where there has not been a valid marriage (Chapman v. Chapman, 11 Tex. Civ. App. 392, 32 S. W. 564; see 68 Am. St. Rep. p. 376, note), the courts may well, in dividing gains made by the joint efforts of a man and a woman living together under a voidable marriage which is subsequently annulled, apply, by analogy, the rules which would obtain with regard to community property, where a valid marriage is terminated by death of the husband or by divorce. The apportionment of such property between the parties is not provided by any statute. It must therefore be made on equitable principles. In the absence of special circumstances, such as might arise through intervening claims of third persons, we can conceive of no more equitable basis of apportionment than an equal division. Until the making of the annulment decree, the marriage was valid, and the property in question was impressed with the community character. Upon annulment, such property, even though it be no longer community property, should be divided as community property would have been upon a dissolution of the marriage by divorce or the death of the husband.

If these views be sound, it is entirely immaterial that the bulk of the property was acquired between the years 1900 and 1906, and that the plaintiff's services in its accumulation were "of no monetary value." She is not suing to recover for services rendered under a contract for labor, nor to establish the value of her interest in a business partnership. What she did, she did as a wife, and her share of the joint accumulations must be measured by what a wife would receive out of community property on the termination of the marriage. "The law will not inquire * * * whether the acquisition was by the joint efforts of the husband and wife, or attempt to adjust their respective rights in proportion to the amount each contributed thereto. The law will not concern itself with such an inquiry, but will leave the parties to share in the property in the same proportion as though the marriage contract was what the wife had every reason to believe it to be, i. e., a valid marriage." F. W. & R. G. R. Co. v. Robertson, supra. If then, the facts would have justified an allotment to the wife of one-half of the property acquired by the parties, there can be no complaint of the allowance of $10,000, which was much less than one-half.

[2] On the question of plaintiff's good faith, the appellant urges that she could not have been in ignorance of the fact of her physical incapacity for 18 years. But any inquiry in this respect is foreclosed by the court's finding, which is not open to attack on this appeal.

[3] Finally, it is argued that the plaintiff's property rights, if she had any, might have been adjudicated in the annulment suit, and that she is estopped by the judgment in that suit from litigating the claim here presented. A judgment is conclusive only upon the issues presented by the pleadings (Freeman, Judgments, § 249), and actually adjudicated. Bank of Visalia v. Smith, 146 Cal. 398, 81 Pac. 542. Thus it has been held in this court that, if in an action for divorce the question of the disposition of community property is not presented by the pleadings or determined by the decree, the parties are not precluded from subsequently asserting their rights with respect to such property. De Godey v. De Godey, 39 Cal. 157; Biggi v. Biggi, 98 Cal. 36, 32 Pac. 803, 25 Am. St. Rep. 141; Kirschner v. Dietrich, 110 Cal. 502, 42 Pac. 1064. For like reasons, the judgment annulling the marriage cannot estop plaintiff from now litigating her property claims. The court below found that the question of property rights was not presented by the pleadings in the annulment suit, and that no disposition of property was made or attempted to be made by the judgment in that suit. This finding is conclusive on the present appeal.

[4] In this connection, the appellant relies on averments of his answer showing that, in answering the complaint in the former action, the plaintiff (defendant in that action) waived alimony. If it were conceded that this would affect the subject of the present action, the alleged waiver cannot be considered. There is no finding with respect to it. The judgment being supported by the findings made, it must be presumed, in the absence of a contrary showing in the record, that there was no evidence which would have sustained a finding in defendant's favor on this issue. Himmelman v. Henry, 84 Cal. 104, 23 Pac. 1098; Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504; Roberts v. Hall, 147 Cal. 434, 82 Pac. 66.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

On Petition for Rehearing.

PER CURIAM. [5] The petition for rehearing is denied. To prevent misunderstanding, there should, however, be some modification of the opinion filed. We do not hold that a woman occupying the position of the plaintiff here is, under any and all conditions, and as a matter of strict legal right, entitled to one-half of the property acquired during the existence of the supposed marriage. The amount to be allotted to her is to be determined by the exercise of the sound discretion of the trial court. Under the circumstances here shown, it cannot be said that the court below abused its discretion in awarding $10,000 to the plaintiff.

161 Cal. 87

DUNPHY v. DUNPHY. (S. F. 5,702.)

(Supreme Court of California. Oct. 5, 1911.)

1. Marriage (§ 7*)—Validity.

A marriage between parties, one of whom is of unsound mind, is a valid marriage until annulled, as authorized by Civ. Code, §§ 82, 83.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 25; Dec. Dig. § 7.*]

2. Marriage (§ 62*)—Suit to Annul—Suit Money to Wife.

The court, in a suit by a husband to annul the marriage on the ground that he was of unsound mind at the time of the marriage, has authority to allow suit money to the wife to enable her to prosecute in good faith her motion for new trial after decree annulling the marriage, and an appeal from the adverse decision, though Civ. Code, § 137, providing for cost money in an action for divorce, does not include actions for annulment.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 137; Dec. Dig. § 62.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Action by James C. Dunphy, by Jennie C. Dunphy, his guardian ad litem, against Lydia M. Dunphy. From an order directing plaintiff to pay money to defendant to enable her to prosecute a motion for new trial and an appeal, he appeals. Affirmed.

J. M. Meredith and Perry Evans, for appellant. Timothy J. Lyons and Bishop, Hoefler, Cook & Harwood (Raymond Benjamin, of counsel), for respondent.

ANGELLOTTI, J. This is an appeal from an order directing plaintiff to pay defendant $2,000, to enable her to prosecute her motion for new trial and appeal, in an action brought against her to annul the marriage solemnized between herself and plaintiff on June 22, 1909.

The complaint in that action alleged that on said day the plaintiff and defendant were married, and this allegation was admitted by the answer and found by the trial court to be true. It further alleged, as the ground of the annulment sought, that at the time of such marriage the plaintiff was, and ever since has been, "of unsound mind," and that the plaintiff has never freely cohabited with the defendant as her husband. These allegations were denied by the answer. The trial court found that the plaintiff was "of unsound mind" at the time of the marriage and until after July 21, 1909, and that the plaintiff has never since said marriage freely cohabited with the defendant as her husband, and gave judgment annulling the marriage. Defendant duly inaugurated her proceedings on motion for a new trial and for a review of the action of the trial court by this court. It was not disputed that she is prosecuting such proceedings in good faith and with reasonable grounds therefor, that she is without the means of paying the costs thereof, and that the amount allowed by the trial court is reasonably necessary to enable her to pay such expense. An appeal from the judgment of the superior court was taken on July 20, 1909, and such appeal is still pending. The sole contention of appellant is that the court had no jurisdiction to make the order, and that the evidence was insufficient to justify the same, "in that there is no evidence to show, and the evidence fails to show, that defendant and cross-complainant is or ever was the wife of plaintiff and cross-defendant."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appellant's point is that, to justify an order requiring the payment of money to enable the defendant to prosecute her motion for a new trial and appeal, the marital relation must be admitted, or shown by a preponderance of evidence. In support of this claim Hite v. Hite, 124 Cal. 389, 57 Pac. 227, 45 L. R. A. 793, 71 Am. St. Rep. 82, is relied upon. That case was an action for divorce by the woman on the ground of adultery, and by the defendant's answer the allegation of the complaint that the parties were married was squarely denied. In this state of the pleadings, upon an appeal from an order allowing the plaintiff alimony, counsel fees, and expense of suit, it was held that to justify alimony marriage must be admitted, or proven to the satisfaction of the judge to whom the application is made. That decision has never been overruled or questioned. But the answer to appellant's claim and the distinguishing feature between this case and Hite v. Hite, supra, is that here the marriage is alleged by the plaintiff, and stands admitted by the pleadings. Admitting the fact of marriage, plaintiff sought to have the marriage annulled on the ground that he was of unsound mind at the time of the marriage. Civ. Code, § 82, subd. 3.

[1] It was held by this court, in the recent case of In re Gregorson's Estate, 116 Pac. 60, that the effect of our statutes is that such a marriage is not void ab initio, and is free from attack, except in proceedings for annulment, brought by the party injured, or on behalf of the party of unsound mind, during the lives of both parties (sections 82 and 83, Civ. Code), and that consequently the validity of the marriage cannot be questioned after the death of the wife, in proceedings for the appointment of an administrator of her estate. It was recognized that, in the absence of any statute providing otherwise, the great weight of authority is to the contrary, but it was shown by an exhaustive consideration of our statutes that the Legislature has made such a marriage valid and free from attack, except in the annulment proceeding already referred to. In the absence of a decree of annulment, it is valid, not only against the world, but also as between the parties. Coats v. Coats, 118 Pac. 441. A merely voidable marriage "must be treated as valid for all civil purposes until annulled by judicial decree." State v. Lowell, 78 Minn. 166, 80 N. W. 877, 46 L. R. A. 440, 79 Am. St. Rep. 358; Willits v. Willits, 76 Neb. 228, 107 N. W. 379, 5 L. R. A. (N. S.) 767. It would appear to necessarily follow that, so far as the annulment proceedings are concerned, it must continue to be accepted as a valid marriage until the decree of annulment therein has become final.

The power to allow alimony in cases of annulment of marriage was fully recognized by Chief Justice Beatty in his concurring opinion in Hite v. Hite, supra, where, after saying that it is only a wife who can claim alimony, and when the fact of marriage is in issue and unproved there is no one in that position, said: "If a husband sues for divorce, alleging a marriage, of course there can be no question of the right to alimony, if he is able to pay and the wife is in need. If he sues to annul a marriage upon the ground that it was void, ab initio, by reason of fraud, precontract, insanity, et cetera, then the granting of alimony pendente lite would be proper, because a formal marriage is alleged, and will remain a lawful and established marriage, in the absence of affirmative proof by him of the existence of some fact or facts which will invalidate it. In such a case, I concede the propriety and justice of allowing the wife (for, until the fraud or other invalidating circumstances are established, she is the wife) money to make her defense."

It was definitely decided by this court, in the later case of Allen v. Superior Court, 133 Cal. 504, 65 Pac. 977, that the superior court may require the husband prosecuting an action against the wife for annulment of the marriage on the ground of fraud to pay the wife such money as is actually necessary to enable her to make her defense. The court said: "As to suit money the right of the wife cannot be denied. Until her alleged fraud is established, she remains the lawful wife of the petitioner, and has the same right to defend the action to annul the marriage that he has to prosecute it, and, until she is provided with the means actually necessary to make her defense, she ought not to be forced into a trial. This conclusion is sustained by all the opinions, concurring and dissenting, in the case of Hite v. Hite, 124 Cal. 389 [57 Pac. 227, 45 L. R. A. 793, 71 Am. St. Rep. 82]." This is in accord with the great weight of authority. In some of the decisions, the conclusion of the court requiring the husband to make such payments is based on statutes held to confer the power; but, where it is held that the only statute on the subject is one limited to proceedings for divorce for some cause occurring after the marriage, it is further generally held, to use the language of the New York Court of Appeals, in Higgins v. Sharp, 164 N. Y. 4, 8, 58 N. E. 9, 10, as follows: "The general jurisdiction conferred by the statute to entertain such actions carries with it, by implication, every incidental power necessary for its proper exercise. When a statute gives the court jurisdiction over a class of actions, it is not necessary that all the powers of the court, or all the details of the procedure and practice, should be specially enumerated. For the purpose of administering justice in such cases, the court may * * * exercise such incidental powers as are usual or necessary in such cases. The power to allow alimony and counsel fees to the wife, in order to enable her to live pending the action, and to present her defense, if she has one, must be regarded as incidental and necessary in all matrimonial actions. Without such power, the rights of the woman, in many cases, could not be adequately protected. It seems to us, therefore, that actions to annul a marriage are governed, with respect to alimony and counsel fees, by the same principles as all other actions for divorce. When the court was vested with jurisdiction in such cases, the incidental power to guard and protect the rights of the wife, which had always been regarded as a part of the jurisdiction, necessarily followed and attached upon the plainest principles of reason and justice." See, also, Hunt v. Hunt, 23 Okl. 490, 100 Pac. 541, 22 L. R. A. (N. S.) 1202, Willits v. Willits, 76 Neb. 228, 107 N. W. 379, 5 L. R. A. (N. S.) 767; Vroom v. Marsh, 29 N. J. Eq. 15; Webb v. Brooke, 144 Mich. 674, 108 N. W. 358; Arey v. Arey, 22 Wash. 261, 60 Pac. 724; Eliot v. Eliot, 77 Wis. 634, 46 N. W. 806, 10 L. R. A. 568; Schroter v. Schroter, 57 Misc. Rep. 199, 107 N. Y. Supp. 1065, 2 Am. & Eng. Ency. of Law, p. 104, and note 3. The later New York case of Jones v. Brinsmade, 183 N. Y. 258, 76 N. E. 22, 3 L. R. A. (N. S.) 192, 111 Am. St. Rep. 746, in no way affects the rule declared in the earlier cases

[2] Learned counsel do not seriously question the power of the trial court to allow the wife suit money in such cases up to such time as the husband establishes to the satisfaction of such court that the marriage should be annulled, but earnestly contends that a decree of the lower court, annulling the marriage, bars any allowance from the time the trial court makes its decree, notwithstanding that the judgment has not become final and the wife is in good faith and with due diligence prosecuting an appeal therefrom. The power to make the allowance to the time of judgment being established, we can see no reasonable ground for holding that it does not exist to the time the judgment becomes final. It is settled that in ordinary divorce actions the power exists as long as the action is pending, which is from the time of the commencement of the action "until its final determination on appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." Section 1049, Code Civ. Proc. The same considerations which make such power, pending appeal from the judgment of the trial court, essential to the adequate protection of the wife, in an ordinary action for divorce, are present in an action by the husband for annulment of the marriage; and the reasons given by the courts for holding that the power exists in the annulment action, independent of express statutory provision, warrant the exercise of the power, as long as it is essential to enable the wife to make such defense in the annulment action as she may have, including necessarily such rights as are given her by the law to have the action of the trial court reviewed on appeal. The right to make such an allowance to the wife pending appeal has been upheld in some of the cases already cited, and, as already said, the right to make the allowance before judgment once being established, we can see no sound reason for denying the power, so far as it may be essential to the wife's prosecution of the appeal given her by law from such judgment. For all the purposes of the annulment action, so long as the action is pending, to use the language of Brinkley v. Brinkley, 50 N. Y. 186, 10 Am. Rep. 460, "the relation actually exists upon which the right to alimony depends."

So that, even if section 137 of the Civil Code, providing for alimony and cost money in an "action for divorce," does not by its terms include actions for annulment, the weight of authority is in favor of the existence of the power as to cost money, notwithstanding the absence of express statutory authority, and by reason of the general jurisdiction expressly conferred to entertain such actions; and Allen v. Superior Court, 133 Cal. 504, 65 Pac. 977, must be taken as deciding that such power exists in this state In view of what we have said, it must also be held that such power exists as long as the annulment action is pending. But there is much force in the claim that the term "action for divorce," in section 137, Civil Code, includes such actions for annulment as are provided for in sections 81 and 82 of the Civil Code. Section 137 is a part of article 4 of chapter 2, tit. 1, pt. 3, of the Civil Code, an article entitled "General Provisions." Chapter 2 is entitled "Divorce," and contains four articles; article 1 being entitled "Nullity," and embracing the provisions stating the causes for annulment and providing for the proceedings to obtain such relief; article 2 being entitled "Dissolution of Marriage," and providing for ordinary divorce proceedings; article 3 being entitled "Causes for Denying Divorce"; and article 4, as already stated, being entitled "General Provisions." It is apparent that the term "Divorce," constituting the title of chapter 2, was used as including annulment proceedings, as well as divorce proceedings, for causes occurring after marriage; and it may well be argued that such provisions in the subdivision entitled "General Provisions" as are appropriate in actions for annulment are applicable thereto. However, it is not necessary to definitely decide this question here, in view of what we have already said.

The order appealed from is affirmed.

We concur: SHAW, J.; SLOSS, J.

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17 Cal. App. 51

In re BLAKE. (Civ. 992.)

(District Court of Appeal, First District, California. Aug. 31, 1911.)

1. JUSTICES OF THE PEACE (§ 159*)—REVIEW OF PROCEEDINGS—APPEAL—FILING UNDERTAKING—NOTICE TO RESPONDENT.

Under Code Civ. Proc. § 978a, providing that the undertaking on appeal from a justice must be filed within five days after notice of appeal, and notice of the filing of the undertaking must be given to the respondent, and the adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, as no time is fixed for notice to the respondent of the filing of the undertaking, such notice is not essential to the perfecting of the appeal, and its omission is a mere irregularity.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 159.*]

2. MANDAMUS (§ 57*)—SUBJECT OF RELIEF—ACTS OF COURTS.

Where a superior court erroneously dismisses an appeal on the theory that it has no jurisdiction, mandamus will lie to compel it to proceed to hear and decide the cause.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 68, 114, 120; Dec. Dig. § 57.*]

Application by F. T. Blake for writ of mandate to the superior court of Santa Clara County. Peremptory writ granted.

Will M. Beggs and R. C. McComish, for petitioner. J. C. Black, for respondent.

KERRIGAN, J. This is a proceeding in mandamus against the superior court of Santa Clara county. On January 31, 1911, the petitioner commenced an action in the justice's court of San Jose township against Eugenia M. Salisbury, and after appearance by defendant the case was regularly tried, and judgment was entered for defendant. Subsequently, and within 30 days from the date of the judgment, to wit, on March 14th, petitioner herein served and filed a notice of appeal, and executed and filed an undertaking on appeal in proper form and amount; but he did not serve upon Eugenia M. Salisbury or her counsel any notice of the filing of said undertaking. Later the papers in the cause were transmitted to the superior court of Santa Clara county; and in the month of May said court granted a motion theretofore made to dismiss the appeal, on the ground that no notice of the filing of the undertaking was given as aforesaid, basing its ruling on section 978a of the Code of Civil Procedure. The correctness of that ruling is the main question we are called upon to decide in this proceeding.

[1] Respondent contends that under the terms of said section notice of the filing of the undertaking is an integral part of the procedure upon an appeal to the superior court, and that, as no such notice was given in this case, the appeal was ineffectual for any purpose, and was properly dismissed. We cannot agree with this contention. Said section 978a reads as follows: "The undertaking on appeal must be filed within five days after the filing of the notice of appeal and notice of the filing of the undertaking must be given to the respondent. The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or judge within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given."

Probably the Legislature intended by the enactment of this section to remedy an abuse to which the law had become subject, by providing that an exception to the sureties might be taken within five days after the filing of the undertaking and notice thereof, and by making the giving of this notice one of the steps necessary to vest the superior court with jurisdiction of the appeal; but, if so, it must be held that the Legislature failed of its purpose. According to the plain language of the section the sureties must be excepted to within five days after the filing of the undertaking; and as no time is fixed within which the notice of such filing must be given, and as no penalty is attached to the failure to give the same, it must be regarded as an act not essential to the perfecting of the appeal, and the omission to give it as a mere irregularity. In support of this conclusion we need do no more than refer to the cases of W. P. Jeffries Co. v. Sup. Ct., 13 Cal. App. 193, 109 Pac. 147; and Golden Gate Tile Co. v. Sup. Ct., 114 Pac. 978. In the Jeffries Case the facts were precisely similar to those in the one under consideration, and there the court held that the giving of the notice of filing the undertaking was not a jurisdictional prerequisite.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[2] Where a superior court erroneously dismisses an appeal on the theory that it has no jurisdiction, mandamus will lie to compel it to proceed to hear and decide the cause. Golden Gate Tile Co. v. Sup. Ct., supra.

From what has been said it follows that the superior court of Santa Clara county has jurisdiction of the appeal, and the peremptory writ prayed for must therefore issue. It is so ordered.

We concur: LENNON, P. J.; HALL, J.

16 Cal. App. 452

BELDEN v. FARMERS' & MECHANICS' BANK OF HEALDSBURG et al.

(Civ. 818.)

(District Court of Appeal, Third District, California. June 16, 1911. Rehearing Denied by Supreme Court Aug. 15, 1911.)

1. CONTRACTS (§ 153*)—CONSTRUCTION IN FAVOR OF VALIDITY.

Where the meaning of the language of an instrument is in doubt, the instrument must not be so construed as to render it invalid, but be so as to render it valid, and effectuate the manifest intention of the parties, provided it is reasonably susceptible of such a construction.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 734; Dec. Dig. § 153.*]

2. LANDLORD AND TENANT (§ 157*)—LEASE—CONSTRUCTION—RIGHTS OF LESSEE.

A lease which stipulates that the lessee shall plant the land in hops and provide all appliances required therefor, and that the lessor at the end of the term will "buy" them, and pay therefor the reasonable value, to be appraised by arbitrators in case the parties are unable to agree, does not vest in the lessee any actual ownership of the physical improvements called for, but he acquires only a right to be reimbursed for reasonable value of the improvements, as determined by the parties or by arbitrators.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 571–607; Dec. Dig. § 157.*]

3. ASSIGNMENTS (§ 23*)—INTERESTS ASSIGNABLE—"RIGHT ARISING OUT OF AN OBLIGATION."

The interest of a lessee in a lease binding the lessor to reimburse him at the end of the term for the then reasonable value of improvements placed on the premises by the lessee, as called for by the lease, is a mere right arising out of an obligation, within Civ. Code, § 1458, or a chose in action, or a right to recover money by a judicial proceeding, within section 953, and is transferable by assignment during the term under section 954.

[Ed. Note.—For other cases, see Assignments, Dec. Dig. § 23.*]

4. ASSIGNMENTS (§ 39*)—MANNER OF MAKING—DELIVERY.

An assignment by a lessee of his right to be reimbursed by the lessor at the end of the term, to the extent of the then reasonable value of improvements placed on the premises by the lessee, is valid without any delivery, to the assignee of the possession of the leasehold.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 75; Dec. Dig. § 39.*]

5. ASSIGNMENTS (§ 66*)—CONSIDERATION—PAST-DUE NOTES.

Matured notes, even should they be barred by limitations, are a valid consideration for an assignment of a chose in action by the maker to the holder of the notes.

[Ed. Note.—For other cases, see Assignments, Dec. Dig. § 66.*]

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by Charles C. Belden against the Farmers' & Mechanics' Bank of Healdsburg and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

Rehearing denied by Supreme Court (S. F. 5,945) August 15, 1911.

J. T. Coffman, for appellants. James W. Oates, for respondent.

HART, J. This action was brought for the purpose of securing a judgment adjudging that certain money, amounting to the sum of $767, and in the possession of the defendant Olmsted, is the property of one L. C. Lowrey, and compelling said Olmsted to pay said sum to plaintiff as part satisfaction of a judgment obtained by plaintiff against said Lowrey prior to the institution of this action. Plaintiff was awarded judgment, from which and the order denying defendants a new trial these appeals are prosecuted.

The facts are: Said Lowrey became, by an assignment from one of the original lessees, the lessee of certain land situated in Sonoma county. Said lease stipulated for the lease of the land to the lessees for a term of five years, beginning with the date of the execution thereof, viz., the 20th day of February, 1904. The land so leased embraced about 40 acres, and the lessees bound themselves by the covenants of said lease to plant a certain portion thereof in hops. It was further agreed between the parties that the lessees would, for the purpose of carrying on the business of growing hops, "provide all wires, hophouses, and appliances reasonably required for the cultivation, picking, curing and baling of hops to be raised on said premises during the term of this lease, and to erect such hophouses in a good and substantial manner." It was further agreed that, at the expiration of five years from the date of said lease, the first parties to the lease (the lessors) would buy all poles, wires, hophouses, and appliances then upon said premises, and pay therefor the reasonable value thereof at that time; that "if said parties hereto or their assigns shall not agree as to the reasonable value of said property or any part thereof, at that time, then and in that event the reasonable value thereof shall be determined by three arbitrators, at the equal expense of the parties hereto. * * *" On the 29th day of September, 1908, Lowrey, being indebted to the defendant bank in the aggregate sum of $1,075, together with interest, executed an instrument in writing, purporting to sell to said bank "all his right, title, interest, estate and expectancy, of, in and to all that certain personal property, to wit, all hop poles, wires, hophouses and appliances of every nature and kind used or employed in or about the cultivation, picking, curing and baling of hops and now situated on the lands and premises of L. C. Olmsted, * * * the same being the improvements placed on said premises under and in pursuance of the terms of a certain lease, dated the 20th day of February, 1904," etc. Upon the execution of said instrument by Lowrey and its delivery to the bank, the cashier of the latter addressed a letter to Olmsted, notifying him that said bank "was the owner of the Lowrey interest in the property" referred to in said instrument. On the 20th day of July, 1909, in an action against Lowrey and his wife, previously instituted in the superior court of Sonoma county, plaintiff was given judgment for the sum of $1,596.25 and $13.80 costs; said judgment having been duly entered against said Lowrey and his wife. In said action a writ of attachment was issued and executed by attaching all debts owing by said defendant L. C. Olmsted to said defendants R. L. Lowrey and wife, and "all personal property and effects in the hands of L. C. Olmsted, * * * and belonging to said defendants R. L. Lowrey and Mrs. R. L. Lowrey, or either of them, and due return of same made to court." Olmsted answered the complaint in said action, as he has in this, "stating therein that he had the sum of $767 in his hands belonging to said R. L. Lowrey under a contract with said Lowrey, but that he (said Olmsted) had been notified by the defendant Farmers' & Mechanics' Bank of Healdsburg, that it (said corporation) was the owner of said moneys, and demanded that said Olmsted pay the same to said corporation, and that said Olmsted refused to pay over any of said money under said attachment, or to said Farmers' & Mechanics' Bank of Healdsburg."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The court found the facts as stated in the foregoing, and further found, in harmony with the cashier's testimony, that the defendant corporation notified Olmsted that it claimed said money, but found that "said claim was and is without merit, and said corporation defendant did not ever, and does not now, own the said money, and has no right whatever to the same."

Lowrey's indebtedness to the defendant bank was evidenced by five promissory notes, dated, respectively, November 5, 1906, December 1, 1906, January 15, 1907, June 13, 1907, and July 15, 1907; said notes calling, in the order in which they were dated, for the sums, respectively, of $400, $100, $250, $200, and $125, and each note bearing interest at the rate of 7 per cent. per annum. All these notes were due at the time the instrument was executed, purporting to transfer to the bank Lowrey's interest in the property, or in the money to be paid for the improvements on the land leased to him.

The decision in this case hinges on the nature of Lowrey's "interest," if any, in the improvements made by him on the leased premises, and the nature and effect of the transaction by which he purported to transfer such "interest" to the defendant corporation.

Counsel for respondent in his brief deals with the first question upon the assumption that Lowrey owned an interest in, or was part owner with Olmsted of, the improvements themselves, and upon this assumption argues that, if the instrument purporting to transfer Lowrey's interest therein was intended as a bill of sale, it was void, as against other creditors of Lowrey, because possession of the property so attempted to be transferred was not taken by or delivered to the bank contemporaneously with the execution of said instrument, or at all. The main contention is, however, that, if anything at all, the instrument is a mortgage, and, if so intended, the argument proceeds it was likewise void, so far as other creditors are concerned, because not executed according to the formalities prescribed by section 2957 of the Civil Code, nor recorded, as required by said section.

Manifestly, if Lowrey sought to transfer to the bank an interest in the improvements themselves—the physical property—or intended, by the instrument he executed and delivered to the bank, to mortgage an interest in said improvements, assuming that he had a mortgageable interest therein, the position of counsel could not be impeached. Lowrey testified that the value of said improvements, whatever it might be determined to be, was, by the assignment, transferred to the bank, to be by it, when collected, applied on his notes. He further testified that it was understood between him and the bank that, if the money found to be due to him from Olmsted for said improvements proved in amount to be in excess of his indebtedness to the bank, the overplus would be turned over to him. Upon this testimony the argument is erected that the transaction between the bank and Lowrey as to said improvements amounted to an ineffectual attempt to burden Lowrey's "interest" therein with the lien of a mortgage. But we think that it is very clear that Lowrey had no interest in said improvements which could be subjected to the lien of a mortgage. Indeed, an examination of the lease will clearly disclose, in our opinion, that, strictly speaking, he had no interest whatsoever in the improvements themselves.

[1] In the ascertainment of the legal nature and scope and effect of the instrument made and delivered by Lowrey to the bank, said instrument must be examined by the light of the covenants of the lease. And

where the language of an instrument in writing or the facts of a transaction are of a character to leave in some doubt what the parties thereto intended should be the precise nature or the legal effect thereof, and there is, from the nature of the subject-matter of such instrument or transaction, but one thing that it can be and have the effect of legally attaining any end, and such instrument or transaction is reasonably capable of a construction that will give to it legal vitality and effect, the rule is that, under such circumstances, the parties thereto must be presumed to have intended that the obligation arising therefrom is one that could be legally effectuated or enforced. In other words, such transaction must not be so construed as to lead to an absurdity, or so construed as to render it invalid, if it is reasonably susceptible of a construction that will render it valid, or will result in effectuating the manifest intention of the parties.

[2] By the terms of the lease, as we have seen, Lowrey agreed to provide "all poles, wires, hophouses and appliances reasonably required for the cultivation, picking, curing and baling of hops to be raised on said premises during the term of this lease, and to erect such hophouses in a good and substantial manner," and that Olmsted agreed to buy the same at the expiration of the term of said lease, and pay therefor the reasonable value thereof, at that time, to be appraised by arbitrators to be selected by the parties, in case they themselves were unable to agree upon such value.

We think that there can be no doubt from this language that the parties intended that whatever improvements might be found necessary to be made for the stipulated purpose should, upon being erected, become the property of the lessor, and that therefore the only right acquired by Lowrey would be what might be the reasonable value thereof, measured in money, on the date of the expiration of the term prescribed by the lease. In other words, notwithstanding the language is that Olmsted agrees "to *buy* all hop-poles, wires, hophouses," etc., the lease cannot reasonably be construed to mean that Lowrey was vested with any kind of actual ownership of the physical property itself, but that, by making the improvements called for thereby, he acquired only a right to be reimbursed to the extent of the reasonable value of such improvements as appraised and determined, either by themselves or by third parties, at the time of the termination of the lease. In short, we construe that portion of the lease relating to the improvements to be nothing more, in principle or in effect, than a contract, by the terms of which one party engages to erect a building for another on the latter's premises, for which the owner of the property agrees to pay the builder the reasonable value thereof upon the completion of the structure. That this is the true interpretation of the meaning of that part of the lease is sustained by the fact that there is contained in the instrument no provision that the improvements, portions of which are capable of becoming fixtures, may be removed from the freehold in the event that a satisfactory price could not be agreed upon or, for that matter, for any reason, and, furthermore, by the provision that, in case the parties themselves could not agree upon a reasonable value of the improvements, arbitrators should be selected to perform that office.

[3] By the instrument executed by him to the defendant corporation, Lowrey transferred all his "interest" in and to the *improvements* "placed on said premises *under and in pursuance of the terms of a certain lease*," etc., and, therefore, whatever the nature and extent of such "interest," determinable by the terms of the assignment, as construed by the light of the lease to which it makes reference, such "interest" thereby became the property of said bank. Of course, it will not be contended that Lowrey transferred or pretended to transfer the leasehold. There is no language in the written assignment even remotely indicating such intention. The property conveyed was confined to Lowrey's *interest* in the *improvements*. All, then, that he could have intended to transfer was either the improvements themselves, or the reasonable value thereof, as agreed upon by the parties to the lease, or as appraised by arbitrators appointed for that purpose; and, as it is very clear, as we have seen, that he could not transfer the improvements themselves, or any physical part thereof, it follows, necessarily, that what he did transfer, and intended only to transfer, was his right to be paid for the reasonable value of said improvements.

[4] The result of the foregoing views is that Lowrey's "interest" in the improvements erected by him on the demised premises constituted a mere "right arising out of an obligation" which was his property, and which he had the legal right to transfer. Section 1458, Civ. Code. In other words, it was a chose in action, or a right to recover money by a judicial proceeding (section 953, Civ. Code), which may be transferred. Section 954, Civ. Code. It, therefore, follows that by the assignment the bank became the owner of the thing or right, then potentially existing, which had been assigned to it, with full power, of course, to take such steps, when the time was ripe therefor, to reduce it to an actuality. Manifestly, this was all that Lowrey himself could have done with the thing so assigned. It is obvious, from the view we have thus taken of the "interest" acquired by Lowrey in said improvements and assigned by him to the bank, that it follows that it was not only not necessary, but impossible, to put the assignee in the possession of the thing or right assigned. The suggestion of respondent that, to make the sale valid, Lowrey should have delivered

possession of the leasehold to the bank with the execution and delivery of the instrument evidencing the sale to the bank proceeds, of course, from the misconceived theory that Lowrey owned an interest in the physical property itself; but we have shown that such theory is not maintainable under the facts as disclosed here. If, however, it is intended by said suggestion to advance the proposition that, in order to have effected a valid *assignment* of the thing which was so assigned, possession of the leasehold should also have been assigned, the obvious reply is that, in a legal sense, the effect of that act, so far as concerned Lowrey's right (the right transferred) to be paid for the improvements, would not have been to transfer to the bank any greater interest in or better title to said right than it has already acquired. Of course, if Lowrey had so desired, he could have transferred the remainder left of the leasehold, and this, if not restricted by the language of the transfer, would have had the effect of carrying with it all the incidents of the lease as prescribed by the covenants thereof. But, as suggested, this was not at all essential in order to make a valid assignment of any money which would become due him from the lessor, by reason of the covenants of the lease.

Nor, in the determination of the nature of the transaction between Lowrey and the bank, do we attach any importance to the circumstance that the extent of the right thus transferred was not at the time of such transfer determined. Lowrey acquired a vested right, to be enjoyed at a specified time in the future, against Olmsted the moment he completed the erection of the hop poles, the stringing of the wires, and the construction of the hophouses, etc., and whether such right might, at the time it matured or became enforceable, be determined to be worth $1 or $1,000, it nevertheless existed, and, as stated, was vested in Lowrey; and it was such right that he transferred to the bank—nothing less and nothing more. A promissory note is a mere chose in action, which may ordinarily be sold and transferred; but as well may the validity of a sale or transfer of such an instrument be questioned, merely because the security for its payment might become impaired, or even worthless and its makers and indorsers, if any, insolvent, and thus the amount, if anything, that could be recovered on it undeterminable until its maturity. The reply to this illustration may be that the note itself, upon its face, discloses the exact sum to become due; whereas such is not the case here; but the illustration will nevertheless serve as an apt exemplar of the rule which respondent seems to hope to invoke here, and which, if sound, would invalidate not only many and various kinds of assignments of future or contingent interests which have invariably been upheld by courts of equity, such as the assignment of money to become due employés and servants, and the like (not public officers, of course), whose compensation from month to month can be, in many instances, hardly more than approximately estimated or prognosticated, but would render void many assignments of vested interests, to take effect at some future time; for illustration, contracts of the nature of the one here, whose terms have not been fully completed, or are not to be fully performed until some specified time in the future.

[5] There is no question of fraud raised here by the pleadings or otherwise as to the transaction between Lowrey and the bank. It is not disputed that Lowrey was indebted to the bank in a large sum of money. It is true that the notes evidencing said indebtedness had each passed the date of its maturity, yet they were alive and constituted, as they would even have done if barred by the statute of limitations, a valuable consideration for the assignment. The bank, upon the receipt of the assignment and before the attachment in plaintiff's action against Lowrey was issued and served, notified Olmsted that it had become the owner of the right existing against him and in favor of Lowrey, and this circumstance, in the absence of any charge of fraud, is itself significantly corroborative of the testimony of the bank cashier and Lowrey that the assignment involved an absolute transfer of Lowrey's right against Olmsted.

We think, as our views clearly indicate, that the judgment and order are erroneous, and should be reversed.

It is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

16 Cal. App. 506

SAUL v. MOSCONE et al. (Civ. 719.)

(District Court of Appeal, First District, California. June 26, 1911. Rehearing Denied by Supreme Court Aug. 25, 1911.)

1. APPEAL AND ERROR (§ 267*)—NECESSITY OF EXCEPTIONS—"FINAL" JUDGMENT—JUDGMENT OF "NONSUIT."

Where both parties introduced their evidence, and plaintiff's evidence supported a judgment for him, and defendant made no motion for a judgment of dismissal, a judgment, though termed a dismissal, was a "final" decision, and deemed excepted to, within Code Civ. Proc. § 647, and not a judgment of "nonsuit," within section 581, authorizing a nonsuit, on motion of defendant, on plaintiff failing to prove a case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1572–1581; Dec. Dig. § 267.*

For other definitions, see Words and Phrases, vol. 3, pp. 2773–2798; vol. 8, p. 7663; vol. 5, pp. 4825–4827.]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. TRIAL (§ 388*)—TRIAL BY COURT—FINDINGS—NECESSITY.

A judgment on the merits, on trial by the court without a jury, must be reversed, where no findings were filed, and where findings were not waived.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 908–915; Dec. Dig. § 388.*]

3. APPEAL AND ERROR (§ 931*)—JUDGMENT—FINDINGS—PRESUMPTIONS.

Where the record on appeal shows that the court below, after all the evidence was in, acting on a mistaken view of the law, and in presence of the parties in open court, directed a dismissal of the action, stating that neither party would recover costs, and entered an order which he termed an order of dismissal, that subsequently the court denied a motion to set aside the dismissal, and for findings of fact and judgment on the merits, there can be no presumption on appeal that findings of fact were waived, though the bill of exceptions is silent on the question whether they were waived or not; the only reasonable inference being that there was no waiver.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3762–3771; Dec. Dig. § 931.*]

4. SPECIFIC PERFORMANCE (§ 29*)—CONTRACTS FOR SALE AND PURCHASE OF REAL ESTATE—DESCRIPTION—AIDER BY EVIDENCE.

Where the description of the real estate in a contract of sale is too uncertain to justify specific performance, but the extrinsic facts remove any uncertainty, the contract may be specifically enforced.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 69–82; Dec. Dig. § 29.*]

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by John R. Saul against Giacomo Moscone and another. From a judgment of dismissal, plaintiff appeals. Reversed and remanded.

Rehearing denied by Supreme Court (S. F. 5,795) August 25, 1911.

E. B. Coil, for appellant. Breen & Kelly, for respondents.

KERRIGAN, J. This action was brought by the plaintiff for the specific performance of a contract for the sale of a lot of land described in the complaint. The cause came on for trial before the court, without a jury, upon the issues made by the complaint and the answer thereto. It appears from the bill of exceptions that the plaintiff offered testimony sufficient to support the material allegations of the complaint, showing the execution of the contract, the payment of $10 as part payment for the land, a tender of the balance, and a demand for a deed. The evidence shows that the contract in question was executed in duplicate, being made out on a printed blank. The printed blank provided that the vendee should have ten days in which to examine the title to the property, but in the plaintiff's duplicate of the executed contract the word "ten" was crossed out and the word "sixty" substituted in pencil. Plaintiff testified that the same change had been made in the vendors' (defendants') duplicate; the change in both having been made before execution. The vendors produced their contract, which showed no such change, and denied that they had ever agreed with the vendee that he should have more than ten days in which to examine title. Under this state of the evidence, the plaintiff requested the court to take an adjournment until the following morning, and in this connection the record shows as follows: "Mr. Coil (plaintiff's counsel): * * * If you will continue the matter until 9:30 to-morrow morning, I will have the witnesses here. Mr. Coghlan (defendants' attorney): What do you want them to testify? Mr. Coil: I want them to testify that they saw the original contract; that the word 'sixty' was in the original contract at the time it was signed. The Court: If, on your side, the word 'sixty' was written in there as an after consideration, you lose; if, on the other side, they erased whatever was in the copy, those sixty days, they lose. That is all I have got to decide in this case. Mr. Coil: Well, I contend, if the word 'sixty' was in the original contract at the time the party to be charged signed it, although the copy by inadvertence might have omitted it, that the original contract would be good. The Court: No; if that is the fact, I will resolve it against you, because business men should not do business that way, and, if business men cannot be taught in any other way than by a case in court, let them learn the lesson there. If this original and the copy contained the word 'sixty,' you win; if one did not contain it, and it has not been erased, you lose."

An adjournment was then taken, and the trial resumed on the following morning, when plaintiff introduced evidence tending to show that the word "sixty" had been substituted in pencil for the printed word "ten" in both duplicates of the contract, and that this pencil change had been subsequently erased in the copy of the contract retained by the vendors. In this condition of the evidence, and without any motion or request made by the defendants, the court ordered the action dismissed, without costs to either party. No exception was taken to this order, and the order dismissing the action was entered in the minutes of the court November 22, 1906.

The plaintiff thereafter, on December 10, 1906, moved the court to set aside its order dismissing said action, and to render a decision on the merits and file its written findings of fact, which motion, after submission by the parties, was denied, and subsequently a judgment of dismissal, without costs, was duly entered by the clerk of said court. Plaintiff appeals from said judgment, and urges in support of his appeal that the decision is against law, and that it was the duty of the court, upon the submission of the cause, to render a judgment upon the merits and file its written findings of fact and conclusions of law.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Prior to the amendment of section 647, Code of Civil Procedure, in 1909, it was necessary, in order to protect the right of appeal, to reserve an exception to an order on a motion for nonsuit. Martin v. S. P. Co., 150 Cal. 130, 131, 88 Pac. 701; Hanna v. De Garmo, 140 Cal. 172, 73 Pac. 830; Craig v. Hesperia, etc., Co., 107 Cal. 675, 40 Pac. 1057; Warner v. Darrow, 91 Cal. 309, 27 Pac. 737. This case was tried before the enactment of said amendment, and defendant contends that the judgment was a judgment of dismissal authorized by subdivision 5 of section 581, Code of Civil Procedure, and that the defendant, having failed to note an exception to the order, waived his right to object thereto and to have the order reviewed on appeal. Said subdivision of section 581 reads as follows: "An action may be dismissed, or a judgment of non-suit entered, in the following cases: * * * 5. By the court, upon motion of defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury."

[1, 2] Here both parties had introduced all their evidence touching the material issues in the case; the evidence introduced by plaintiff was ample to support a judgment in his favor; and, as no motion was made by defendant for a judgment of dismissal upon the ground that plaintiff had failed to prove a sufficient case, or upon any other ground, we think the judgment in this case, irrespective of what it is called, must be regarded as a final decision, and as such, of course, "is deemed excepted to." Section 647, Code Civ. Proc. While a nonsuit may, under the provisions of section 581, be granted on motion after the evidence for both sides is closed (Toulouse v. Pare, 103 Cal. 251, 37 Pac. 146), that section does not purport to warrant a nonsuit, except *upon a motion of the defendant* "when upon the trial the plaintiff fails to prove a sufficient case." Estate of Higgins, 156 Cal. 257, 260, 104 Pac. 6; Hanover Fire Ins. Co. v. Shrader et al., 11 Tex. Civ. App. 255, 260, 31 S. W. 1100; Burns v. Rodefer, 15 Nev. 59, 63; 14 Cyc. 458. And where, as here, a judgment, although it is termed a "dismissal," is in fact a final decision of the case, and not a mere order of nonsuit or dismissal, made in accordance with the provisions of section 581, it will be treated as a final judgment. Wood, Curtis & Co. v. Mo. Pac. Ry. Co., 152 Cal. 344, 347, 92 Pac. 868. The judgment being on the merits of the case, and no findings having been filed, the judgment must be reversed.

[3] Some suggestion is made that if the judgment should be considered as a final judgment, and regarding it as such, we must presume that findings were waived; and it is contended that the record does not show that they were not waived. In our opinion, the rule does not apply. We have often said, and it is the rule, that where it becomes necessary on an appeal from a judgment on the judgment roll, or where other questions are raised, exclusive of the question as to whether or not the findings support the judgment or the evidence supports the findings, we will, in the absence of a showing to the contrary, presume that findings were waived. But that rule has never been carried to the extent of presuming that findings had been waived, where the only reasonable inference that can be drawn from the record is directly to the contrary. In this case, while the bill of exceptions does not show whether findings were waived or not, the order of the court, summarily dismissing the action, and the views expressed by the court, show that he acted upon an erroneous idea as to the law and as to his right to dismiss the action. It was dismissed in open court while the parties were present, and the court termed it an order dismissing the action, and remarked that neither party would recover costs. Not only this, but the record shows that the plaintiff made a motion for an order vacating the order made by the court dismissing said action, and asking the court to render judgment on the merits and file written findings of fact, which motion, as we have seen, the court denied. We do not think that any fair-minded person can say, in the face of this record, and in view of the order made by the court, refusing to vacate or set aside the order of dismissal, and refusing to make and file findings, that findings were waived.

[4] The respondents urge that the court's order dismissing the action may be upheld, for the reason that the description of the real property as contained in the contract is too uncertain to entitle the plaintiff to a decree of specific performance, and that therefore the complaint did not state a cause of action, which defect may be urged at any time. But in the case of Carr v. Howell, 154 Cal. 372, 97 Pac. 885, it was held that in such a case the description may be aided by evidence of extrinsic facts. Such evidence was introduced in the present case, and removed any uncertainty as to the lot of land sought to be recovered.

The judgment is reversed, and the cause remanded for a new trial.

We concur: LENNON, P. J.; HALL, J.

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16 Cal. App. 416

PEOPLE v. BURNS. (Cr. 183.)

(District Court of Appeal, Second District, California. June 14, 1911. Rehearing Denied by Supreme Court Aug. 14, 1911.)

1. CRIMINAL LAW (§ 371*)—EVIDENCE—SIMILAR ACTS AND TRANSACTIONS.

In a prosecution for grand larceny by the withdrawal of a bank deposit without the consent of the owner, evidence of a series of similar transactions, relating to deposits by the same owner in another bank, was admissible to show the motive of defendant.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830–832; Dec. Dig. § 371.*]

2. LARCENY (§ 3*)—ELEMENTS OF OFFENSE—INTENT.

To constitute the withdrawal by defendant of a bank deposit without the consent of the owner larceny, it is necessary to show an intent on the part of defendant to convert the money to his own use.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 3–10; Dec. Dig. § 3.*]

3. INDICTMENT AND INFORMATION (§ 45*)—SETTING ASIDE—GROUNDS.

That the testimony adduced at the examination of defendant, held by a magistrate on July 13, 1910, for the larceny of $300 on May 20, 1910, was substantially the same as that presented on July 21, 1910, at a hearing on a complaint for the larceny of $1,500, on March 28, 1910, is not ground for setting aside the information based on the second examination; the two charges not being preferred on the same state of facts.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 45.*]

4. CRIMINAL LAW (§ 226*)—DISQUALIFICATION OF MAGISTRATE—GROUNDS.

That, in the first of two examinations before a magistrate on the charge of grand larceny, evidence was introduced touching a larceny on the charge of which the second examination was held did not disqualify the magistrate from acting at the hearing of the second charge.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 226.*]

5. CRIMINAL LAW (§ 814*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In a prosecution for grand larceny, an instruction that if the sum alleged to have been stolen was taken at various times, and in sums of less than $50 each, defendant could not be convicted of grand larceny was properly refused, where the defendant obtained the possession of the money by a single draft, without the consent of the owner.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1979; Dec. Dig. § 814.*]

6. CRIMINAL LAW (§ 762*)—TRIAL—INSTRUCTIONS—INVADING PROVINCE OF JURY.

An instruction that the presumption of innocence with which the law clothes one charged with crime is not intended to aid the guilty, but to guard the innocent from unjust punishment, is not an invasion of the province of the jury, as emphasizing the probability in the mind of the court that defendant was guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1750, 1754, 1758, 1759; Dec. Dig. § 762.*]

7. WITNESSES (§ 392*)—CONTRADICTION—INCONSISTENT STATEMENTS.

In a prosecution for grand larceny, a complaint, filed by the complaining witness for embezzlement by defendant of the same sum which he is alleged to have stolen, was not admissible to impeach the testimony of the complaining witness that he did not tell the district attorney that defendant was his agent, nor that he had given to defendant, to keep for him, the sum for the larceny of which defendant was being tried, and that he did not sign a criminal complaint, stating that he had turned over to defendant, to keep for him, the sum referred to in the information, where it is not made to appear that the charge of embezzlement was founded on the same transaction and state of facts on which the charge of grand larceny was based.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 392.*]

8. WITNESSES (§ 379*)—IMPEACHMENT—INCONSISTENT STATEMENTS.

To impeach a witness on the ground of inconsistent statements, the impeaching testimony must be plainly inconsistent with that already given.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1209, 1220–1222, 1247–1256; Dec. Dig. § 379.*]

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

A. H. Burns was convicted of grand larceny, and appeals. Affirmed.

Rehearing denied by Supreme Court (Cr. 1,691) August 14, 1911.

L. E. Dadmun, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was convicted upon an information charging him with the crime of grand larceny. He appeals from the judgment and an order denying his motion for a new trial.

It appears from the record that about March 1, 1910, the complaining witness, Frank Brayer, a German laborer, having little knowledge of the English language, went to San Diego from Los Angeles, and for $8 per month secured a room in a lodging house conducted by defendant and his wife, with neither of whom prior to such time was he acquainted. At this time Brayer had $135 in cash, and on deposit with the Security Savings Bank of Los Angeles the sum of $1,500, and also had on deposit with the German-American Savings Bank of Los Angeles the sum of $2,040. From the time Brayer entered defendant's lodging house, he indulged in the excessive use of liquor, as a result of which he was in a continuous state of intoxication, which rendered him, during a great part of the time, both physically and mentally helpless. About March 15th, while in this condition of incapacity, he authorized the transfer of $1,000 from the German-American Savings Bank to the Blochman Banking Company, in San Diego, signing a receipt therefor by means of his mark. A few days thereafter defendant forwarded to the German-American Savings Bank another receipt, purporting to be likewise signed by Brayer, for the balance of said deposit. The bank, as a precautionary measure, it seems, sent the money to the Blockman Banking Company, where it was deposited to Brayer's credit. All of this amount, except $15.11, was drawn out of the bank upon various checks, payable to defendant, nearly all of which purported to be signed by the mark of Brayer, witnessed by the signatures of others. It appears, however, that the signatures of these persons so signing as witnesses were by defendant procured upon blank checks before they were filled out, and before Brayer had made his purported mark thereon. On or about March 15th, defendant presented to the Merchants' National Bank of San Diego a draft, payable to S. J. Burns, on the Security Savings Bank of Los Angeles, for the sum of $1,500, which draft purported to be signed by Brayer, and stating that he desired to use it at once, requesting the cashier to ask the Security Savings Bank to notify him by wire if paid. This draft was returned, with a statement that the signature was irregular. Another draft was prepared, which was likewise unpaid, and still a third prepared, which purported to be signed by Frank Brayer and witnessed by three persons, likewise payable to S. J. Burns, whom defendant falsely stated to the bank was his sister-in-law, and also falsely stated to the bank that Brayer was his brother-in-law. This last draft, upon the guaranty of the signature made by the Merchants' National Bank, was paid by the Security Savings Bank, and the proceeds deposited to the credit of said S. J. Burns in the Merchants' National Bank, under an agreement that defendant should control the fund and draw checks thereon, signing the name of S. J. Burns thereto. This $1,500 is the subject of the larceny for which defendant was tried and convicted.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

There is a conflict of evidence as to whether Brayer signed this $1,500 draft. The evidence, however, clearly tends to prove that if he did sign it his signature thereto was procured while he was in a state of intoxication, which rendered him incapable of intelligent action, and by means of a scheme and trick devised and planned by defendant for the purpose of feloniously obtaining possession of the money, with the intent to convert it to his own use, and that he did so convert it. Without undertaking to recite the voluminous evidence tending to establish the many circumstances pointing to defendant's guilt, it is sufficient to say that the jury was warranted in its conclusion that no authority was given for the act, by means whereof defendant obtained possession of the $1,500 which Brayer had on deposit with the Security Savings Bank. There is no merit in the contention that the evidence is insufficient to justify the verdict.

[1] For the purpose of showing the motive accompanying the acts of defendant in securing the $1,500, the court, over defendant's objection, permitted the district attorney to introduce evidence touching the withdrawal of the money deposited to Brayer's account in the Blochman Banking Company. This ruling is assigned as error. It appears that on March 16, 1910, $1,000 was deposited in Brayer's name with the Blochman Banking Company, followed on March 31st by a deposit of $1,040.11; that between March 16th and May 20th this entire sum, less $15, was drawn out by defendant by means of 12 checks presented on as many different days, the amounts of which checks varied from $75 to $300 each, all of which were drawn by defendant, payable to himself, and the signatures to all of these checks, but one, purported to be by Brayer's cross or mark. It is significant that on the day this $300 was drawn a like sum was deposited by defendant to the account of S. J. Burns with the Merchants' National Bank. With reference to these checks, Brayer testified that he signed his full name to one check for $25, which, however, does not appear to have been presented, and he admitted that while drunk he affixed his mark to three checks, the amounts of which he could not state, for the reason that defendant held his hand over them, preventing his seeing the same. It thus appears that after the transfer of the $2,040.11 to the Blochman Banking Company defendant also, and by means similar to that employed by him in getting possession of the $1,500, obtained the possession of the entire sum, less the amount of $15.11 above stated, which was drawn out by Brayer. The testimony shows that defendant, from time to time during the period from March 16th to May 20th, gave small sums of money to Brayer, one of which amounted to $25, and that he paid his liquor bills and other bills and bought liquor for him, all of which, according to Brayer's testimony, did not exceed the sum of $2.50 per day.

[2] While it was shown that the withdrawal from the Security Savings Bank of the $1,500 was unauthorized, nevertheless it was necessary, in order to constitute the act larceny, to show an intent on the part of defendant to convert the same to his own use. The evidence touching the transactions had by defendant at the same time with the Blochman Banking Company, whereby he obtained possession of Brayer's money on deposit with that bank and converted it to his own use, was proper as tending to show that a like motive prompted him in securing possession of the deposit of $1,500 from the Security Savings Bank. The system employed to obtain the deposit in the Security Savings Bank was identical with that which defendant was at the same time employing in gaining possession of and appropriating to his own use the money of Brayer deposited with the Blochman Banking Company, and the fair and logical inference to be drawn from his acts is that in each case the motive was the same. In the case of People v. Zimmerman, 11 Cal. App. 117, 104 Pac. 591, this court, in discussing a like question, said: "Where the purpose is to show motive or system, the evidence is admissible, if it have a direct tendency, in view of the surrounding circumstances, to prove motive or intent or other material fact." That it was not error to admit the evidence is fully sustained by numerous cases. People v. Cook, 148 Cal. 334, 83 Pac. 43; People v. Tomalty, 14 Cal. App. 224, 111 Pac. 513; People v.

Schwartz, 14 Cal. App. 9, 110 Pac. 969; People v. Ruef, 14 Cal. App. 576, 114 Pac. 48, 54.

[3, 4] Two informations charging defendant with grand larceny were filed by the district attorney, one of which, numbered 16,307, based upon the proceedings had before the magistrate on July 13, 1910, upon which charge a commitment was issued, charged him with grand larceny in the felonious stealing of $300 from Frank Brayer on May 20, 1910; the other, numbered 16,308, being the one upon which defendant was tried and convicted, and based upon the hearing and proceedings had before the magistrate on July 21, 1910, upon which commitment was issued, charged him with the larceny of $1,500 from Frank Brayer on March 28, 1910. Defendant made a motion to set aside the information No. 16,308, and upon which defendant was tried, upon the ground that defendant had not been legally committed by the magistrate before the filing of the information. The motion was denied. It appears that the testimony adduced at the examination held by the magistrate on July 13, 1910, for the stealing of the $300, was substantially the same as that presented on July 21, 1910, at the hearing upon the complaint charging defendant with the stealing of the $1,500. At the first hearing, defendant was committed for the larceny of $300 on May 20, 1910, and at the second hearing he was committed for the larceny of $1,500 on March 28, 1910. Appellant's argument in support of his contention that the ruling constituted error is based upon the theory that two criminal charges were preferred upon the same state of facts. This, of course, cannot be done. Such, however, is not the case here. The larceny of the $1,500 obtained from the Security Savings Bank is entirely distinct and separate from the transaction had by defendant with the Blochman Banking Company, by reason whereof he was charged with feloniously obtaining possession of $300 belonging to Brayer. Nor would the fact that because in the one case evidence touching upon the other was introduced disqualify the magistrate from acting at the hearing upon the other charge, any more than it would disqualify a judge who had presided at the trial of the one from sitting upon a hearing of the second. In our opinion, the point is wholly without merit.

[5] The court refused to give certain instructions requested by defendant. One of these was to the effect that if the $1,500 alleged to have been stolen by defendant was taken at various times, and in sums of less than $50 each, defendant could not be convicted of grand larceny. Not only was the subject of this instruction fully covered by other instructions, but since the taking was of the entire deposit of $1,500, possession of all of which was obtained at one and the same time, and the act of conversion was complete, if converted at all, when deposited in the Merchants' National Bank to the account of S. J. Burns, controlled by defendant, there was no theory of the case under which the instruction was proper. The effect of another instruction requested was to take from the jury the consideration *for any purpose* of all evidence pertaining to transactions had by defendant with the Blochman Banking Company in securing Brayer's money deposited therein. In view of what has heretofore been said upon the admissibility of this evidence, it must necessarily follow that defendant was not entitled to an instruction in the unqualified form requested. The substance of other instructions requested appears to have been embodied in instructions given by the court of its own motion.

[6] At the request of the district attorney, the court instructed the jury to the effect that the presumption of innocence with which the law clothes one charged with the commission of crime, thus casting the burden of establishing his guilt upon the state, is not intended to aid the guilty, but to guard the innocent from unjust punishment. Appellant insists that the giving of this instruction was an invasion of the province of the jury by the court, in that it emphasized the probability existing in the mind of the court that defendant was guilty. We do not so regard it. Moreover, as the instruction was but a correct statement of the reasons underlying the law, error cannot be predicated thereon.

[7, 8] On cross-examination, Brayer testified that he did not tell the district attorney that defendant was his agent, nor that he had given to defendant, to keep for him, the $1,500 for the larceny of which defendant was then being tried; also that he did not sign a criminal complaint before a justice, wherein he stated that he had turned over to defendant, to keep for him, this particular $1,500 referred to in the information. He was then shown a criminal complaint, which had theretofore been filed with a justice of the peace, and admitted signing and swearing to the same. Thereupon defendant offered the complaint in evidence, an objection to the introduction of which was sustained. The purpose of offering the complaint in evidence was to impeach the testimony of Brayer by showing that he had made statements in this complaint inconsistent with his testimony above referred to. Brayer, however, had testified that he had filed no complaint, charging defendant with embezzling the particular $1,500 for which he was then being tried upon an information charging him with grand larceny. Defendant made no attempt to identify the $1,500 specified in the complaint charging him with embezzlement with that for which he was being tried upon a charge of grand larceny. Whether or not the charge of embezzlement was founded upon the same transaction and state of facts as that upon which the charge of grand larceny was based is not made to appear; indeed, the testimony of Brayer tends to prove the contrary. Hence it was not error for the

court to refuse to admit the complaint in evidence, particularly as the district attorney had objected to its introduction upon the ground that it referred to a different transaction which had no reference to the taking of the $1,500 referred to in the information, or in any way connected with the offense for which defendant was then being tried. "To impeach a witness upon the ground of inconsistent statements, the impeaching testimony must be plainly inconsistent with that already given." Estate of O'Connor, 118 Cal. 69, 50 Pac. 4; People v. Collum, 122 Cal. 186, 54 Pac. 589.

The record discloses no prejudicial error. The judgment and order are therefore affirmed.

We concur: ALLEN, P. J.; JAMES, J.

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16 Cal. App. 433

HELFRICH v. ROMER. (Civ. 791.)

(District Court of Appeal, First District, California. June 16, 1911. Rehearing Denied by Supreme Court Aug. 15, 1911.)

1. ABATEMENT AND REVIVAL (§ 9*)—PENDENCY OF ACTION — DEFENSE — SUFFICIENCY OF EVIDENCE.

In an action on notes, in which defendant pleaded in abatement that another suit on the same notes by the same plaintiff had been hitherto brought in the name of another, and was still pending, evidence *held* to justify a finding that the plaintiff never caused such action to be brought.

[Ed. Note.—For other cases, see Abatement and Revival, Dec. Dig. § 9.*]

2. PLEADING (§ 106*)—ABATEMENT—PENDENCY OF ACTION.

An answer to an action on notes, a plea in abatement, alleging the commencement of an action against the present plaintiff, and another for an accounting of an alleged copartnership, for the purposes of which it is alleged the notes in suit were originally given, but which does not allege that plaintiff was a member of the firm, is insufficient.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 219–227; Dec. Dig. § 106.*]

3. PLEADING (§ 106*)—PENDENCY OF OTHER ACTION.

And, as the defense of lis pendens does not apply to cross-suits, such an answer is insufficient.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 106.*]

4. NEW TRIAL (§ 23*)—GROUNDS—JUDGMENT NOT SUPPORTED BY FINDINGS.

Where, in an action on notes, the court found that an action brought by defendant was pending for an accounting, in which the notes in suit were involved, but gave judgment for plaintiff, nevertheless, even if the pendency of such action were ground for abatement, the case is merely one of a judgment not supported by the findings, which is not a ground for new trial, and can only be corrected on an appeal from the judgment.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 35; Dec. Dig. § 23.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Cora A. Helfrich against Robert Romer. From an order denying a motion for a new trial, defendant appeals. Affirmed.

Rehearing denied by Supreme Court (S. F. 5,951) August 15, 1911.

William P. Hubbard, for appellant. W. H. Barrows, for respondent.

HALL, J. This is an appeal from an order denying defendant's motion for a new trial.

The action is one upon two promissory notes, one for $1,000 and the other for $92, alleged to have been executed by defendant to G. P. Helfrich, husband of plaintiff, as her agent, and in consideration of money, alleged to be the separate property of plaintiff, loaned to defendant. It is also alleged that said G. P. Helfrich, after the execution of said notes, indorsed and delivered them to plaintiff, and that no part of either has been paid, save $20 as interest.

Defendant in his answer denied that said notes were executed to said G. P. Helfrich, as agent of plaintiff; that the money loaned thereon was the separate property of plaintiff; that said G. P. Helfrich indorsed or delivered said notes to plaintiff, and alleged payment in full of said notes.

Defendant affirmatively alleged that defendant and G. P. Helfrich were copartners, and that said notes were given in consideration of money originally borrowed by said G. P. Helfrich for partnership purposes, and that said G. P. Helfrich has received full payment from said partnership funds of said notes. Defendant further alleged that he had commenced an action against G. P. Helfrich and Cora Helfrich, as defendants, for the purpose of obtaining an accounting of said partnership business, and that said notes be delivered up and canceled. The answer also alleged that plaintiff, in March, 1906, before the comencement of this action, caused to be filed in the superior court of the city and county of San Francisco an action against defendant upon said two promissory notes, and that said action is still pending.

The court made findings of facts in accordance with the allegations of the complaint and against the contentions of the defendant, save that it found that defendant had commenced an action against G. P. Helfrich and plaintiff for an accounting of the affairs of said copartnership (which it found had been formed between said G. P. Helfrich and defendant, after the execution of said two promissory notes) as alleged in defendant's answer, and that said action is still pending.

Appellant attacks the sufficiency of the evidence to support the findings, and devotes a considerable portion of his brief to discussing the evidence that tends to support the theory that the money represented by the notes was borrowed and used for partnership purposes. Upon this point it is sufficient to say that the evidence given by G. P. Helfrich and plaintiff amply supports all the allegations of the complaint, and the findings made by the court upon all issues presented in bar of the action. As the record discloses no plausible reason for contending to the contrary, no good purpose can be served by setting out the evidence given pro and con upon the issues presented by the allegations of the complaint and the matters set up in the answer in bar of the action.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] As to the matter pleaded in abatement of the action, to the effect that the plaintiff, in March, 1906, had caused an action to be filed against defendant upon said notes, the evidence shows that prior thereto plaintiff placed the two notes in the hands of her attorney for collection, who brought an action thereon against defendant in the name of one McKinley, all the papers and records of which were destroyed in the conflagration of April, 1906. The evidence tends to show that said notes were never indorsed or delivered to McKinley, and that the suit was brought in his name without any authorization from plaintiff so to do. It is not pretended that any action was ever brought in her name on the notes, and the court was justified from the evidence in finding that she never caused any action to be brought on said notes, as alleged in the answer.

[2, 3] The matter pleaded and found as to the pendency of the action brought by defendant against G. P. Helfrich and plaintiff, for an accounting of the alleged copartnership between defendant and G. P. Helfrich, did not constitute a good plea in abatement. It, at best, as against plaintiff, presented a case of a cross-demand only. The plaintiffs, or the actors in the two suits, are not the same. It is not alleged or claimed that she was a member of the copartnership. The general rule is that, before one suit may be pleaded in abatement of a second suit, it must appear that the plaintiffs are the same in the two suits. The defense of lis pendens does not apply to cross-suits. O'Connor v. Blake, 29 Cal. 313; Ayres v. Bensley, 32 Cal. 630. The exceptional conditions existing in Coubrough v. Adams, 70 Cal. 374, 11 Pac. 634, are absent from this case.

[4] Furthermore the court found the pendency of the action for an accounting as alleged in the answer, but gave judgment for plaintiff nevertheless. If this was error, it does not require nor justify a new trial, but can only be corrected by an appeal from the judgment. It presents a case, if the contention of appellant be correct that it shows a ground for abating this action, of a judgment not supported by the findings. That the judgment is not supported by the findings is not a ground for a new trial. Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Pierce v. Willis, 103 Cal. 91, 36 Pac. 1080; Petaluma Paving Co. v. Singley, 136 Cal. 616, 69 Pac. 426. No other points are made for a reversal.

The order is affirmed.

We concur: LENNON, P. J., KERRIGAN, J.

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16 Cal. App. 443

SCHROEDER v. MAUZY. (Civ. 818.)

(District Court of Appeal, First District, California. June 16, 1911. Rehearing Denied by Supreme Court Aug. 15, 1911.)

1. PLEADING (§ 126*) — ANSWER — NEGATIVE PREGNANT—EFFECT.

In an action against a bailee for the value of a piano, or for the amount for which it was insured, an attempted denial in the answer of the alleged value in the form of a negative pregnant was not a denial of the allegation in the complaint, but was an admission that it was of a value of any sum less than that named in the complaint, and raised no issue on the subject of value.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 261–263; Dec. Dig. § 126.*]

2. APPEAL AND ERROR (§ 171*)—PRESENTATION OF QUESTIONS IN TRIAL COURT—THEORY OF TRIAL.

In an action for the value of a piano left with defendant for storage, or the amount of insurance thereon, neglect of the defendant to ask for a nonsuit on the ground of variance between the proof and the pleadings verifies the contention that the cause was tried by the court, with the approval of the parties, on the theory that the liability of a defendant, if any, was for damages from breach of his obligation to keep the property insured for plaintiff's benefit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053–1069; Dec. Dig. § 171.*]

3. APPEAL AND ERROR (§ 175*) — PRESENTATION OF QUESTIONS IN TRIAL COURT—THEORY OF TRIAL.

Where the trial court and the parties proceed to trial on the theory that there is a material issue, and the court finds in accordance with the evidence addressed to that issue, and received without objection, the parties will not be allowed for the first time on appeal to say that there was no such issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1137–1140; Dec. Dig. § 175.*]

4. APPEAL AND ERROR (§ 867*) — REVIEW — QUESTIONS REVIEWABLE—"NEW TRIAL."

Under Code Civ. Proc. § 656, defining a "new trial" as a re-examination of an issue of fact, and section 657, providing that a verdict or other decision of fact may be reviewed on an appeal from an order denying a new trial, the question whether the judgment is authorized by the pleadings cannot be raised or reviewed on an appeal from an order denying a new trial, irrespective of the issues presented by the pleadings, and notwithstanding the findings may be at variance with such issues.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476–3486; Dec. Dig. § 867.*

For other definitions, see Words and Phrases, vol. 5, pp. 4788–4790.]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. BAILMENT (§ 18*) — COMPENSATION OF BAILEE.

Where plaintiff left a piano with defendant for storage and to keep it insured, defendant would, in the absence of an agreement respecting his compensation, be entitled to a reasonable value of his services in that behalf.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 77–84; Dec. Dig. § 18.*]

6. BAILMENT (§ 12*)—MUTUAL RIGHTS AND LIABILITIES—NEGLIGENCE.

Even if an agreement between plaintiff and defendant that defendant should provide storage and insurance for plaintiff's piano constituted merely a gratuitous agency, the defendant was obligated to act in good faith, without negligence, and to obey the instructions of the plaintiff, as principal, to procure insurance.

[Ed. Note.—For other cases, see Bailment, Dec. Dig. § 12.*]

7. TRIAL (§ 105*)—RECEPTION OF EVIDENCE—FAILURE TO OBJECT.

Where the testimony of plaintiff, in an action for the value of a piano, or for the amount of insurance thereon, as to when and where she delivered the piano to the defendant was given in response to a preliminary question, which was not objected to, its admission was not error.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 105.*]

8. BAILMENT (§ 31*)—EVIDENCE OF MAKING —ADMISSIBILITY.

In an action for the value or amount received from insurance on a piano left with defendant for storage and insurance, conversations between plaintiff and defendant with reference to the piano, its insurance, and the amount thereof were competent and relevant to establish an agreement of defendant to insure.

[Ed. Note.—For other cases, see Bailment, Dec. Dig. § 31.*]

9. APPEAL AND ERROR (§ 204*) — PRESENTATION OF QUESTIONS IN TRIAL COURT—RECEPTION OF EVIDENCE.

Where testimony was not objected to, a motion to strike it out will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1258–1280; Dec. Dig. § 204.*]

10. BAILMENT (§ 31*)—LIABILITIES OF BAILEE —ACTIONS.

In an action for the value or the amount of insurance received on a piano, where the defendant denied any agreement to store and insure, and plaintiff testified that when she delivered the piano to defendant she directed him to store and insure as he had always done before, her testimony as to her previous dealings with defendant concerning the storage and insurance of the same piano, and a letter from defendant to plaintiff's husband, which contained a statement of charges for insurance on the piano for at least two years immediately preceding its loss, were competent and relevant.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 124–131; Dec. Dig. § 31.*]

11. TRIAL (§ 165*) — APPEAL AND ERROR (§ 241*) — INVOLUNTARY NONSUIT — STATEMENT OF GROUNDS.

On a motion for a nonsuit, only the stated grounds thereof may be considered by the trial court or on review.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 373; Dec. Dig. § 165;* Appeal and Error, Dec. Dig. § 241.*]

12. APPEAL AND ERROR (§ 706*)—RECORD—AFFIDAVITS FOR NEW TRIAL.

Under Code Civ. Proc. § 658, providing that when a motion is made for a new trial for newly discovered evidence it must be made on affidavits, and section 661, providing that the affidavits used on the hearing, with a copy of the order made, shall constitute the record on appeal from the order granting or refusing a new trial, affidavits as to newly discovered evidence, which were filed in support of a motion for new trial, but not offered or read in evidence on the hearing of the motion, and which are not included in the bill of exceptions, cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2944–2947; Dec. Dig. § 706.*]

13. APPEAL AND ERROR (§ 1072*)—REVIEW—HARMLESS ERROR—RULING ON MOTION FOR NEW TRIAL.

In an order granting a new trial, unless the plaintiff within a stated time remit a sum allowed in the judgment as interest, the portion of the order relating to such remittitur is not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4233½; Dec. Dig. § 1072.*]

14. APPEAL AND ERROR (§ 867*) — REVIEW — QUESTIONS CONSIDERED.

In an order granting a new trial, unless plaintiff should remit from the judgment a portion allowed as interest, any error in the provision for the remittitur cannot be reviewed on an appeal solely from the order denying a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476–3486; Dec. Dig. § 867.*]

Appeal from Superior Court, City and County of San Francisco; Geo. H. Buck, Judge.

Action by Eugenie H. Schroeder against Byron Mauzy. From an order denying a new trial after judgment for plaintiff, defendant appeals. Affirmed.

Rehearing denied by Supreme Court (S. F. 5,950) August 15, 1911.

Walter E. Dorn, for appellant. Edward Myers, for respondent.

LENNON, P. J. The plaintiff recovered a judgment against the defendant in the sum of $900.21, upon a complaint which, for a cause of action, alleged substantially that the plaintiff, in her separate right, was the owner of a piano, valued at $1,000, which had been delivered into the care and custody of defendant, pursuant to an oral agreement with plaintiff, whereby, for a valuable consideration, to be paid upon demand, defendant was to keep said piano on storage, and have the same insured against loss by fire for the benefit of plaintiff; that the defendant under this agreement did insure said piano for the benefit of plaintiff against loss by fire; that thereafter the piano, while in the custody of defendant and during the life of the insurance, was destroyed by fire; that thereupon defendant received and collected as insurance for the loss of said piano a sum of money, the amount of which was unknown to plaintiff, and has ever since refused to account to the plaintiff for the whole or any part thereof. The prayer of plaintiff's complaint was "for the sum of $1,000, the value of said piano, if the defendant failed to cause same to be covered and insured against loss or damage by fire for plaintiff's use, pursuant to his said agreement; or that defendant account to plaintiff and pay over to her the amount of money recovered and received by him as insurance on said piano."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] The answer of the defendant denied that he had caused the piano to be insured for plaintiff's benefit or at all, and by specific denials put in issue every other material allegation of the plaintiff's complaint, save and except the allegation of the loss and the value of the piano. The defendant's attempted denial of the alleged value of the piano, in the form of a negative pregnant, was not a denial of the allegation in the complaint, but was an admission that the piano, at the time specified in the complaint, was of the value of any sum less than $1,000, and raised no issue upon the subject of value as pleaded by plaintiff. Leffingwell v. Griffing, 31 Cal. 232; Scovill v. Barney, 4 Or. 288.

The findings of the trial court fixed the value of the piano at the sum of $999, and then, following the language of the complaint, were in favor of the plaintiff upon the issues of the ownership of the piano, the delivery of the same to the defendant for storage, and his agreement, for a valuable consideration, to insure the piano against loss by fire for the benefit of plaintiff. From this point on, however, the findings of the trial court are at variance with the allegations of plaintiff's complaint to the extent that the court found affirmatively that, although the defendant had agreed to insure the piano for a specific sum, viz., $750, he had failed and neglected to have it insured in that or any other amount, and that he had refused, upon demand, to pay this sum or any part thereof to plaintiff.

The defendant has appealed from the order denying his motion for a new trial, but did not appeal from the judgment. His motion for a new trial specified, as grounds thereof, (1) that the evidence was insufficient to justify the judgment; (2) that the decision was against law; (3) errors of law occurring at the trial; and (4) newly discovered evidence.

[2] The principal point urged by the defendant in support of his appeal is that "the decision is against law" in this: That the gravamen of the plaintiff's complaint reveals a cause of action for moneys had and received, while the judgment of the court is founded upon findings which indicate a cause of action for damages for breach of contract. The record discloses that the defendant moved the court for a nonsuit on the grounds that the evidence was insufficient "to support a judgment of any kind"; that "the value of the piano at the time of the alleged loss by fire had not been proven"; and that "there was no agreement in writing covering the insurance." The neglect of the defendant to ask for a nonsuit upon the ground of a variance between the proof and the pleadings, in conjunction with a perusal of the entire record, verifies plaintiff's contention, that the cause was tried by the court, with the acquiescence and approval of the parties to the action, upon the theory developed by the proof, and assumed by the court and the parties to be in issue, that the liability of the defendant, if any, was for damages arising out of the breach of his alleged obligation to have and keep the property of the plaintiff insured for her benefit. In other words, it appears from the record that the cause was tried as if the answer of the defendant, by its denial of the agreement to insure, had put in issue the agreement as found by the court.

[3] It has been repeatedly held in this state that where the trial court and the parties to an action proceed to a trial of the cause upon the theory that there is a material issue, and the court, upon evidence addressed to that issue and received without objection, finds in accordance with that evidence, and upon the theory that an appropriate issue was raised by the pleadings, "the parties will not, nor will either of them, be allowed here for the first time to say there was no such issue." Horton v. Dominguez, 68 Cal. 642, 10 Pac. 186; Ortega v. Cordero, 88 Cal. 221, 26 Pac. 80; Murdock v. Clarke, 90 Cal. 427, 27 Pac. 275; Klopper v. Levy, 98 Cal. 525, 33 Pac. 444; Rudel v. Los Angeles Co., 118 Cal. 281, 50 Pac. 400; Barbour v. Flick, 126 Cal. 628, 59 Pac. 122; McDougald v. Hulet, 132 Cal. 163, 64 Pac. 278; Krasky v. Wollpert, 134 Cal. 338, 66 Pac. 309; Carroll v. Briggs, 138 Cal. 454, 71 Pac. 501; Roberts v. Sierra R. Co., 14 Cal. App. 180, 111 Pac. 519. Aside from this view of the case, the contention of defendant that the decision is against law cannot be maintained, or even considered upon the record before us.

[4] A new trial is a re-examination of an issue of fact (Code Civ. Proc. § 656), and a verdict or other decision of fact may be reviewed upon an appeal from an order denying a motion for a new trial. Code Civ. Proc. § 657. But the question of whether or not a judgment is authorized by the pleadings is not involved in a re-examination of an issue of fact, and therefore the question of the sufficiency of the complaint to support the findings and judgment in any given case cannot be raised or reviewed upon an appeal from an order denying a motion for a new trial. Martin v. Matfield, 49 Cal. 42; Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Crescent Feather Co. v. United Upholsterers' Union, 153 Cal. 434, 95 Pac. 871. This is so irrespective of the issues

presented by the pleadings, and notwithstanding the findings may be at variance with the issues pleaded. Riverside Water Co. v. Gage, 108 Cal. 240, 41 Pac. 299. It follows from the foregoing conclusions that the only points available to the defendant, on the record presented by his appeal, are the insufficiency of the evidence to justify the decision, and the alleged errors of law occurring at the trial.

[5] In support of the first of the points just enumerated, the defendant strongly urges the specifications of insufficiency of the evidence to support the findings as to the making of the agreement sued upon, and the existence of a consideration therefor. In this behalf, it would suffice to say that, in our judgment, the evidence is sufficient to sustain both of the findings in question. But, even if the evidence, as contended by the defendant, does not show clearly and unequivocally a meeting of minds upon the subject of compensation as a consideration for the agreement sued upon, the defendant cannot claim exemption from liability for the breach of his obligation to insure merely because, as is admitted, he never charged or collected any compensation for the service which was to be rendered. The undisputed evidence of the plaintiff shows that her property in this instance was intrusted to the defendant under an express agreement for storage, and it is an admitted fact in the case that on at least two previous occasions the same or similar property had been by the plaintiff intrusted to the defendant for storage, and that he was in the habit of effecting insurance thereon for the benefit of the plaintiff. "Any one who undertakes to transact some business or to manage some affair for another, by authority and on account of the latter, and to render an account of it, is an agent." 1 Am. & Eng. Ency. of Law (2d Ed.) p. 938. "In the absence of instructions, or a usage of trade, or habit of dealing between the parties, the agent is not bound to insure the property of his principal; but if he has received instructions to insure, or has been in the habit of effecting insurance in the previous dealings between them, he will be liable as an insurer for any loss or damage arising from his failure to insure." 1 Am. & Eng. Ency. of Law (2d Ed.) p. 1068. If, as in effect is declared by the findings, the defendant, under an express agreement, became the agent of the plaintiff for the purpose of storing and insuring her property, he would, in the absence of an agreement respecting his compensation, have been entitled under the law to charge for the reasonable value of his services in that behalf.

[6] If, on the other hand, as the defendant insists, the evidence is not inconsistent with the conclusion that the agreement between plaintiff and defendant constituted merely a gratuitous agency, nevertheless, under the facts of this case, the defendant was obligated to act in the premises in good faith and without negligence. In other words, having, as the evidence shows, undertaken the agency, the defendant was bound, though it were gratuitously undertaken, to obey instructions and exercise good faith and ordinary diligence in executing that which he had pretended to do, and for a failure to do so he will be held liable to his principal for the resulting loss or damage. Herrick v. Hodges, 13 Cal. 434; Samonset v. Mesnager, 108 Cal. 354, 41 Pac. 337; 1 Clark & Sayles on the Law of Agency, p. 964, § 433. Therefore, whether the defendant undertook the service in controversy with or without an express understanding for compensation is immaterial.

[7-9] The testimony of the plaintiff, upon direct examination, as to when and where she delivered the piano in question to the defendant was given, evidently, in response to a preliminary question, which was not objected to, and therefore we fail to appreciate the defendant's contention that the admission of this testimony was error. The conversations which the plaintiff related as having occurred between her and the defendant with reference to the piano, its insurance, and the amount thereof were competent and relevant to establish the agreement to insure. This testimony was not objected to, and therefore we cannot consider the motion of the defendant to strike it out.

[10] In view of the defendant's denial of the agreement to store and insure, and plaintiff's testimony that when she delivered the piano to the defendant she directed him to store and insure "as he had always done before," the testimony of the plaintiff as to her previous dealings with the defendant concerning the storage and insurance of the same piano, as well as the letter from defendant to plaintiff's husband, which contained a statement of charges for insurance upon the piano for at least two years immediately preceding its loss, were clearly competent and relevant.

[11] The trial court did not err in denying the defendant's motion for a nonsuit. Upon a motion for a nonsuit, only the stated grounds thereof may be considered by the trial court or reviewed by this court (Coffey v. Greenfield, 62 Cal. 602; Gardiner v. Schmaelzle, 47 Cal. 588; Raimond v. Eldridge, 43 Cal. 506), and the only grounds stated in support of the motion for a nonsuit in the case at bar were, as hereinbefore indicated, that the evidence was insufficient to justify a judgment of any kind; that the value of the piano had not been shown; and that the agreement to store and insure was not in writing. The point that the agreement was not in writing has been abandoned upon this appeal; the evidence fully supports the findings, and therefore justifies the judgment; and the point that there is no evidence as to the value of the piano at the time of its loss by fire is answered by the record, which shows that upon the hearing

of the motion for a nonsuit counsel for defendant expressly admitted that the piano, when it was originally purchased from the defendant, was of the value of $1,000, and it is in evidence as a part of the plaintiff's case that the piano at the time of its delivery to the defendant for storage was in perfect condition. Moreover, the answer of the defendant raised no issue as to the value of the piano at the time of its delivery to the defendant and its subsequent destruction by fire.

[12] In the opening brief of counsel for defendant, no mention is made of the sufficiency of the affidavits filed in support of the motion for new trial upon the ground of newly discovered evidence. In his closing brief, however, counsel urges these affidavits upon our attention, but for what purpose we are at a loss to understand. There are printed in the transcript several affidavits, purporting to disclose newly discovered evidence, which apparently were filed in support of defendant's motion for a new trial, but not offered or read in evidence, or referred to in any way, upon the hearing of the motion. When a motion for a new trial is made upon the ground of newly discovered evidence, it must be made upon affidavits (Code Civ. Proc. § 658), and "the * * * affidavits * * * used on the hearing with a copy of the order made shall constitute the record to be used on appeal from the order granting or refusing a new trial." Code Civ. Proc. § 661. It is further provided and required by rule 29 (78 Pac. xii) of the Supreme Court that "in all cases of appeal to this court from the orders of the superior courts the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same into a bill of exceptions, except where another mode of authentication is provided by law." This appeal comes here upon a duly authenticated bill of exceptions, and as the affidavits in question are not referred to or included therein they cannot now be considered. Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491; Cohen v. Alameda, 124 Cal. 508, 57 Pac. 377; Ramsbottom v. Fitzgerald, 128 Cal. 75, 60 Pac. 522; Pereira v. City Sav. Bank, 128 Cal. 47, 60 Pac. 524; San Diego Sav. Bank v. Goodsell, 137 Cal. 424, 70 Pac. 299; People v. Gay, 141 Cal. 42, 74 Pac. 443; People v. Wrin, 143 Cal. 14, 76 Pac. 646; Skinner v. Horn, 144 Cal. 279, 77 Pac. 904.

[13, 14] As conclusions of law from the facts found, the trial court decided that the plaintiff was entitled to judgment against the defendant for the sum of $750, with interest thereon at the rate of 7 per cent. per annum from July 1, 1906, the date upon which it was found that plaintiff made demand upon defendant for the agreed amount of insurance to be placed upon the piano. Judgment was entered accordingly for the sum of $900.21. Subsequently the trial court was of the opinion that this allowance of interest was unwarranted and erroneous, and upon the hearing and submission of the motion for a new trial ordered that the motion be granted, unless the plaintiff, within a stated time, remit in writing the sum of $151.21, which was the amount of the interest herein referred to as having been allowed and entered in the judgment. No other or further order was made by the court in the premises, and the record is silent as to whether or not the plaintiff complied with the terms imposed. It seems to be conceded, however, that the plaintiff did remit from the judgment the amount specified, and it is now claimed by the defendant that the order of the court in this particular was prejudicial error. It is clear that that portion of the order complained of profits, rather than prejudices, the defendant, and whether it be considered a special order made after final judgment, or a modification of the original judgment, which subsequently became a part of the judgment, it was not and could not have been made the basis of a motion for a new trial. It was not an error occurring in the trial, but rather in the judgment, and cannot now be reviewed solely upon an appeal from the order denying the defendant's motion for a new trial.

The order appealed from is affirmed.

We concur: HALL, J.; KERRIGAN, J.

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17 Cal. App. 45

McDONOUGH et al. v. NOWLIN. (Civ. 815.)

(District Court of Appeal, Third District, California. Aug. 30, 1911.)

1. Bills and Notes (§ 448*)—Payment by Accommodation Maker—Remedy Against Principal Maker.

Where accommodation signers of a note pay it on the failure of the principal maker so to do, their remedy against the principal maker is, not on the note, but on the promise to repay, which the law implies from the facts.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1330-1339; Dec. Dig. § 448.*]

2. Pleading (§ 433*)—Aider by Judgment—Payment by Sureties—Remedy Against Principal Maker.

A complaint which alleges that plaintiffs and defendant executed a joint and several note for the sole debt of defendant, that plaintiffs signed as sureties only as an accommodation to defendant, and without any other consideration, that defendant failed to pay the note, and that plaintiffs were compelled to pay it, and which prays for judgment against defendant for the face of the note, with interest, though ambiguous for failing to disclose whether the action is on the note or on the promise implied by law, supports a judgment for plaintiffs, in the absence of any special demurrer pointing out the objection.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1451-1477; Dec. Dig. § 433;* Bills and Notes, Cent. Dig. § 1473.]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. BILLS AND NOTES (§ 539*)—ACTIONS—FINDINGS—SUFFICIENCY.

Where the court, in an action by accommodation signers of a note against the principal maker for reimbursement, found that the note was for defendant's sole debt, and that plaintiffs did not receive any benefit from the note, but executed it as an accommodation, and that plaintiffs paid the note on the maker's refusal so to do, a judgment for the plaintiffs was justified; and a finding that they were the owners and holders of the note, and were entitled to judgment against the maker, was unnecessary.

[Ed. Note.—For other cases, see Bills and Notes, Cent.Dig. §§ 1911–1913; Dec.Dig. § 539.*]

4. BILLS AND NOTES (§ 262*)—PRINCIPAL AND SURETY (§ 184*)—SURETY OR ACCOMMODATION INDORSER—PAYMENT.

Where a surety or accommodation indorser pays the note by executing his own note to the holder, who accepts it in payment and in extinguishment of the first note, he may recover the amount of the first note from the principal as money paid for his use, though the second note has not been paid.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 262;* Principal and Surety, Dec. Dig. § 184.*]

5. PRINCIPAL AND SURETY (§ 185*)—ENFORCEMENT—COLLATERAL SECURITY.

A mortgage, given by a maker of a note to his sureties thereon to secure an obligation different from the one created by the sureties signing the note as such, does not operate as security for the implied obligation of the maker to pay the sureties on their paying the note of the maker, and the sureties are not precluded from suing on the implied obligation without first seeking relief under the mortgage, especially where they disavowed claiming any rights under it, and the trial court regarded it as having no legal force.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 185.*]

6. PRINCIPAL AND SURETY (§ 190*)—PAYMENT BY SURETIES—OBLIGATION OF MAKER.

A surety of a note, who pays it on the failure of the maker to do so, is entitled to recover the principal of the note, with interest to date of payment, plus interest on the sum of the principal, and such interest from date of payment to date of judgment.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 568–577; Dec. Dig. § 190.*]

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

Action by John McDonough and others against Ande Nowlin. From a judgment for plaintiffs, defendant appeals. Affirmed.

T. J. Butts and A. M. Ewing, for appellant. J. T. Coffman, for respondents.

CHIPMAN, P. J. This is an action commenced by plaintiffs as sureties against the defendant, alleged to have been the principal in executing the obligation which was paid by plaintiffs.

The complaint alleges: That plaintiffs and defendant, on June 3, 1908, executed the joint and several promissory note set out in the complaint, which was payable to the Farmers' & Mechanics' Bank of Healdsburg, for the sum of $1,000; that the debt evidenced thereby was "the sole debt of the said defendant, and that the plaintiffs signed the same as sureties only, as an accommodation to him, and without any other consideration whatsoever, and upon the promise of said defendant that he would pay the whole of said debt evidenced by said promissory note"; that defendant paid the interest to December 3, 1909, "but nothing further of interest, and no part of the principal has ever been paid"; that the said promissory note falling due, and defendant failing to pay the same, plaintiffs "were compelled to, and thereupon did," pay said promissory note, principal and interest; "that no part of said sum of $1,000, or of the interest thereon, has ever been repaid to plaintiffs or any of them, and that there is now due, owing, and payable and unpaid from said defendant to the said plaintiffs the aforesaid principal sum of $1,000 and interest thereon from the 3d day of December, 1909, at the rate of seven per cent. per annum." The prayer is for judgment for the sum of $1,000 and interest thereon from December 3, 1909, at the rate of 7 per cent. per annum, compounded semiannually, and for costs of suit. Without demurring to the complaint, defendant answered by a general denial.

The court found the facts as alleged in the complaint; that defendant "borrowed and received from said bank the said sum of $1,000, all to his own sole use and benefit, and that the said plaintiffs did not, nor did either of them, at any time or at all receive or have any part of the same, or any use or benefit thereof;" that plaintiffs executed said promissory note as an accommodation to defendant, and without other consideration; that defendant paid the interest due on said promissory note up to December 3, 1909, but has paid nothing further; that said bank demanded payment of said note from plaintiffs, and that plaintiffs paid the same in full and interest thereon falling due after December 3, 1909.

Among the conclusions of law is one, which is more a finding of fact than a conclusion of law, that, having paid the said promissory note, plaintiffs "are now the owners and holders of the same," and that the principal thereof, together with interest thereon at the rate therein provided, "is due, owing, and payable from said defendant to the said plaintiffs, and that they are entitled to judgment against said defendant therefor, together with their costs herein."

The evidence was that the note referred to in the complaint was taken up by plaintiffs after its maturity, and their joint and several note given in its stead and in payment, and that defendant has never paid to plaintiffs any part of the money borrowed by him on the note, except interest up to December 3, 1909.

[1, 2] The principal point relied upon by

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

appellant is that the plaintiffs mistook their remedy by bringing the action on the promissory note, which they claim to have paid, instead of counting upon the assumpsit which the law implies where a surety is compelled to advance money for his principal, as was held to be the correct procedure in Yule v. Bishop, 133 Cal. 574, 580, 65 Pac. 1094. And it is further contended that the trial court fell into the same error, as is shown by the finding referred to as part of the conclusions of law. That the rule is as laid down in the case cited is settled law in this state. The complaint is somewhat ambiguous and uncertain in this regard, and, had the defendant raised the point by demurrer, no doubt the complaint would have been amended so as to remove any ambiguity or uncertainty in the pleading. It was said in the case cited: "Under our system of pleading, where all the facts of the transaction are set out, it can make little difference in the generality of cases whether it be said that an accommodation maker or indorser, who has been compelled to meet the obligation of his principal, is entitled to sue upon the note, with a recovery limited to the amount he has expended, with legal interest, or whether it be said that his action is in assumpsit for money laid out on behalf of his principal, and that his recovery is measured by the amount he has so expended, with legal interest." The facts of the transaction are set out in the present case with sufficient fullness to support a judgment under the rule laid down in Yule v. Bishop, supra.

[3] The finding of the court that plaintiffs are the owners and holders of the promissory note, and are entitled to judgment against defendant therefor, was a superfluous and unnecessary finding. The other findings of fact are supported by the evidence, and are sufficient to support the judgment.

[4] The objection that the evidence failed to show payment of the note by plaintiffs, because the giving by them of their note was not such payment as entitled them to recover from defendant, is not well founded. Where a surety or accommodation indorser has paid the note of his principal by executing his own note to the holder, and it is accepted in payment and extinguishment of the first note, he has an action to recover the amount of the first note from the defendant as for money paid for his use, though his own note was not paid at the time of the trial. Stanley v. McElrath, 86 Cal. 449, 25 Pac. 16, 10 L. R. A. 545.

[5] It is further contended that plaintiffs had a chattel mortgage on "one standard Mergenthaler linotype, and one Hoe cylinder printing press," as collateral security to secure them against the payment of the note to the bank, and that it was plaintiffs' first duty to exhaust this security, before an action would lie on the implied obligation here involved. For some inscrutable reason, plaintiffs submitted in evidence a certain agreement in writing of date May 14, 1908 (prior to the execution of the note), which appears to have been a conditional agreement of certain parties to become sureties for defendant in securing a loan of $1,500. Plaintiffs also introduced in evidence an instrument in writing which has the semblance of a chattel mortgage on "one standard Mergenthaler linotype, and one Hoe cylinder printing press," executed by defendant, and bearing date January 30, 1909, several months after the execution of the note set out in the complaint. Plaintiffs contend that this mortgage is of no validity because of defects in its form and in the manner of its execution. They also claim that in any event defendant cannot avail himself of the mortgage, because he did not set it up as a defense. But it is in the case, and at plaintiffs' instance, and cannot be ignored. It purports to be between defendant and plantiffs, all of whom signed the note, and purports to mortgage "to the said mortgagee, all that certain personal property situated and described as follows, to wit: One standard Mergenthaler linotype, and one Hoe cylinder printing press, as security for the payment to said mortgagees of the said mortgage of one thousand ($1,000) dollars lawful money of the United States of America, on ——— day of ——— in the year nineteen hundred and ——— with interest thereon, at the rate of ——— per cent. per ——— according to the terms and conditions of ——— certain promissory note of even date herewith, and in the words and figures following, to wit: ——— 'After date I promise to pay to Jno. McDonough, et al., the sum of one thousand dollars ($1,000) lawful money of the United States of America without interest. Signed. Ande Nowlin.' It is also agreed that if the mortgagor shall fail to make any payments as in the said promissory note provided, then the mortgagee may take possession of said property, using all necessary force so to do, and may immediately proceed to sell the same in the manner provided by law, and from the proceeds pay the whole amount in said note specified. In witness whereof, etc. Ande Nowlin." Attached to the instrument is an affidavit of the mortgagor in the usual form, and also a certificate of acknowledgment. No other affidavits appear to the instrument. It appears to have been recorded February 19, 1909, at the request of the Farmers' & Mechanics' Bank of Healdsburg.

The evidence was that no such note as is referred to in the mortgage was ever executed, and the mortgage cannot by any stretch of construction be said to refer to the note which was given several months prior to the date of the mortgage. Just how far an equity court would interpose to carry out the intention of the parties, whatever it was, is not easy to conjecture. But it is plain that this mortgage on its face does not show that it was given to secure the note already executed and in the hands of the bank, for it distinctly refers to "a certain promissory note of even date herewith and in the words and figures following, to wit"; whereas the note given to the bank was dated June 3, 1908, and the evidence was that no other note was executed. So far as appears, this mortgage was given to secure an obligation entirely different from the one on which plaintiffs were sureties. How it can be said to operate as security for the implied obligation on which the action is based, we are unable to see. Plaintiffs at the trial disavowed claiming any rights under it, and the trial court regarded it as having no legal force. We do not think that plaintiffs were precluded from pursuing this action, without first having sought relief under this mortgage.

Defendant admits the indebtedness. His fear that he cannot safely pay what he owes without plaintiffs first releasing this mortgage is more fanciful than real. Should plaintiffs attempt to sell his property under this mortgage after he has paid this judgment, he would find little difficulty in preventing it, if it be true that the intention of the parties was that the mortgage should apply to the note given to the bank. Plaintiffs would not be permitted to sell the property in discharge of an obligation already paid by him.

[6] One other point is made, namely, that plaintiffs recovered compound interest. They were entitled to interest on the amount of the obligation paid by them. Plaintiffs were entitled to recover the principal sum of $1,000 and 7 per cent. interest from December 3, 1909, to date of payment by plaintiffs, May 16, 1909, amounting to $1,031.69, and this sum, plus legal interest from the last-mentioned date to October 3, 1910 (date of judgment) making $1,059.15, the amount of the judgment. The correctness of this computation is not disputed by defendant.

Whatever the court may have said in its conclusions of law, its judgment as rendered was supported by the evidence, and is affirmed.

We concur: HART, J.; BURNETT, J.

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17 Cal. App. 37

CHRISTENSON LUMBER CO. v. BUCKLEY et al. (Civ. 855.)

(District Court of Appeal, First District, California. Aug. 28, 1911.)

1. Trial (§ 163*)—Taking Case from Jury—Nonsuit.

Where defects of pleading or proof cannot be corrected, though specifically pointed out, failure to specify the grounds of a motion for a nonsuit is immaterial; but, where corrections could be made, it is improper to grant a nonsuit, in the absence of stated grounds to support the motion.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 163.*]

2. Mechanics' Liens (§ 277*)—Enforcement—Variance.

Where a building contract is unrecorded, it is unnecessary, in an action to enforce a mechanic's lien arising therefrom, to aver the exact contract price, so that, where there is no denial of a valid contract by the defendant, the fact that the complaint avers a sum different from that shown by the contract received in evidence is an immaterial variance.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 546–554; Dec. Dig. § 277.*]

3. Trial (§ 139*)—Questions for Jury—Nonsuit.

Where there is some substantial evidence tending to prove plaintiff's case, a motion for a nonsuit should not be granted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 338–341; Dec. Dig. § 139.*]

4. Evidence (§ 424*)—Contracts.

In an action to enforce a mechanic's lien, the testimony of the agent and architect of the owner is relevant and material to show that a written agreement in evidence did not contain all the contract between his principal and the builder.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1966–1968; Dec. Dig. § 424.*]

5. Trial (§ 105*)—Reception of Evidence—Rejection on Motion of Court.

Where no objection is interposed to an offer to prove facts which are relevant and material, rejection of such evidence by the court of its own motion is improper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 260–266; Dec. Dig. § 105.*]

6. Evidence (§ 424*)—Parol Evidence.

The rule that parol evidence is inadmissible to vary the terms of a contract binds only the parties thereto and their representatives, and does not preclude strangers to the writing from interposing oral testimony thereon in their own interests.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1966–1968; Dec. Dig. § 424.*]

Appeal from Superior Court, City and County of San Francisco; Geo. H. Cabaniss, Judge.

Action by Christenson Lumber Company against C. F. Buckley and J. A. Persson. From a judgment of nonsuit, plaintiff appeals. Reversed.

Chas. M. Bufford, for appellant. Sullivan & Sullivan and Theo. J. Roche, for respondents.

LENNON, P. J. This is an appeal from a judgment of nonsuit.

The admitted facts of the case, as evidenced by the pleadings and the stipulation of counsel for the respective parties, are these: The defendant Buckley, in the month of June, 1908, employed the defendant Persson, a contractor and builder, to repair and alter a dwelling house owned by Buckley, which had been partially destroyed by fire. No formal written contract was executed by Buckley and Persson, but prior to commencing work on the building Persson made, signed, and delivered to the agent of Buckley a memorandum of agreement, wherein Persson "certified" that he would do all the work on the residence of the defendant Buckley, as per accompanying signed specifications, for the sum of $636. The signed specifications referred to in the memorandum of agreement, among other things, required Persson to "frame out roof with new rafters to conform with old lines. Same to be boarded on top and reshingled. * * *" During the progress of the work, Persson purchased from the plaintiff lumber and materials to be used, and which were actually used, in the repair and alteration of said dwelling, and not having been paid the full price therefor, on the 4th day of August, 1908, the plaintiff caused to be left at the residence of the defendant Buckley, with a person in charge thereof, a notice, directed to Buckley, setting forth that plaintiff's account against defendant Persson amounted to $83.79, and requesting Buckley to withhold that amount from defendant Persson. Said notice was sufficient to put defendant Buckley on inquiry as to plaintiff's having furnished lumber and materials to defendant Persson, for use, and which were actually used, in the repair and alteration of said dwelling, and stated as well the kind, grade, and value of the lumber and materials so furnished.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It was alleged in the plaintiff's complaint that at the time of the service of the notice just referred to there was due and unpaid from the defendant Buckley to the defendant Persson, for and on account of the work done under the agreement to alter and repair, a sum of money more than sufficient to pay the plaintiff's demand in full, but that the defendant Buckley ignored said demand, and refused to withhold the amount in the notice specified and claimed to be due the plaintiff.

Incidentally, it should be mentioned that the plaintiff, upon information and belief, alleged in the complaint that the contract price of the work as originally agreed upon by Buckley and Persson was in excess of $1,000; that the contract had never been recorded; and that within the time allowed by law the plaintiff had filed for record its claim of lien, in the ordinary form, for the balance alleged to be due plaintiff for the lumber and materials furnished the defendant Persson, and by him actually used in the repair and alteration of the building.

Upon these pleaded and admitted facts, plaintiff sought to recover a personal judgment against both defendants for the balance claimed to be due it, and to enforce its lien against the property.

No appearance was entered for the defendant Persson, and the record is silent as to whether or not he was ever served with summons in the action. However, the defendant Buckley answered, and, among other things, denied that, at the time plaintiff gave defendant Buckley the notice hereinbefore referred to, there was due and unpaid to the defendant Persson, on the contract in question, any sum of money whatsoever, and alleged that, as subsequently appeared in evidence, the original contract price of the work was less than $1,000.

The case was tried upon the theory, as stipulated by counsel for plaintiff and defendant, that every material allegation of plaintiff's complaint was true, save and except the allegations that the amount of the original contract price was in excess of $1,000, and that at the time of the notice to Buckley there was due to Persson a sum of money more than sufficient to pay the claim of plaintiff.

At the trial the plaintiff called the defendant Buckley as a witness in its behalf, and he testified in effect that at the time he received the notice to intercept any payments that might be due to Persson the work originally specified and contracted for had been completed, and the contract price therefor paid to Persson in full. It was developed, however, during the course of the examination of this witness that when the work on the roof of the building was first completed it was discovered that a shingled roof, as originally specified, was contrary to the fire ordinances of the city and county of San Francisco, and upon demand of representatives of the fire department the shingled roof was removed by Persson and a metal roof substituted. The witness further testified that for the entire work upon the building he paid Persson the sum of $1,377 in the following installments: June 27, 1908, by check, $500; July 17, 1908, by check, $400; on August 11, 1908, by check, $200; and on August 11, 1908, by a promissory note, payable 35 days thereafter, $277. Buckley claimed that the payment of $200 was made on account of the extra work involved in substituting a metal roof for the completed shingle roof, and that this work was not included in or contemplated by the original contract.

The memorandum of agreement hereinbefore referred to was identified by Buckley and admitted in evidence as a part of the plaintiff's case; and then the architect and agent of the defendant Buckley, J. R. Miller, was called as a witness for the plaintiff. By him the plaintiff offered to show that the written memorandum of agreement did not contain all of the negotiations of the parties to the contract, but that, on the contrary, they had further agreed orally that "if the board of public works would not approve the wooden roof a metal roof would be put on." No formal objection was made to this offer of proof by counsel for the defendant, but the court of its own motion refused to admit the evidence, upon the ground that it was an attempt to vary by parol the terms of a written instrument.

Thereupon the plaintiff submitted its case, and the defendant asked for a nonsuit. No grounds for a nonsuit were stated, and the record does not show that the request for a nonsuit was disposed of at the time it was made. To be exact, the court, in response to the request of defendant's counsel for a nonsuit, said, "I think you are entitled to it, but I don't wish to dispose of the matter that way." It would be a fair inference from the quoted language of the court that the request for a nonsuit had been denied; but some 40 days later the trial court, apparently under the impression that it had previously granted a motion for a nonsuit, entered an order which, in part, recited that, "the attention of the court having been called to the fact that the judgment of nonsuit heretofore, on the 19th day of November, 1909, in said cause in favor of defendant C. F. Buckley, had not been entered by the clerk in the minutes of the court, the court orders that said judgment of nonsuit be entered nunc pro tunc as of the 19th day of November, 1909." This was in effect an order granting defendant's motion for a nonsuit, and, as the judgment must be reversed for other reasons, it will not be necessary for us to decide the point as to whether or not the record supports the court's nunc pro tunc entry of a judgment which, it is claimed, was never given or made in the first instance.

[1] No definite and distinct reason was given by the trial court for nonsuiting the plaintiff; but it is defendant's contention that the plaintiff was properly nonsuited because of a variance in the contract price of the work, as pleaded, and that proved upon the trial. It is further insisted in support of the judgment that the evidence offered upon the plaintiff's case affirmatively and conclusively establishes the fact that the work originally specified and contracted for had been completed and paid for in full before the defendant Buckley was served with notice to withhold any money which might be due to the defendant Persson under the contract. There is no merit in either of these contentions. In the first place, it was error for the court to grant the motion for a nonsuit, in the absence of stated grounds to support the motion. The reason for the rule requiring the grounds of a motion for a nonsuit to be stated is to afford the plaintiff an opportunity to correct any defects of pleading or proof which admit of correction. It is true that this reason does not apply in a case where such defects could not be corrected, even if specifically pointed out, and in such a case the error of not specifying the grounds of the motion is immaterial. Daley v. Russ, 86 Cal. 114, 24 Pac. 867. But in the case at bar it is plain that, if the defendant had specified as a ground of his motion for a nonsuit that there was a variance between the proof and the pleadings, the matter could have been easily corrected by a motion to amend the pleadings to conform to the proof, which we feel certain the trial court, in the exercise of a wise discretion, would have granted.

[2] But, aside from this, the defendant's answer does not deny that a valid contract was entered into between the parties for the work in question, and the contract offered and received in evidence is not materially different from the contract pleaded in the plaintiff's complaint. The only difference is as to the price to be paid for the work; but, inasmuch as the contract between Buckley and Persson was not recorded, it was not essential to the plaintiff's cause of action to aver the exact amount of the contract. Morrison v. Gamble et al., 14 Utah, 201, 46 Pac. 1104. And, as it is not apparent how the variance between the pleaded and proven contract could have misled or prejudiced the defendant in the preparation of his defense, the variance must be treated as immaterial. Code Civ. Proc. § 469.

[3] The trial court was not bound by the statement of the defendant Buckley that he "had performed all his obligations in full to Persson" prior to receiving the notice to withhold any money that might be due to Persson under the original contract. This at best was but the conclusion of the witness, and was in direct conflict with his further testimony that he "paid the last payment by note," dated August 11, 1908, and seven days after the service upon him of the notice to withhold any moneys due to the defendant Persson. Where there is a conflict in the evidence, a motion for a nonsuit should never be granted, and, "if there is any substantial evidence tending to prove the facts necessary to make out a case, the plaintiff is entitled to a trial upon the merits." Estate of Arnold, 147 Cal. 583, 82 Pac. 252.

[4-6] The proffered testimony of the witness Miller was relevant and material. No grounds of objection were stated to the offer of proof, and for this reason alone the action of the court in rejecting the evidence was erroneous. San Luis Water Co. v. Estrada, 117 Cal. 185, 48 Pac. 1075. Apart from this, the rule that parol evidence is never admissible to alter, add to, or vary the terms and conditions of a written instrument does not apply to the facts of this case. The rule applies only to those who are parties to the writing, and binds only them and their representatives. It does not preclude strangers to the writing from introducing oral testimony of the actual facts of the transaction which may have a bearing upon their interests. McMaster v. Insurance Co., 55 N. Y. 222, 14 Am. Rep. 239; Smith v. Moynihan, 44 Cal. 53; Dunn v. Price, 112 Cal. 46, 44 Pac. 354; Bickerdike v. State, 144 Cal. 691, 78 Pac. 270; Code Civ. Proc. 1856.

The judgment is reversed.

We concur: KERRIGAN, J.; HALL, J.

16 Cal. App. 461

NAPA VALLEY PACKING CO. v. SAN FRANCISCO RELIEF & RED CROSS FUNDS. (Civ. 827.)

(District Court of Appeal, Third District, California. June 16, 1911. Rehearing Denied by Supreme Court Aug. 15, 1911.)

1. TRIAL (§ 365*)—VERDICT—SPECIAL VERDICT—MATERIAL ISSUE.

Where the complaint alleged that plaintiff sold and delivered certain goods to defendants, other than the defendant corporation, and that the defendant corporation agreed to pay the reasonable value thereof, and assumed all the liabilities and obligations incurred by the other defendants, a special verdict, finding that the plaintiff sold no goods to the original defendants, other than the defendant corporation, precluded a recovery, because it was upon a material issue of plaintiff's case.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 365.*]

2. TRIAL (§ 36*)—PROOF.

Where a complaint alleged that plaintiff sold and delivered certain goods to others than the defendant, and that defendant agreed to pay the reasonable value therefor, proof by way of estoppel that defendant by its conduct led plaintiff to believe that the only controversy was as to the amount of payment could not render proof of the sale unnecessary; that being the real basis of the action.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 36.*]

3. ESTOPPEL (§ 110*)—EQUITABLE ESTOPPEL—PLEADING.

To be relied on, an estoppel must be pleaded.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 300; Dec. Dig. § 110.*]

4. TRIAL (§ 33*)—PROOF.

Where plaintiff alleged that it sold and delivered goods to a third person, and that defendant promised and agreed to pay the reasonable value thereof, proof that defendant had ratified all the contracts made by that third person would not render it unnecessary that this contract of sale be proven, for the sale is the basis of the cause of action.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 85, 86; Dec. Dig. § 33.*]

5. TRIAL (§ 359*)—VERDICTS—"SPECIAL VERDICTS."

Under Code Civ. Proc. § 625, providing that in actions for the recovery of money only, or real property, the jury may render a general or special verdict, and that in all other cases the court may direct a special verdict upon any of the issues, and that a special finding of facts inconsistent with the general verdict controls the latter, the term "special verdict" does not mean, as at common law, a finding upon every material issue in the case, but allows findings upon any issue; and, while there may be a conflict in the special findings themselves, any inconsistency with the general verdict serves to nullify it.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 359.*

For other definitions, see Words and Phrases, vol. 7, pp. 6594-6596.]

6. TRIAL (§ 350*)—VERDICTS—SPECIAL VERDICTS—FINDING OF FACT.

Where the complaint alleged that plaintiff had, at the special instance and request of defendants, other than the defendant corporation, sold and delivered certain goods, and that the defendant corporation promised and agreed to pay the reasonable value thereof, the special issue, "Did plaintiff sell and deliver the goods mentioned in the complaint, or any part thereof, to the original defendants, other than the corporation?" did not call for the determination of a question of law, but for a finding of fact, especially in view of the allegations of the complaint of a sale and delivery of the goods.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 828-833; Dec. Dig. § 350.*]

7. APPEAL AND ERROR (§ 218*)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—OBJECTIONS—NECESSITY.

In the absence of objections to the form of questions in the special verdict at the time of submission, no objections can be raised on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1315-1324; Dec. Dig. § 218;* Trial, Cent. Dig. § 819.]

8. APPEAL AND ERROR (§ 264*)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—EXCEPTIONS—NECESSITY.

Where no exceptions to the phraseology of questions in the special verdict are reserved, such exceptions cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1533-1535; Dec. Dig. § 264.*]

9. TRIAL (§ 350*)—VERDICT—SPECIAL VERDICT.

Where the complaint alleged that plaintiff, at the request of third persons, sold and delivered to them certain goods, for which they promised and agreed to pay the reasonable value thereof, and that defendant assumed all the liabilities of such persons, defendant was entitled to submit to the jury for a special finding the issue of whether such persons promised to pay for any of the goods claimed by plaintiff to have been sold and delivered.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 828-833; Dec. Dig. § 350.*]

10. APPEAL AND ERROR (§ 1175*)—DETERMINATION ON APPEAL.

The general verdict was for plaintiff, though a special verdict inconsistent with it was rendered. Judgment was rendered for plaintiff, and defendant did not move to have judgment entered in its favor on the special verdict; nor upon motion for new trial was any attack made upon the judgment on that ground, though defendant appealed upon several errors. *Held* that, as the party in whose favor the general verdict is rendered is entitled to judgment as of course, and if the opposing party wishes to urge his right to judgment upon the special findings he must move for such judgment, such motion must be made before judgment is entered upon the general verdict; and hence judgment could not be rendered for defendant on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1175.*]

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by the Napa Valley Packing Company against the San Francisco Relief & Red Cross Funds. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed and remanded.

Rehearing denied by Supreme Court (S. F. 5,445) August 15, 1911.

Gray & Cooper, for appellant. Otto Irving Wise, for respondent.

BURNETT, J. The original defendants were the finance committee of the Relief &

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Red Cross Funds, a voluntary association, also certain individuals alleged to have been appointed by the mayor of San Francisco as a committee to relieve the distress caused by the earthquake and fire in San Francisco, of April 18, 1906, and the appellant, San Francisco Relief & Red Cross Funds, a corporation. At the trial, on motion of plaintiff, the action was dismissed as to all of the defendants, except the appellant. The action was brought to recover the value of certain canned goods alleged to have been sold and delivered on or about April 25, 1906. The gravamen of the complaint is that the plaintiff "sold and delivered, at the special instance and request of the above-named defendants, other than the defendant corporation, to the said defendants, other than the defendant corporation," the goods; that they were reasonably worth the sum of $6,547.50, "for which said goods, wares, and merchandise the above-named defendants, other than the defendant corporation, promised and agreed to pay the reasonable value thereof; that the said defendant corporation did assume all of the obligations and liabilities incurred by the said defendants, other than the defendant corporation hereinabove named," and that only $1,809 of the amount due has been paid. The appellant denied all these allegations, and also pleaded an accord and satisfaction. The cause was tried before a jury, and a general verdict was rendered against appellant, and the appeal is from the judgment and the order denying the motion for a new trial.

Among certain special issues submitted to the jury was the following: "Did the plaintiff sell and deliver the goods mentioned in the complaint, or any part thereof, to the original defendants, other than San Francisco Relief & Red Cross Funds?" To this interrogatory, the jury answered, "No." It is therefore insisted by appellant that the judgment should have been entered for defendant. The contention is based upon the assumption that the finding of the jury constitutes a special verdict upon a material matter, and that it is inconsistent with the general verdict. Hence is invoked the rule: "Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly." Section 625, Code Civ. Proc.

As to the nature of a special verdict or finding of fact, no discussion is needed. It is sufficient to refer to section 624 of the Code of Civil Procedure, and to the opinion of the Supreme Court in Plyer v. Pacific, etc., Cement Co., 152 Cal. 125, 92 Pac. 56, and of this court in Williams v. San Francisco, etc., Ry. Co., 6 Cal. App. 715, 93 Pac. 122.

[1] That the said question involves a material issue could hardly be made clearer by argument or illustration. It is apparent that the foundation of respondent's claim is the sale and delivery of the goods to the defendants, other than the defendant corporation. Appellant became liable for the debt, if at all, only by reason of a novation; it assumed the obligation that had been incurred by the other defendants in the purchase of the goods. Eliminate the allegation in reference to the sale and delivery of said goods, and it is clear the complaint would fail to state a cause of action against appellant. Likewise, findings upon the other allegations only would be insufficient to support the judgment. The response of the jury to said question involves, consequently, a matter of vital importance to the determination of the cause.

What appears so plain from the mere statement of the proposition may be made even more manifest by a formal presentation of this finding of the jury in connection with the other findings necessarily implied by the general verdict. We would then have, as the foundation for the judgment, the following facts: "The defendant corporation, upon receiving the sums aforesaid, did assume all of the obligations and liabilities incurred by the said defendants, other than the defendant corporation hereinabove named." "The plaintiff above named did *not* sell and deliver to the said defendants, other than the defendant corporation, the goods mentioned in the complaint, or any part thereof." "All of the merchandise above enumerated was of the reasonable value of $6,547.50, and the defendants have failed, neglected, and refused, and do still fail, neglect, and refuse, to pay the same, or any part thereof, except the sum of $1,809, and there is due, owing, and unpaid to plaintiff the sum of $4,738.50." The layman, even, would see at a glance that an essential element of plaintiff's case is lacking, and that a wrong conclusion has been drawn from the facts found. Plaintiff, of course, must stand upon the complaint, and no allegation therein averred is more certainly material than the one under consideration.

[2, 3] The situation is not affected by the contention of respondent as to estoppel and ratification. The estoppel is claimed by reason of the fact that "appellant never denied its liability for the merchandise, and led plaintiff to believe that there was only a dispute as to the amount it should pay, practically, or that the only controversy as between it and respondent was limited to the reasonableness of its charges." But the question here is one of pleading, and not of evidence. There is no attack upon said finding, upon the ground that it is not supported by the evidence. If we were to grant that the showing made is sufficient to justify plaintiff in believing, from appellant's conduct, that the only real controversy was as to the amount due, it would not affect the materiality of the allegation of the sale and delivery of said goods, although it might have an important bearing as to the proper determination of that issue. Again, estoppel is not pleaded, and it is therefore not properly in the case. Chapman v. Hughes, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982.

[4] So the question of ratification is one of evidence, and must be limited, of course, to the cause of action stated and relied upon by plaintiff. It could mean no more than an affirmance of the agency of Dr. Ford, or a confirmation of the contract that he is supposed to have made. It necessarily presupposes the detriment suffered by plaintiff as alleged in the complaint. Conceding the full authority of Ford and the ratification by appellant of every contract he made, it could manifestly be of no avail to respondent, in view of the finding of the jury that the only contract about which we are concerned here was never executed at all.

Respondent, in support of the contention that the court below could not have rendered judgment for appellant on the special verdict alone, declares: "We claim not; for there was no action of any sort pending before the court with respect to the original defendants. The suit against them has been determined, in the first place; and, secondly, it was not at any time pretended that the goods were sold and delivered to them individually. We contended, and do now, that the obligation to pay for the goods was imposed on the finance committee of the Relief & Red Cross Funds, and that it subsequently devolved upon appellant. The entire question, therefore, was an immaterial one." As to what was intended, we, of course, have no better guide than to follow the simple and ordinary signification of the terms employed. According to our understanding of the words used by the pleader, it seems quite plain that plaintiff intended to rely upon a sale and delivery of the goods to the original defendants. Nor does the original obligation seem immaterial, because it has been assumed by another. If A. sells and delivers goods to B., and C. assumes the obligation to pay for them, in a complaint against B. and C., setting forth these facts, although the action might be dismissed as to B., it would still be necessary to prove the sale and delivery to him, if denied, in order to make out a case against C.

[5] Respondent is equally at fault in the contention that "the provisions of section 625, Code of Civil Procedure, with respect to the inconsistency of a special with a general verdict, apply to an entire special verdict. In other words, if a consistent special verdict is inconsistent with a general one, the former controls. But here the special verdict is consistent with the general one; the first finding notwithstanding." Herein, as we conceive it, is shown a misapprehension of the scope of a special finding of facts. The significance of such finding is clearly pointed out in the Plyer Case, supra. Therein it is shown that the term "special verdict," as used in the statute, does not necessarily mean what it did a common law, viz., "a finding upon every material issue in the case. But the term is not used in that sense in the statute, which authorizes the demand for special verdicts on any one or more of the issues or particular questions of fact, not for the purpose of determining what judgment shall be entered, but primarily and principally for the purpose of determining whether the general verdict is or is not against law." It must be clear, therefore, under our practice, that if the finding of any material fact by the jury is irreconcilable with the general verdict, the latter cannot be upheld. Without doubt, there may be a conflict in the special findings themselves; one being consistent and another inconsistent with the general verdict. But, of course, this circumstance would not alleviate nor change the situation. The finding in harmony with the general verdict could not derogate from the effect of an adverse special finding upon a material fact in issue.

[6] Another objection by respondent, probably not so free from doubt, is that the said question proposed to the jury, "Did the plaintiff sell and deliver?" etc., does not call for a finding of fact, but, in effect, the determination of a proposition of law. As to this vital point, we are not afforded much assistance by counsel; the briefs being largely devoted to the discussion of other questions. There is no dispute, of course, that the special verdict or finding must be as to a question of fact, and not of law. In the language of section 624 of the Code of Civil Procedure, we have it: "The special verdict must present the conclusions of fact established by the evidence, and not the evidence to prove them." There may be a special finding, though, upon an issue made by the pleadings, or upon a question of fact included within, but not so comprehensive as, the issue. But in the latter event "a special finding upon any single essential element of the issuable fact inconsistent with the general verdict would be as fatal as a special verdict upon the broader issue." Plyer Case, supra. Here, in accordance with the more restricted meaning of the first term, the question of "sale" and "delivery" might have been resolved into two separate elements, and thus submitted to the jury. But, strictly speaking, the former includes the latter, as there can be no completed sale without delivery. In this view, the "delivery" must be treated as surplusage. If, however, the term "sale" or "sold" be construed as simply embracing an agreement to transfer the property, then, of course, "delivery" becomes an essential element to perfect the title. In either event, it is manifest the finding strikes at the very root of respondent's claim.

Preliminary to the main controversy, there are two considerations that should be noticed. The first of these is that the issue was submitted in the same form as it is presented in the pleading. As we have already seen, plaintiff alleged the sale and delivery of the goods. If this is not an allegation of facts, but of mere conclusions of law, it is at least doubtful whether the complaint states a cause of action. At any rate, when plaintiff has deliberately selected such terms by which to tender a material issue of fact, and the question has been submitted to the jury in the language which plaintiff has employed, an objection by him that, after all, the finding amounts to no more than a conclusion of law does not invite favorable comment, and it appears somewhat unseemly. If the form of the statement is sufficient for the complaint, it should not be held lacking for the purposes of a special finding.

[7, 8] Again, before the case was submitted to the jury the court stated to them: "The defendant has requested certain issues which you must decide in this case, and they are as follows." Thereupon the court read them to the jury. Counsel for plaintiff objected to Nos. 3 and 4 of the proposed interrogatories, and the court declined to submit them; but no objection whatever was made to the one in controversy here. Furthermore, it does not appear that any objection was made at any time to the form of the verdict. The propriety, in a case like this, of requiring such objection with the alternative of being denied the privilege thereafter, must be apparent. Indeed, it has been held that an objection to the form must be made at the time of submission; otherwise it will be presumed that there was assent to the submission of questions as presented. Gerhardt v. Swaty, 57 Wis. 24, 14 N. W. 851. Where no exceptions to the phraseology of questions in a special verdict are reserved, such exceptions cannot be considered on appeal. Dodge v. O'Dell's Estate, 106 Wis. 296, 82 N. W. 135; Algier v. Steamer Maria, 14 Cal. 168; Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379.

But, recurring to the main inquiry, it should be held, we think, that the question involved ultimate facts, rather than conclusions of law. No doubt, it is sometimes a question of law whether there has been a sale or delivery of property. The case is somewhat like that of ownership. This has been held to be an ultimate fact or a conclusion of law, depending upon circumstances. An allegation that plaintiff is the owner of certain property is unobjectionable, and a special finding by a jury that one of the parties is the 'owner" would be entirely proper. The terms "sale" and "delivery" are familiar expressions. They convey to the average business man or farmer a meaning as definite as to the members of the bar; and it seems difficult to understand how you could more appropriately than was done in this case submit to the jury the question whether there was an actual transfer to said defendants, for a consideration, of the goods mentioned in the complaint. Would it be any more satisfactory if the jury had been asked whether there was "a contract by which, for a pecuniary consideration, called a price," plaintiff transferred said goods to said defendants? The conception of "sale" and "delivery" might have been resolved, probably, into simpler elements embraced in several questions, but no useful purpose seems to require it.

[9] But this branch of the subject may be dismissed with the reflection that if we view said finding as a conclusion of law, and therefore to be eliminated from the case, still the conclusion of the trial court cannot be upheld for the following reason: Defendant also requested the trial judge to direct the jury to find a special verdict upon this issue: "Did the original defendants, other than San Francisco Relief & Red Cross Funds, promise to pay for any of the goods claimed by plaintiff to have been sold and delivered?" Plaintiff objected on the ground that, "having dismissed as against the other defendants, the only issue before this jury is one concerning the defendants before the bar." The court sustained the objection, and refused to submit the question. The ground of the objection, as we have already seen, is not tenable. This is still further emphasized by a consideration of the circumstances of the succeeding question: "Did the San Francisco Relief & Red Cross Funds assume the obligation incurred by the other original defendants?" This latter, covering one of the allegations of the complaint, was submitted without objection, and was answered in the affirmative. But the particular obligation relied upon, as has already appeared, was the promise to pay for the goods, which was specifically averred in the complaint, and thereby made an essential element in the cause of action. We think, therefore, that appellant had a perfect right, under the law as it existed at the time of the trial, to demand that the jury determine categorically this issue. It is to be observed, also, that the question is entirely unobjectionable in form, and covers an additional feature of the case to that included in the issue as to the sale and delivery. It is manifest that said defendants, by their promise, might have incurred an obligation to pay for the goods, although the goods were sold and delivered to some one else. The question, then, is as to the disposition of the appeal.

[10] Appellant did not move to have judgment entered in its favor on the aforesaid special verdict; nor, upon the motion for a new trial, was any attack made upon the judgment on said ground. One of the errors of law, however, specified on the said motion for a new trial was the refusal of the court to submit said issue to the jury. The party in whose favor the general verdict is rendered is entitled to judgment thereon as a matter of course, without motion. If, therefore, the opposing party wishes to urge his right to judgment, he must move for judgment on the special findings, on the ground that they are inconsistent with the general verdict. Leese v. Clark, 20 Cal. 387; Farley v. Eller, 40 Ind. 319. The motion for judgment on the special findings must be made, of course, before judgment is entered on the general verdict. This was not done, and therefore

it would not be proper practice, nor indeed just to respondent, to direct judgment to be entered for appellant; but, as we view the matter, the motion for a new trial should have been granted.

The judgment and order are therefore reversed.

We concur: CHIPMAN, P. J.; HART, J.

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17 Cal. App. 29

RIALTO CONST. CO. v. REED. (Civ. 579.)

(District Court of Appeal, First District, California. Aug. 24, 1911. Rehearing Denied by Supreme Court Oct. 21, 1911.)

1. Contracts (§ 284*)—Building Contracts—Decision of Chief Engineer—Conclusiveness.

A stipulation in a contract for railroad construction work that the chief engineer of the railroad company shall decide as to the classification and quantity of materials moved, and that his decision shall be final, is binding on the parties, in the absence of fraud, or such gross mistake as to imply fraud.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 284.*]

2. Contracts (§ 353*)—Building Contracts—Decision of Chief Engineer—Conclusiveness.

An instruction that the estimates of a chief engineer of a railroad company, authorized by a construction contract to finally decide as to the classification and quantity of materials moved, are not conclusive, but the contractor may recover for the work performed, with a further charge that before the jury can set aside the estimates of the engineer there must be convincing evidence overcoming the presumption that the estimates correctly state the facts, and that mere difference in the classification reached by the engineer and that claimed by the contractor does not justify the setting aside of the estimates, but that the difference must be such as to lead the mind to the conclusion that fraud has been practiced, when construed together, correctly state that the estimates are conclusive, in the absence of fraud, or such mistake as to imply fraud.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1829-1844; Dec. Dig. § 353.*]

3. Trial (§ 295*)—Instructions—Construction.

The instructions must be read as a whole, and if, when so read, the jury was correctly instructed, the judgment will not be reversed because of an apparent conflict between isolated parts thereof.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713; Dec. Dig. § 295.*]

4. Estoppel (§ 81*)—Requests—Payments.

The contractor under a railroad construction contract cannot question the payment by his employer of bills for supplies furnished pursuant to the contract, where the contractor, on the presentation of the bills for inspection and approval, directed his employer to consult the contractor's bookkeeper to O. K. the bills, and the bookkeeper did so.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 216, 217; Dec. Dig. § 81.*]

5. Set-Off and Counterclaim (§ 60*)—Failure to Assert—Effect.

In an action in which defendant filed a counterclaim covering the basis of a prior action by him against plaintiff, an objection to the maintenance of plaintiff's suit, on the ground of the failure to present a counterclaim therefor in the prior action by defendant, raised for the first time after the case had been on trial for about eight days, and just before it was expected to go to the jury, was properly overruled as too technical.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Dec. Dig. § 60.*]

6. Contracts (§ 284*)—Construction Contracts—Construction.

A contract for railroad construction work, which authorized the railroad company to discontinue the entire work, or cancel the contract without liability for damages, provided that in case of cancellation a final estimate of the work done should be prepared and payments made therefor at contract prices, contemplated that on the cancellation of the contract there should be a final estimate of all the work done, on which full settlement should be made; and the objection that a final estimate was not binding because made after final suspension of the work, but before the cancellation of the contract, must be disregarded.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 284.*]

7. Contracts (§ 284*)—Building Contracts—Decision of Chief Engineer.

A contract for railroad construction work, which makes the decision of the chief engineer of the railway company as to the classification and quantity of materials moved final, does not contemplate that the chief engineer shall in person make the estimates, but estimates made by an assistant detailed on the work, checked up in the engineer's office, which formed the basis for the final estimate of the chief engineer, are sufficient.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 284.*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by the Rialto Construction Company against Charles Wesley Reed. From a judgment granting relief to plaintiff, both parties appeal. Modified and affirmed.

Page, McCutchen, Knight & Olney, for appellant Rialto Const. Co. Charles Wesley Reed, in pro. per.

KERRIGAN, J. In this case there are two appeals, both from the judgment; one being taken by plaintiff, and the other by the defendant.

A brief outline of the facts of the case is as follows: On September 20, 1905, C. E. Loss entered into a contract with the Ocean Shore Railway Company to perform all the grading work, tracklaying, and surfacing for the company's double-track railroad from its initial point in San Francisco to Scott creek, in Santa Cruz county, being a distance of about 67 miles. The contract, among other things, contained a classification of the materials to be worked; said materials being classified as earth, loose rock, solid rock, etc. On October 2, 1905, C. E. Loss sublet certain parts of the work, constituting what were known as sections 4 and 5 thereof, to Mahoney Bros. & Malley, copartners, the predecessors and assignors of plaintiff. In January, 1906, Mahoney Bros. & Malley, on the one part, and the defendant, on the other, confirmed in writing a previous oral agreement between them, whereby the defendant was to perform that portion of the work known as section 4. Prior to February 27, 1906, Mahoney Bros. & Malley had transferred to plaintiff all their interest in the contract of October 2, 1905, and on that day plaintiff and defendant entered into a contract, whereby the defendant was to perform the work on section 4. This contract, which took the place of the one between defendant and Mahoney Bros. & Malley, is the one by which the rights of the parties hereto are to be determined.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It provided in part as follows: "The said Rialto Construction Co. agrees to furnish the said Reed, or his order, with the necessary hay and grain for the said stock, and supplies for the men engaged upon the work, at cost price, and also agrees to pay weekly the time checks issued to his employés by the said Reed for work performed upon section 4, in accordance with the contract. * * * It is understood that all money earned by said Reed shall be first applied to the payment of said time checks, and the said supplies and the said hay and grain, and all other bills incurred by said Reed in the prosecution of this work, before any of it shall be used by said Reed for any other purpose. The said Reed is to be paid for the performance of said work as follows: Earth, 18c per cubic yard; loose rock, 28c per cubic yard; solid rock, 50c per cubic yard."

Each of the contracts mentioned provided that the estimate of the engineer of the Ocean Shore Railway Company, both as to classification and quantity of materials moved, as also the construction placed by said engineer upon the contract and specifications, were to be final and conclusive, and binding upon the parties.

Under the contract between the parties hereto of February 27th, defendant performed certain excavating and grading work upon said section 4, and was engaged in the performance of this work at the time of the earthquake occurring in San Francisco and vicinity, in April, 1906, at which time operations were suspended by direction of the railway company, and have not been resumed by the defendant. In the following month the chief engineer prepared a classification and final estimate of the work done by defendant.

Plaintiff alleges that it disbursed under the contract for the account of the defendant the sum of $21,965.10, upon which it has been reimbursed $15,622.78, leaving a balance of $6,342.32, which is the amount sued for by plaintiff.

To the complaint defendant interposed a counterclaim for $9,906.57, based upon an alleged erroneous classification by the chief engineer of the work involved. The case was tried with a jury, which rendered the following verdict: "We, the jury in the above-entitled cause, find a verdict in favor of the plaintiff in the sum of $6,842.32. We further find for the defendant $4,500 because of erroneous classification." In accordance with the verdict, a judgment was duly entered. From that part thereof awarding plaintiff the sum of $6,842.32, the defendant has appealed; and from the part awarding $4,500 to the defendant, the plaintiff has appealed. The two appeals will be considered together.

[1] The contract sued on provides that the chief engineer of the railway company is empowered to decide, and his decision is made final and conclusive, as to the classification and quantity of materials moved, and plaintiff is correct in stating that this provision of the contract is binding on the parties thereto, in the absence of an averment and proof of fraud, or such gross mistake as to imply fraud. Cook v. Foley, 152 Fed. 41, 81 C. C. A. 237; Martinsburg & Potomac R. R. Co. v. March, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255; Chicago, Santa Fé & Cal. R. Co. v. Price, 138 U. S. 185, 11 Sup. Ct. 290, 34 L. Ed. 917; Memphis Trust Co. v. Brown-Ketchum Iron Works, 166 Fed. 398, 93 C. C. A. 162. But, contrary to plaintiff's contention, there is in this case an allegation in the counterclaim appropriate in all respects to raise the question of gross mistake; and we also think, without hesitation, after having carefully read all the testimony in the case, consisting of over 500 pages, that the evidence is sufficient to sustain the implied finding of the jury that the estimate certified by the chief engineer of the railway company was palpably inaccurate. It would be tedious and not worth while to review or even summarize the evidence. The jury believing, as they evidently did, the testimony introduced by the defendant on the subject, it was for them to say whether the erroneous estimate made by the chief engineer was as to such classification a mere error of figures or in judgment, or such a negligent or careless mistake as to indicate bad faith. They adopted the latter view, and under the circumstances of the case we cannot disturb their finding.

[2, 3] The court, at one place in its charge, instructed the jury: "That the engineer's estimates are not conclusive upon the defendant; but defendant is entitled to be paid the prices called for in his contract for the work which he performed under the contract." It may be conceded that this instruction, standing alone, does not correctly state the law applicable to the facts of the case; but immediately following that instruction the court said: "I further charge you that before you can set aside the certificate of the chief engineer of the Ocean Shore Railway Company, which, by the terms of the contract between the parties, was made final as to yardage and classification, you are entitled to have submitted to you clear and convincing evidence to overcome the presumption that the certificate correctly stated the facts in that

respect. Mere difference in the classification reached by the Ocean Shore engineer and that claimed by the defendant does not justify you in setting aside such certificate. The difference must be so large, the disregard of the defendant's rights must be so palpable and gross, as to lead the mind but to one conclusion, and that is that fraud has been practiced upon him." It is sufficient answer to plaintiff's contention to say that when these two instructions are read together, as they are required to be, it does not appear that they were misleading or confusing; but, on the contrary, it is clear that they gave the jury "a fair and just notion of the law upon the point discussed. As just indicated, the charge to the jury must be read as a whole, and, if when so read it appears that the jury was correctly instructed, the judgment will not be reversed because there is an apparent conflict between isolated parts thereof. Stephenson v. S. P. Co., 102 Cal. 143, 34 Pac. 618, 36 Pac. 407. This disposes of plaintiff's contentions. We therefore pass to a consideration of the defendant's appeal.

[4] The plaintiff, depending upon the action of defendant's bookkeeper, who approved all of the bills for supplies furnished to the defendant, introduced no evidence of the cost price, nor of the reasonable value, of such articles. The bookkeeper, however, was not employed by the defendant until March, 1906; and therefore defendant insists that said bookkeeper was without authority to bind him for any goods furnished prior to that date, by his approval of the bills therefor. There is no merit in this position, for, when these bills were presented to the defendant for his inspection and approval, he informed plaintiff that he did not personally know if they were correct, and directed that they should be sent to his bookkeeper "to be O. K.'d." This was done; and the bookkeeper testified that his approval of these bills was based as to some of the articles on his own knowledge, and as to others upon an investigation made by him. The plaintiff in good faith paid these bills for the defendant, and having submitted them to the defendant's bookkeeper for approval, as directed by the defendant, and having received that approval and acted upon it, the defendant cannot now in justice be heard to complain.

[5] At a period prior to the commencement of this action, Charles Wesley Reed brought an action against the Rialto Construction Company et al., to the complaint in which action the construction company filed an answer, but set up no counterclaim. Subsequently the construction company commenced this action, and Reed in due time answered and filed his counterclaim, covering identically the same matters and things which formed the basis of the action commenced by him. After the present case had been on trial for about eight days, and just before it was expected to go to the jury, Charles Wesley Reed made for the first time, by way of an amended answer, as well as a requested instruction to the jury, the objection that the plaintiff, having failed to file a counterclaim in the first case, it could not maintain the present action. It seems that immediately after this objection was made the plaintiff here filed an amended answer in the case of Reed v. Rialto Construction Company, setting up its counterclaim, and requested permission to introduce in this case the record in that action showing such fact; but the court, feeling doubtless that Reed's point was without merit, sustained an objection to the proposed evidence, and refused to instruct the jury to render a verdict in favor of defendant, as requested by him. The case was before a jury; ten days had been consumed in its trial; the issues would have been the same, no matter which case was tried first; and, passing the point that Reed waived the objection now urged by not making it earlier, we think that his contention depends upon an argument too technical to be seriously considered.

[6] A provision of the contract between the Ocean Shore Railway Company and C. E. Loss, which was carried into the contract between the parties to this action, provided "that the company may at any time reduce the contractor's force, or suspend the work or any part thereof for any length of time, or may discontinue the entire work or cancel this contract without liability for damages to the contractor, provided that in case of such cancellation a full and final estimate of the work done shall be prepared and payment made to the contractor in full thereof at contract prices, less all proper deductions," etc. This final estimate, it appears, was made after a suspension of the work, but before the cancellation of the contract. It also appears that the measurements of the work done were made up by an assistant of the chief engineer, who was detailed upon the particular section of the work undertaken by the defendant, his figures being checked up in the engineer's office, and upon the data thus furnished the chief engineer made the final estimate. Defendant contends that the admission in evidence of the so-called final estimate was error, because (1) the estimate was made before a cancellation of the contract; and (2) because the estimate was not made by the chief engineer personally.

(1) It was not contemplated by the contract that the progressive estimates of the work as it proceeded, made for the purpose of paying installments on the contract, should be accurate; but, on the other hand, it was intended by the parties to the contract that when the work was finished or the contract canceled there should then be

a final and correct estimate of all the work done, upon which full settlement should be made. After the earthquake, operations were suspended, and shortly thereafter, without resumption of work and in anticipation of the cancellation of the contract, the final estimate was made. Under these circumstances, we wholly fail to see what difference it could possibly make to the defendant whether the estimate was made just before or after such cancellation. This objection is purely technical, and may be disregarded.

[7] (2) The law does not contemplate in a case like this that the chief engineer shall in person make the estimates, for, on account of the extent of the work, such a course would be impracticable. It is sufficient if he exercises, as was done in this case, a general supervision over them. A case in point, from which we here quote at length, is Sweet v. Morrison, 116 N. Y. 19, 22 N. E. 276, 15 Am. St. Rep. 376: "Considering the extent of the railroad, the time provided for its completion, the details and complications in the measurements, and the nature of the duties of the chief engineer as implied from his position, even if it would be possible for him to give the requisite personal attention, it would be unreasonable to expect it. As said by the court in the Herrick Case (Herrick v. Vermont C. Ry. Co., 27 Vt. 673): 'When we come to know that practically the chief engineer never does and never can make these estimates, or even verify those made by others, that the thing is altogether impracticable, we must conclude that the parties had reference to something which was usual, or at least possible, in such cases.' It was accordingly held that an estimate by the assistant engineer was sufficient in that case. * * * The position of chief engineer made him conversant with the general facts, and gave him a thorough knowledge of the engineers under his control. He was in a position to exercise his judgment upon the reliability of their reports, and could direct others to revise their measurements, if he deemed it necessary. The same means that he employed to protect the railroad in its payments to the defendants were apparently regarded as sufficient to protect the parties as between each other." See, also, the following authorities to the same effect: Palmer v. Clark, 106 Mass. 373, 388; Edwards v. Hartshorn, 72 Kan. 19, 82 Pac. 520, 1 L. R. A. (N. S.) 1050; Nelson Bennett Co. v. Twin Falls L. & W. Co., 14 Idaho, 5, 93 Pac. 789, 797.

The judgment, which follows the verdict, is for $500 more than the plaintiff anywhere in the record demands. The plaintiff sought to recover $6,342.32; the verdict of the jury was for $6,842.32. This evidently was due to some clerical error, and the judgment therefore will be modified by deducting therefrom the sum of $500. In all other respects, it is affirmed.

We concur: LENNON, P. J.; HALL, J.

17 Cal. App. 14

TENCH v. McMEEKAN. (Civ. 877.)

(District Court of Appeal, First District, California. Aug. 23, 1911. Rehearing Denied by Supreme Court Oct. 21, 1911.)

1. Trusts (§ 103*)—Constructive Trusts—Enforcement.

Where an aged and helpless grantor conveyed all his property to a sister in reliance on her promise to care for him for life, made without any intention to perform, the conveyance was obtained by the grantee's actual fraud, and a subsequent grantee of the grantor could compel a conveyance from the grantee or one claiming under him with notice and without consideration.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 154; Dec. Dig. § 103.*]

2. Trusts (§ 110*)—Constructive Trusts—Enforcement.

Evidence *held* to show that an aged and helpless grantor executed a deed of all his property in reliance on the grantee's promise to care for him for life, made without any intention to perform it, justifying a decree that one, holding under the grantee with notice and without consideration, held in trust for a subsequent grantee of the grantor.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 160; Dec. Dig. § 110.*]

3. Appeal and Error (§ 1010*)—Findings—Conclusiveness.

Where the findings of the trial court find support in the evidence or by fair inference therefrom, they must stand, and the court on appeal will not reverse them merely on the ground that it would have come to a different conclusion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

4. Trusts (§ 103*)—Constructive Trusts—Evidence.

An aged and helpless owner conveyed all his property to his sister in reliance of her promise to use it to care for him for life. She subsequently conveyed the property to a third person, who had notice of the facts, and paid no consideration for the conveyance, and the sister did not impose on him any duty to carry out the agreement of support. The third person did not disturb the owner in his occupancy of the premises. The promise by the sister made by her without any intention to perform it contemplated that she should give her personal attention to the owner for life. She died in his lifetime. *Held* to justify a decree that the third person held the premises in trust for a subsequent grantee of the owner.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 154; Dec. Dig. § 103.*]

5. Trusts (§ 109*)—Constructive Trusts—Parol Evidence—Admissibility.

In a suit to establish a trust in real estate, conveyed to defendant by one who obtained a conveyance thereof on her promise to care for the aged and helpless grantor, parol evidence of admissions of defendant's grantor, since deceased, that she held the title in trust for the original grantor, was admissible to establish a constructive trust.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 159; Dec. Dig. § 109.*]

6. Evidence (§ 278*)—Declaration Against Interest—Admissibility.

Such admissions were also admissible under Code Civ. Proc. § 1870, subd. 4, as declarations of a decedent against interest in respect to his real property.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1137, 1138; Dec. Dig. § 278.*]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Elizabeth Tench against Eliza McMeekan. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

William H. H. Hart and Aylett R. Cotton, for appellant. R. B. Tappan, for respondent.

HALL, J. This action was brought to obtain a decree that the defendant held certain described real estate in trust for plaintiff and for a conveyance thereof. Plaintiff recovered judgment as prayed for, and defendant moved for a new trial, which motion was denied. In due time defendant appealed from the judgment and order to the Supreme Court. The appeals were subsequently, by order of the Supreme Court, transferred to this court for determination.

Respondent claims the premises in suit under a conveyance from John Tench, now deceased, to herself, while appellant claims the said premises under a conveyance from Temperance Tench, now deceased, who in her lifetime had received a conveyance of the premises from said John Tench. For the better understanding of the case it is proper to make a general statement as to some undisputed facts in the case. On the 31st day of May, 1906, John Tench, then aged 73, was, and for some time prior thereto had been, sick and a paralytic to such an extent as to be almost helpless and unable to walk or to attend to his personal wants, and so continued up to the time of his death, which occurred on the 18th day of July, 1907. His wife, Mary Ann Tench, had deceased on May 22, 1906, leaving said Tench without any near relative except his sister Temperance Tench, who during the last illness of his said wife had cared for both the wife and John Tench, and after the death of said Mary Ann, continued to care for and keep house for John Tench as before until May 31, 1906. On May 31, 1906, John Tench, by a deed executed on said day, conveyed the premises in suit, of a conceded value of $3,500, to his sister Temperance Tench, and at the same time transferred to her all the money he had on deposit in the savings and loan society, consisting of $1,150.29. This was all the property he owned save a little household furniture and personal effects of little value. Temperance Tench thereupon moved her own personal effects into the home of John Tench, which was the lower flat of the premises in suit, and continued to care for and keep house for him until the 5th day of October, 1906, when she was taken ill, and was no longer able personally to attend to her said brother, but did on the following day, to wit, October 6, 1906, employ plaintiff, then Mrs. Brandt, a widow, to nurse and care for both herself and said John Tench. From the deposit account transferred to her Temperance drew and used for the support of herself and said John Tench $250. On the 16th day of October, 1906, she transferred the entire balance of the money still on deposit to appellant, and at the same time conveyed to appellant the premises in suit. Temperance Tench died October 29, 1906. Plaintiff, formerly Mrs. Brandt, married John Tench October 31, 1906, and thence continued to live with and care for him until his death, which occurred July 18, 1907. On May 27, 1907, John Tench by deed conveyed the premises in suit to plaintiff, his then wife.

It is alleged in the complaint that on May 31, 1906, said Temperance Tench promised and represented to her said brother, John Tench, that, if he would convey to her the premises in suit, she would care for and keep house for him as long as he should live, and would not record the deed thereto nor claim ownership therein until his death. It is also alleged that she also promised and represented to him that, if he would transfer and assign said sum of $1,130.29 on deposit in said bank to her, she would accept said money and use it for their joint support, and would not assert ownership to any portion of said sum of money until after his death. It is further alleged, and not denied, that on May 31, 1906, John Tench, now deceased, reposed great trust and confidence in his said sister Temperance Tench, and believed that she would deal fairly and justly with him. It is further alleged that said John Tench relied on the said promises and representations of his said sister, and in reliance thereon conveyed the premises in suit, and transferred the money to her, and without other consideration, and that said representations and promises were made in bad faith and without any intention to perform them.

The court found the facts in accordance with the allegations of the complaint above set forth. It is further alleged and found, and as we think upon abundant evidence, that the conveyance and assignment to appellant were without any consideration, and were taken by her with knowledge of the trust and conditions upon which Temperance held the same. Further allegations are made as to breach and nonperformance of the promises in reliance upon which the conveyance to Temperance by John Tench was made, and upon which findings were made in favor of respondent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] If, however, the promises were made as alleged, without any intention of performing them, and the conveyance was made in reliance thereon, the conveyance was obtained by actual fraud, and respondent, as the grantee of John Tench, would be entitled to a conveyance from Temperance Tench or her grantee with notice and without consideration. Brison v. Brison, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189; Nordholt v. Nordholt, 87 Cal. 552, 26 Pac. 599, 22 Am. St. Rep. 268.

[2] Appellant, however, attacks the sufficiency of the evidence to support either the finding that Temperance made the representations and promises alleged, or that the conveyance to her was made by John Tench in reliance thereon, or that said Temperance made said promises without intention of performing them. As to the making of the promises, and that the conveyance to Temperance was made in reliance thereon, we think the evidence is ample to support the findings upon these issues.

The very circumstances surrounding the transaction strongly suggest that the conveyance and assignment were both made for the purpose of securing to the old, sick, and helpless grantor the care, support, and attention that he would inevitably need for his remaining days. Up to the time of the death of Mary Ann Tench it is apparent that the care and services rendered by Temperance to her brother and his wife were but of a temporary nature. Upon the death of Mary Ann it became necessary that some more permanent arrangement should be made for the care of John Tench and his home. The suggestion that he make a conveyance of his home and a transfer of his bank account to Temperance came from appellant. She made the arrangements therefor and herself drew the deed. She enlisted the aid of John Baird to explain the transaction to the sick man. In effect the evidence of this witness John Baird shows that appellant, in the presence of Temperance Tench, requested him to procure the execution of the conveyance and assignment from John Tench to Temperance, and to explain to him that Temperance for such conveyance and assignment would take care of him as long as he lived, but that the deed would not take effect until after his death and would not be recorded until after his death. Among other things this witness said: "Miss McMeekan said that the purpose of getting me there was to have the deed signed and that Temperance Tench was willing to take care of her brother for the property, and that if it was signed into her name it would not be recorded. The deed would be held and would not become effective until after John Tench's death. The money was to be used for their joint use, to be John Tench's just the same as though there had been no assignment made. Whatever was left of the money and property after John Tench's death, it would go to Temperance Tench." For this property he further said that Miss McMeekan said that "she" (Temperance) "was to take care of him, nurse him during his life. * * *" According to his testimony, he thereupon explained the matter to John Tench in substance as instructed by appellant. The witness said: "I told him that this deed was to transfer his property over to his sister, and it would not take effect until after his death, that the property would be his just the same as long as he lived. At his death the property and the money would go to his sister, what was left. During his life it would be his just the same as if there would be no transfer taken. * * * I said that his sister would take care of him."

In addition, there is evidence of admissions made by Temperance Tench during her life, and, while she held the title to the premises, that she held it and the money in trust only while her brother lived, and that it would only become hers at his death.

From the evidence above quoted, as given by John Baird, and the conduct of both John and Temperance, it is a fair deduction that both understood that for the transfer of the money and the conveyance of the realty she was to care for John Tench as long as he lived, to use the money for their joint support, and to hold the home for him during his life, and to claim no interest therein until after his death. That he made the conveyance and transfer in reliance on such promises there can be little doubt. Otherwise we must believe that in his old age, when helpless and incurably sick, of what would or might probably be a long illness, he made himself a pauper without claim upon any one for care and support except by way of charity. Appellant earnestly attacks the finding that the promises and representations of Temperance were made in bad faith and without intent to perform the same. What a person's intent in such a matter may be is often a difficult thing to determine. It usually must be ascertained from his future conduct and speech, and the fact as to such intent is one peculiarly to be deduced by process of reasoning from the facts in evidence by the trial judge.

[3] It is not sufficient, to reverse his finding upon this or any other fact, for us to say that we would have come to a different conclusion. If the finding of the trial court finds support in the evidence or by fair inference therefrom, it must stand.

[4] Appellant points to the fact that Temperance cared for John until she was taken sick, and then employed a nurse (this respondent) to take her place. This is true, but, on the other hand, the evidence shows without conflict that she also on the 16th day of October, 1906, made an absolute transfer and conveyance of all the money and property which had been conveyed to her by John, and to which alone he might look in the future for his support. There is no pretense in the record for any claim that when she as-

signed and conveyed to appellant she imposed any duty or obligation on appellant to support or care for John. Both in her pleadings and in her testimony appellant claims that the transfer and conveyance to her by Temperance, as well as the transfer and conveyance from John to Temperance, were absolute and without promise of any kind by her or Temperance. It is true that appellant did not disturb John Tench in his occupancy of his home, and allowed the tenant of the upper flat to pay the rental thereof to him until his death, and furnished him a small sum of money before his death. But she distinctly claims to have done this out of no legal duty to do so, but because she had a right to do with her own as she pleased. In addition to the undisputed evidence as to what Temperance did with the money and property before her death, there is evidence that she also at about the same time made efforts to have her brother sent to the county poorhouse. There is evidence that Temperance showed anxiety that her brother John might soon die, so that all the property might then become hers. In speaking of sending him to the county poorhouse, it is in evidence that she said that "she thought he would live about two weeks after he did get there. That would fix him."

The promises made by Temperance contemplated that she should give her personal attention to him as long as he should live, and that he should be supported out of the money and property transferred. By her sickness and death she was unable to carry out her promise for personal care, and by her deliberate act she at least attempted to deprive him of the right of his future support. While it must be conceded that a different conclusion might have been drawn by the trial court as to the intention of Temperance when she made the promises, we think that there is sufficient in the evidence to support the finding made that the promises were made in bad faith and without intention to perform same.

Some claim is also made that the evidence shows that the deed to Temperance was made in consideration of some advances that it is claimed had been made by Temperance to John. From the whole record it is extremely doubtful whether or not any such advances had been made. If any were made, they were of a most trifling amount, but it is clear that the deed was not made in consideration thereof, or that they were taken into consideration in connection therewith at all.

[5] Appellant also contends that the court erred in admitting parol evidence as to admissions and statements made by Temperance Tench concerning her title and interest in the property in dispute. The court did not err in so doing. Parol evidence is admissible to establish a constructive trust, or fraud in procuring a conveyance. Brison v. Brison, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189.

[6] And the declarations of a decedent against his interest, in respect to his real property, are admissible in evidence. Section 1870, subd. 4, Code Civ. Proc.

Appellant also urges that she was entitled to judgment on the pleadings and findings, because it appears therefrom that John Tench conveyed the premises in suit to Temperance Tench. But the allegation and findings as to such conveyance must be read in connection with the other allegations and findings, which overcome the effect of such allegation, and show that respondent is entitled to a reconveyance of the title thus fraudulently acquired.

The findings support the judgment.

The judgment and order are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

17 Cal. App. 22

TENCH v. McMEEKAN et al. (Civ. 829.)

(District Court of Appeal, First District, California. Aug. 23, 1911. Rehearing Denied by Supreme Court Oct. 21, 1911.)

1. Trusts (§ 103*)—Constructive Trusts—Evidence.

Where a brother assigned his bank deposit to his sister on a promise of the sister to hold the same in trust for their joint support, and the sister transferred the deposit to a third person with notice and without consideration, on the death of the sister the balance of the deposit belonged to the brother.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 154; Dec. Dig. § 103.*]

2. Dead Bodies (§ 6*)—Burial—Liabilities for Expenses.

Under Pen. Code, §§ 292, 293, providing that the duty of burying an unmarried woman leaving kindred devolves on the nearest of kin possessed of sufficient means, and that, when a person fails to perform his duty, the person who incurs burial expenses may recover from the delinquent treble the expenses, a brother of sufficient means must bury his deceased unmarried sister, leaving no property, and, where he fails to do so, another doing so should be allowed for the expense thereof against a fund belonging to the brother.

[Ed. Note.—For other cases, see Dead Bodies, Cent. Dig. §§ 6, 7; Dec. Dig. § 6.*]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Elizabeth Tench against Eliza McMeekan and others. From a judgment against Eliza McMeekan and from an order denying a new trial, she appeals. Modified and affirmed.

William H. H. Hart and Aylett R. Cotton, for appellant. R. B. Tappan, for respondent.

HALL, J. These are appeals from a judgment against Eliza McMeekan and the order denying her motion for a new trial, and are presented in one transcript.

The action grows out of the same general state of facts as were involved in the case of Elizabeth Tench v. Eliza McMeekan, 118 Pac. 476, No. 877, the appeals in which were this day decided by this court. The present action was brought to recover the balance remaining of the money referred to in the opinion filed in the other action. Isadora Brandt and her husband, F. W. Brandt, were made parties because the name of Isadora Brandt had been joined with that of appellant as depositor of the fund sued for, but, as her name was subsequently removed from the account, no judgment was taken against her or her husband.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The facts concerning the transfer of both the money and the land are set forth in the complaint in this action substantially as in the other, and the allegations of the complaint are supported by the same evidence. The court made similar findings in this case as in the one to recover the land, and similar attacks are made upon the sufficiency of the evidence to support the findings, and for the reasons set forth in the opinion in the other case we think these attacks are not well founded. In disposing of this case we do not deem it necessary to restate in detail the facts disclosed by the record. They are quite fully stated in the opinion filed to-day in the case involving the land, to which reference may be made for a complete understanding of the facts. The complaint in this case was framed upon the theory that the assignment made by John Tench to Temperance Tench of the money which he had on deposit in the bank was in trust during their joint lives, to be used for their joint support, and that said Temperance was to acquire no interest in said money until the death of John Tench. That such interpretation of the assignment was justified by what was said and done in connection with the making of the assignment, in view of all the surrounding circumstances we have no doubt.

[1] It was represented to John Tench, then old and helpless from paralysis, that, if he would assign his money to his sister Temperance, she would use the same for their joint support; that the money would be his just the same as if there had been no assignment made, and whatever was left after his death would go to Temperance Tench. He accordingly made the assignment. Probably neither John nor his sister Temperance clearly or at all had in mind that John might survive Temperance, which he in fact did. But it is clear that neither understood or intended by the assignment that Temperance should become the beneficial owner of the fund until after the death of John. That her understanding was that until such event occurred she held the money as well as the land in trust only is made certain by her repeated declarations to that effect to various witnesses who so testified. It is a fair deduction from the evidence as to what was said and done, in view of the conditions and circumstances surrounding the parties, that it was never intended that Temperance should become the beneficial owner of either the land or the money unless she should survive her brother. To accept the contention of appellant that both the conveyance of the land and the assignment of the money were absolute would be to suppose that John Tench in his old age, when sick and helpless, intended to deprive himself of all means of support except as the same might be accorded him as a matter of charity. This we would be loath to do.

Appellant with notice of the conditions of the assignment from John Tench to Temperance Tench, which she herself instigated and without any consideration therefor, took an assignment from Temperance of the balance of such money then on deposit in the bank. When Temperance died, John was entitled to this money. The court found, in accordance with the contention of appellant that she had drawn from the money on deposit, either personally or through Mrs. Brandt, $350; that from such sum she had expended various sums for specified purposes. From the findings it appears that $148 thus expended was for the support of either John or Temperance Tench, while the balance of the $350 was expended in and about the burial expenses of Temperance. The court gave appellant credit for the $148, but charged her with the balance of the $350, and included the same in the amount for which it gave judgment. The court in terms found that she had appropriated such balance to her own use. This, in view of the findings as to the specific purposes for which such balance was expended, should be treated as a conclusion of law and not properly a finding of fact. The court treated the expenditures for the burial of Temperance as not properly chargeable against the trust fund.

[2] In this we think the court erred. The action against appellant was in effect an action in equity to charge her as an involuntary trustee for the estate of John Tench with the amount of the balance of a trust fund in her hands at the time of his death. Temperance Tench at her decease was an unmarried woman, and John Tench was her brother and her next of kin; and, if the theory of plaintiff in this action be correct, had sufficient means to bear the expense of her burial, while Temperance was of right possessed of no means whatever. Under section 292 of the Penal Code, it was the duty of John Tench to cause the body of his sister Temperance to be buried and to bear the expense thereof. This section provides that: "The duty of burying the body of a deceased person devolves upon the persons hereinafter specified: (1) * * * (2) If the deceased was not a married woman, but left any kindred, the duty of burial devolves upon the person or persons in the same degree nearest of kin to the deceased, being of adult age, and within this state, and possess-

ed of sufficient means to defray the necessary expenses."

The next section (293, Pen. Code) provides that, if the person whose duty it is to cause the burial of the remains of a deceased person fails to perform such duty, the person who does do so may recover from such delinquent treble the expenses thereof. See, also, Enos v. Snyder, 131 Cal. 68, 63 Pac. 170, 53 L. R. A. 221, 82 Am. St. Rep. 330. Upon John Tench, therefore, devolved the duty of causing the remains of his sister Temperance to be buried. He did not do it, but appellant performed that duty and paid the expense thereof out of a trust fund in her hands belonging to John. In this action to recover of appellant the balance of such trust fund it would clearly be just and equitable that she should be allowed for the expenditures thus made, and we think that the court erred in not so doing. The amount for which judgment was ordered and entered September 2, 1909, is the sum of $815.37 and costs of suit. As appears from the findings and conclusions of law, this amount included the sum of $251.89 which the court erroneously charged against appellant as the principal and interest thereon on account of the amount expended out of the trust fund in and about the burial of Temperance Tench. This latter sum, $251.89, should be deducted from the principal amount for which judgment was rendered, as of date September 2, 1909.

Appellant also contends that, because it is alleged and found that John Tench assigned his interest in the money in question to Temperance, the judgment is not supported by either the pleadings or the findings. This allegation and finding must be read in the light of the other allegations and findings, which show that such assignment was in trust only. Thus read there is no basis for appellant's contention in this regard. The order denying the motion for a new trial is affirmed, and the trial court is directed to modify the judgment entered by substituting in lieu of the figures "$815.37" the figures "$563.48" as of date September 2, 1909, and as so modified the judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

16 Cal. App. 499

BUSICK v. SUPERIOR COURT, SACRAMENTO COUNTY, et al. (Civ. 892.)

(District Court of Appeal, Third District, California. June 22, 1911. Rehearing Denied by Supreme Court. Aug. 24, 1911.)

1. Prohibition (§ 11*)—Grounds for Relief—Want of Jurisdiction.

Irregularities in proceedings, or abuse by the court of discretion, are not grounds for prohibition, which is available only where there is want of jurisdiction, or legal authority in the court to make the orders complained of.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 36; Dec. Dig. § 11.*]

2. Elections (§ 280*)—Contest—Alias Citation—Power to Issue.

The court has authority to issue an alias citation in an election contest, where the original has not accomplished its purpose.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 280.*]

3. Elections (§ 280*)—Contests—Citation—Alias Citation.

Under Code Civ. Proc. §§ 1119, 1121, requiring the issuance of a citation to contestee in an election contest, and service thereof five days before the time fixed for hearing, and requiring the court to meet at the time fixed and determine the contest, but authorizing the court to adjourn from day to day, and to continue the trial before its commencement for any time not more than 20 days, the superior court, continuing an election contest for more than 20 days before the commencement of the trial, but not dismissing the proceeding, which was based on a proper written statement of grounds of contest, does not exhaust its jurisdiction to hear the contest; and, where the original citation was not served five days before the time originally fixed, the court has authority to issue an alias citation and fix a time for the hearing of the contest.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 280.*]

Appeal from Superior Court, Sacramento County; P. J. Shields, Judge.

Petition for writ of prohibition by Charles O. Busick against the Superior Court of the County of Sacramento and Peter J. Shields, judge thereof. Writ denied.

Rehearing denied by Supreme Court (Sac. 1,951) August 24, 1911.

O. G. Hopkins, A. L. Shinn, and Chas. O. Busick, for petitioner. Shelley & Hoag, for respondents.

BURNETT, J. This is a petition for a writ of prohibition. In reply to the order to show cause, respondent filed a demurrer, upon the ground "that the petition does not state facts sufficient to authorize the issuance of the writ prayed for," and thus is presented the question for determination. It appears that, on the 16th day of November, 1910, the board of supervisors of the county of Sacramento, after duly canvassing the returns of the general election held on the 8th day of November, 1910, by resolution duly passed, declared the result thereof, and on said 16th day of November, 1910, by resolution passed and entered on its minutes, the said board of supervisors declared the petitioner elected to the office of justice of the peace of said Riverside township. On the 9th day of December following, Michael F. Shelley filed, in the office of the county clerk of said county, a statement of his contest of the right of petitioner to said office of justice of the peace. On December 15th the court made an order setting the 28th day of said month as the day upon which a special session of the court should be held to hear said contest, and directed the clerk of the court to issue a citation, directed to said Charles O. Busick, citing him to appear on said date and answer the contest of the said Michael F. Shelley. Said citation was issued, and, on said 28th day of December the said court convened for the purpose of hearing said contest, and also the contest of J. S. Hill v. R. A. Merkeley, 114 Pac. 805. Petitioner appeared specially and objected, on certain grounds, to the hearing of said contest, and the court thereupon made and entered its order quashing said citation, and refused to proceed with the trial, placing its decision on the grounds: First. That the court had not acquired jurisdiction over the contestee, as the citation had not been served upon him personally, nor in the manner provided by law; and, second, that the said order of the court was made and the said citation issued prior to the expiration of the time for filing contests to the right of persons declared elected to office at the general election held on said 8th day of November, 1910, and therefore that the court was not authorized to proceed with the trial at the time appointed. The foregoing order has never been set aside nor appealed from. On said 28th day of December, while said Michael F. Shelley and his attorneys were present, without any affidavit by any person, the court made an order continuing said special session from time to time till the 8th day of March, 1911, when the ballots in said Riverside township were opened by said court for the purpose of having a recount taken of the votes cast for the various candidates in all contested elections, where it appeared from the statements filed that a recount was necessary, and a recount was taken in the said election contest of Hill v. Merkeley. In said proceeding no request was made by said Shelley that a recount be had in his contest against petitioner. At no time on or after March 8, 1911, did said Shelley ever apply to said superior court for any continuance of the trial of his said contest or of said special session and no continuance was had after said March 8th. On the 17th day of April following, the said Shelley served upon petitioner an affidavit of merits and notice of intention to apply to said court for an order directing said clerk to issue an alias citation, and for an order fixing a day for the hearing of said election contest. In said affidavit, as exculpatory of his delay, affiant declared: "That plaintiff and his attorneys, at the time said order was made [the order quashing the citation], believed that the court was without power to order an alias citation issued and served in such procedure and therefore, because of their mistaken understanding of the law governing election contests, the plaintiff did not at said time ask the court for an alias citation." On the 1st day of May, the said motion of Shelley came on for hearing, and was regularly continued until the next day, and was then submitted, after a full hearing, upon the affidavits, records, and papers on file in said election contest. On the 19th day of May, the said court made and entered an order that a special session of the said court be held on Wednesday, May 31, 1911, "at which session the ballots shall be opened and a recount be taken, in the presence of all the parties interested in the above-entitled contest and cause, of the votes cast at the last general election held on November 8, 1910, for the parties to this contest, where it appears from the statement filed that such recount is necessary for the proper determination of said contest; and it is further ordered that the clerk of this court shall issue an alias citation, directing the said defendant to appear at the time and place specified in this order and answer the plaintiff's statement of contest on file herein." Hence this application for a writ of prohibition.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] It may be observed that the record, as above recited, suggests certain questions of irregularity in the proceedings, or of possible abuse of discretion on the part of the lower court, that might be the proper subject of discussion on appeal, but which are not germane to the consideration here, which relates entirely and exclusively to the jurisdiction or legal authority of the court to make the orders in controversy. And it is manifest that we are concerned only with the validity of the said order, directing an alias citation to be issued, and fixing the 31st day of May for the hearing of the contest.

[2] As to the authority of the court to issue an alias citation where the original has not accomplished its purpose, there can be no doubt. This question has been decided by the Supreme Court in O'Dowd v. Superior Court, 158 Cal. 537, 111 Pac. 751, wherein it is said: "But, in view of the provisions of section 1121 [Code Civ. Proc.], it is not intended, or at least there is no room for construing the section as to service as contemplating, that service within the five days prior to the day fixed for the hearing was a limitation upon the jurisdiction of the court over the party upon whom the sheriff had failed to make proper service. On the contrary, we think that the provision of section 1119 as to service was simply, as held in Hadley v. Gutridge, supra (58 Ind. 302), directory to the sheriff as to the time within which, and the method whereby, he should make the service; that failure on his part, in either of these particulars, did not oust the court of jurisdiction to further provide for such service, but only precluded the court from proceeding with the hearing against a contestee until service was made upon him by order of the court, and by virtue of the power vested in it to do so under section 1121."

As to the order fixing the time for the hearing of the contest, the situation in the O'Dowd Case was different from what we have here. There the hearing was not continued beyond the 20-day limitation after the time originally set for the trial of the contest. Here, as we have seen, the first order was made on the 15th day of December, 1910, fixing the 28th day of the same month for the date of the contest. It was nearly five months thereafter, to wit, the 19th day of May, 1911, when the order was made for the issuance of the alias writ, and fixing the 31st day of May for the hearing of the contest. Said section 1121 provides that: "The court must meet at the time and place designated, to determine such contested election, and shall have all the powers necessary to the determination thereof. It may adjourn from day to day until such trial is ended and may also continue the trial before its commencement for any time not exceeding twenty days for good cause shown by either party upon affidavit, at the costs of the party applying for such continuance." It is the contention of petitioner that by virtue of this provision the superior court exhausted its jurisdiction to hear the contest, since it was continued for more than 20 days beyond the time originally fixed. It is insisted that proceedings to contest an election are special and summary in their nature, and that this limitation is inconsistent with the exercise of the general discretionary power of granting continuances possessed by courts in ordinary civil actions, and that the expression of the particular modes and time of continuances is exclusive of all not enumerated.

[3] It is to be remembered, however, that, while the proceeding is statutory and summary, and the "provisions" of the statute, as said in the O'Dowd Case, supra, "contemplate a speedy adjustment of the question as to who is legally entitled to an office, but the speedy determination which the Legislature had in view is not to dominate the construction of these provisions, so as to defeat altogether the right to have a contested election settled on its merits, unless such construction is imperative. A determination on its merits is what the statute mainly has in view." We think the same liberal spirit of interpretation which led the Supreme Court to hold that the power in reference to the citation is directory merely should be applied to the section before us, and should lead to a like conclusion. Indeed, we have authority for the position that this section is not mandatory and exclusive, as contended by petitioner. Thomas v. Van Zandt, 56 Wash. 595, 106 Pac. 141; Hagerty v. Conlan, 115 Pac. 762. The former was a decision by the Supreme Court of Washington, but the statutory provisions therein construed are similar to the sections of the law involved herein. We quote from the opinion as follows: "It is contended by learned counsel for respondents in effect that, since the trial court, by its order to show cause of November 25th, set the cause for hearing on December 9th, which to that extent was valid, and no legal process was issued or served, returnable on that day, to bring the respondents into court, therefore the court exhausted its power to thereafter acquire jurisdiction to try the cause. This contention is based upon the assumption that the statute is, in effect, mandatory in requiring the court to enter such order on the day of filing the contest, finally fixing the day of the hearing, and when once made such order cannot be changed or superseded by another order fixing another return day. We are quite unable to agree with this construction of the law. We find nothing in section 1433 which can be construed as rendering it mandatory that the order fixing the return day shall be made upon the day of filing the contest, or within any specified time thereafter; and clearly, if such order made upon that day should for any cause prove futile, that fact could not take away or lessen the power of the court to make an effective order at a later time, fixing another return day."

In the Hagerty Case, supra, the District Court of Appeal of the First district, after citing section 1118 of the Code of Civil Procedure, declared: "Notwithstanding the use of the word 'thereupon' the requirements of this section, with reference to the time of making the order designating a special session of the court, are not mandatory. The word 'thereupon' does not necessarily mean immediately"—citing cases. In that case, on the 24th day of January, 1910, the trial court had made an order "that the motion to dismiss proceedings be and the same is hereby granted, and that judgment of dismissal be entered." From this order an appeal was taken, and the said appellate court, on March 21, 1911, reversed the judgment, and the trial court was directed "to designate another day for a special session of the court; to thereupon issue an alias citation for service upon respondent, and upon a return thereof showing a service in the manner and within the time required by law, to hear and determine the contest." Thus the court held upon appeal that it was not only within the jurisdiction, but the duty, of the lower court to make another order, fixing another date for the hearing of the contest, which order would necessarily be made more than a year after the first order was entered and, indeed, more than a year after a judgment of dismissal of the proceedings had been entered. It is impossible to construe said decision otherwise than as warranting respondent's action herein.

But, viewing one or two of the vital considerations a little more in detail, with the single object of testing the jurisdiction of the court to make the order in controversy, it becomes more manifest that the court below has not transcended the bounds of its judicial authority. If there had been a judgment of dismissal entered, as in the

Hagerty Case, supra, it could probably be maintained that the whole cause had thus been withdrawn from the cognizance of the court, and, as long as such judgment was not suspended or set aside by appeal or otherwise, it would, of course, preclude any further proceeding, unless a new action were brought. Here, however, no disposition was made of the action itself. There was, rather, nonaction on the part of the court, as far as the determination of the cause is concerned. There was no hearing whatever upon the merits, and there was simply an abatement, not of the cause itself, but rather of that particular trial under the original citation. As far as the contest itself is concerned, it is still pending in the lower court. The written statement of the grounds of contest, which may be considered the complaint, is unaffected by any order that has been made, and it still invites the consideration of the court. It is this statement which gives the court jurisdiction of the subject-matter of the action. O'Dowd v. Sup. Ct., supra. In the O'Dowd Case, certain decisions to the effect that service on the contestee before the hearing is essential to and a limitation on the jurisdiction of the court to proceed with a hearing of the contest are held not applicable to our practice, for the reason that they involved "the question of jurisdiction of the subject-matter of the contest itself, and not jurisdiction of the person against whom the contest was directed. Under the statutes of our sister states, whose decisions are referred to, an election contest was not inaugurated by filing a petition or statement, and then giving notice; but it was provided that where a contest was contemplated the party contemplating it should, within a given time, serve notice on the contestee of his intention to contest, or his intention to appeal from the findings of an election commission to the courts. The proposed contestants in those cases failed to serve their notice of intention within the time prescribed, and, of course, the court never acquired any jurisdiction of the subject-matter. * * * Under our statutes, however, the superior court in the election proceeding here under consideration had acquired jurisdiction of the subject-matter of the contest, as the statement of contest was filed within the time." Jurisdiction of the subject-matter having thus been acquired, and not having been lost, as far as the record shows, it was within the legal power of the court to appoint another time for the contest, and to proceed to trial, if in the meantime jurisdiction is obtained of the person of the contestee by proper service of the alias citation. Some other minor questions are suggested by counsel, which we deem unnecessary to a determination of the proposition before us.

We are satisfied that the court has jurisdiction to do what it contemplates, and the demurrer is sustained, and the order to show cause is discharged and the writ denied.

We concur: CHIPMAN, P. J.; HART, J.

In re SHEPARD. (Cr. 1,608.)

(Supreme Court of California. Oct. 13, 1911. Rehearing Denied Nov. 10, 1911.)

1. Criminal Law (§ 1144*)—Appeal—Regularity—Presumptions.

An appeal, in a proceeding under Pen. Code, § 758, from a conviction of defendant of corrupt misconduct in office will be presumed to have been duly taken, in the absence of objection by the people, and on otherwise regular submission of the cause, though the record fails to show that an appeal has been taken.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3037; Dec. Dig. § 1144.*]

2. Indictment and Information (§ 125*)—Proceedings Against Public Officers—Accusation—Joinder.

The rule restricting indictments to a single charge does not apply to an accusation under Pen. Code, § 758, charging a municipal officer with corrupt misconduct in office, and such accusation may join more than one specification of misconduct.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 125.*]

3. Extortion (§ 7*)—Acts Constituting.

That accused extorted money from persons soliciting privileges from the city council of which he was a member, or having large claims against the city for local improvements, by soliciting loans from such persons, and that moneys were advanced to him on his unsecured notes unwillingly, to prevent unfavorable official action by him, shows official misconduct.

[Ed. Note.—For other cases, see Extortion, Cent. Dig. § 7; Dec. Dig. § 7.*]

4. Extortion (§ 7*)—Extortion by Public Officers.

It is extortion for a public officer to demand money as a condition to doing his duty, and especially if it is demanded as a condition of allowing a just claim against a public corporation.

[Ed. Note.—For other cases, see Extortion, Cent. Dig. § 7; Dec. Dig. § 7.*]

5. Criminal Law (§ 881*)—Verdict—Sufficiency.

In a proceeding against a municipal officer under Pen. Code, § 758, for corrupt misconduct in office, a verdict of guilty was sufficiently responsive to a plea of "not guilty."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2089, 2093; Dec. Dig. § 881.*]

6. Officers (§ 122*) — Offenses — Proceedings—Legislative Power.

Pen. Code, § 758 et seq., authorizing proceedings against public officers for official misconduct, is a valid exercise of power under Const. art. 4, § 18, authorizing the trial of public officers for misconduct otherwise than by impeachment.

[Ed. Note.—For other cases, see Officers, Dec. Dig. § 122.*]

7. Municipal Corporations (§ 174*) — Offenses by Officers — Proceedings—Practice.

A proceeding against a municipal officer under Pen. Code, § 758, for corrupt misconduct, is exempt from technical rules of procedure.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 410–414; Dec. Dig. § 174.*]

8. Municipal Corporations (§ 174*) — Offenses—Proceedings — Accusation—Sufficiency.

While a proceeding against a municipal officer under Pen. Code, § 758, is essential in a criminal action, an accusation is not insufficient because not formally entitled "People of the State v. ——."

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 174.*]

9. Municipal Corporations (§ 174*) — Proceedings Against Public Officers—Evidence—Sufficiency.

Evidence *held* to sustain a conviction of a municipal officer for corrupt misconduct in office under Pen. Code, § 758.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 174.*]

In Bank. Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Proceedings under Penal Code, § 758, against W. T. Shepard, for misconduct in office. From a judgment of conviction, he appeals. Affirmed.

A. H. Carpenter, for accused. U. S. Webb, Atty. Gen., Geo. F. McNoble, Dist. Atty., and Max Grimm, for respondent.

BEATTY, C. J. [1] This is a proceeding under section 758 of the Penal Code, instituted by an accusation in writing presented by the grand jury of San Joaquin county, charging W. T. Shepard, a member of the Stockton city council, with corrupt misconduct in office. A trial of the accusation resulted in a conviction of the defendant. A transcript of the record has been filed here which contains no evidence that an appeal has been taken to this court, or to any court, except a stipulation of counsel that it contains a correct copy of a notice of appeal, while in fact no such copy is to be found. We shall assume, however, in the absence of any objection on the part of the people, and in view of an otherwise regular submission of the cause, that an appeal to this court was duly taken in conformity to the decision in the Burleigh Case, 145 Cal. 36, 78 Pac. 242, in which it was held (contrary to my opinion) that an accusation presented under said section 758 is not an indictment, and consequently that the only appeal allowed in this class of cases is that secured by the statute to the defendant. Pen. Code, § 770. Upon this assumption, I shall proceed to consider such of the numerous errors assigned as counsel has attempted to sustain by argument.

[2] 1. The accusation against the defendant contained 15 specifications of misconduct. He demurred to the accusation upon that ground, and as to each specification moved to strike out. His demurrer was overruled, and his motion to strike out sustained as to the specifications Nos. 6 and 13. Upon the remaining 13 he was put to trial. His general objection to the accusation presented by the demurrer is the joinder of distinct charges of misconduct, and this he attempts to sustain by reference to the rule governing indictments. But, as held in the Burleigh Case and in other cases, the rule restricting indictments to a single charge does not apply to this class of accusations, in which more than one specification may be joined.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[3, 4] 2. The more specific objections to the accusation presented by the demurrer, and by the several motions to strike out were, in effect, that the facts alleged did not constitute official misconduct. The various charges were in substance that the defendant had extorted money from parties soliciting franchises or privileges from the council of which he was a member, or having large claims against the city for moneys due or alleged to be due upon contracts for the performance of public works, such as grading, paving, etc. It is charged that he solicited loans of money from these parties while their petitions and claims were pending or accruing, and that moneys were advanced to him on his unsecured notes unwillingly by said parties to prevent unfavorable official action by him. If these allegations were true, we cannot doubt that they constituted official misconduct. To avoid the risk of misstating the contention of counsel for appellant as to this point, we quote from his brief: "As above stated, the defendant was a legislative officer, and his acts to constitute official misconduct must have been committed *in the line of his legislative duties and by way of ordinance or resolution*, for that was the only method whereby he could act officially." The application of this argument is to the failure of the accusation to charge that defendant voted in favor of any of the claims or petitions of those from whom he received money when, as matter of justice, or to protect the rights and interests of the public, he should have opposed them. But it is extortion for a public official to demand money as a condition of doing what is his duty, as trustee of a public trust, to do, and more especially if it is demanded as a condition of allowing a just claim against a public corporation.

[5-7] 3. It is claimed that the verdict is void for uncertainty. The verdict was as specific as the plea. The accusation was of corrupt misconduct in office with 13 specifications. The plea was simply "not guilty," without any specification, and an unqualified verdict of guilty responds to the plea. It imports a finding of official misconduct and is sufficient to support the judgment of removal. This is a summary proceeding, regulated, as far as it is regulated at all, by a statute (Pen. Code, § 758 et seq.) which the Legislature has plenary power to pass under the authority of section 18 of article 4 of the Constitution, providing for the trial of public officers for misdemeanor in office otherwise than by impeachment. It is exempt from merely technical rules of procedure. Case of Burleigh, supra.

[8] 4. For the same reason, it is no objection to the jurisdiction of the court that the accusation was not formally entitled "People of the State v. Shepard." Undoubtedly it is a criminal action in every essential respect, but it is not governed by the rule applied in Santa Barbara v. Sherman, 61 Cal. 57, which was a prosecution for an ordinary misdemeanor.

5. Nor is the decision in Craig v. Superior Court, 157 Cal. 481, 108 Pac. 310, at all in point upon the question of jurisdiction. The opinion in that case carefully and properly distinguishes proceedings to remove firemen and policemen from proceedings to remove elective officers. This case is governed by the decision in Coffey v. Superior Court, 147 Cal. 525, 82 Pac. 75.

[9] 6. It is claimed that the evidence is insufficient to sustain any of the specifications of misconduct. The record of the proceedings at the trial is very bulky—made unnecessarily so by the repetition of objections and motions to strike out—and the case upon the facts has been very meagerly presented in the printed arguments of counsel. Such examination of the testimony as we have found time to make does not warrant us in holding that the verdict is wholly unsupported by the evidence. The testimony of the defendant, and the testimony of those who advanced him money in the form of loans, is all to the effect that they were bona fide loans, made from motives of friendship, and without any thought of influencing official action; but there were circumstances from which the jury might reasonably have put a more unfavorable construction upon these transactions.

7. There are 36 separate errors assigned upon the rulings of the trial judge admitting or excluding evidence, or striking out or refusing to strike out evidence. Many of these exceptions are based upon legal propositions above discussed and disapproved. With respect to the others, it may be said that the rulings were generally correct, and if in one or two instances they were technically wrong they were harmless.

The judgment is affirmed.

We concur: MELVIN, J.; HENSHAW, J.; SLOSS, J.; ANGELLOTTI, J.

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160 Cal. 695

RECLAMATION DIST. NO. 730 v. SNOWBALL et al. (Sac. 1,831.)

(Supreme Court of California. Oct. 9, 1911.)

In Bank. On petition for rehearing. Rehearing denied.

For opinion in department, see 117 Pac. 905.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing.

The special defense discussed in the last paragraph of the opinion of the court, I think, deserves more consideration than it has received. When a reclamation district includes in its plan of works, and appropriates and uses, a levee originally constructed by the owner of lands within the district, he has an undoubted claim against the district for the value of the levee so appropriated. This is conceded in the case of Reclamation District v. Burger, 122 Cal. 442, 55 Pac. 156, which is cited by the court as sufficient to support the decision here. But the only point there decided was that the commissioners appointed to assess benefits have no jurisdiction to determine the equities between the district and the owner of the levee so appropriated. Because they attempted to do so, their assessment was declared invalid. The effect of this decision was to remit the owners of private levees taken over by reclamation districts to the courts for a remedy, and I know of no reason why the remedy may not be invoked by way of counterclaim in a suit to enforce the lien of an assessment.

According to the statement of the case the value of the levee taken over by the district was due when it was taken, and before the commencement of this action. The district owed the defendant so much, and the defendant owed the district so much. They were counterclaims within the meaning of sections 438, 439, of the Code of Civil Procedure. If they were not the subject of set-off, the reason for denying them that character must be sought elsewhere than in the Burger Case.

(161 Cal. 152)

In re HOWE'S ESTATE. (L. A. 2,818.)

(Supreme Court of California. Oct. 11, 1911. Rehearing Denied Nov. 10, 1911.)

1. Executors and Administrators (§ 314*)—Distribution of Decedents' Estates—Jurisdiction of Probate Court—"Matters of Probate."

Code Civ. Proc. § 1678, authorizing a court of probate to order distribution of a decedent's estate, though some of the heirs, legatees, or devisees have conveyed their shares, applies only where no question arises on the distribution as to the conveyances having been made; and, where the fact of conveyance is disputed or its validity is in issue, the question is not within probate jurisdiction; "matters of probate" including the determination of the persons succeeding to the estate of a decedent, either as heir, devisee, or legatee, the amount to which each is entitled, and the construction of the will, but not including a determination of claims against heirs or devisees for their portion arising subsequent to decedent's death.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 314.*

For other definitions, see Words and Phrases, vol. 5, p. 4417.]

2. Executors and Administrators (§ 314*)—Distribution of Decedents' Estates—Jurisdiction of Probate Court.

Where, in probate proceedings for the distribution of the estate of a decedent, there were conflicting claims to the interest of the surviving husband of decedent, one party claiming under an execution sale of the husband's interest, another claiming as a judgment creditor of the husband, and another claiming under an assignment prior to the execution sale, the court must remit claimants to a court of competent jurisdiction to determine the conflicting claims.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 314.*]

Department 2. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Proceedings for the distribution of the estate of Cora C. Howe, deceased, in which John A. Stanwood and others appeared and asserted conflicting interests in the interest of an heir of the deceased. From a judgment denying relief, John A. Stanwood and others appeal. Affirmed.

Tanner, Taft & Odell, for appellants. Porter & Sutton, for respondents.

LORIGAN, J. Edward T. Howe, on July 10, 1908, was appointed administrator of the estate of the deceased, his wife, who died on June 4, 1908, the owner of certain lots of land in Los Angeles county, and leaving as her heirs at law said husband and two children. On September 12, 1908, John A. Stanwood and others, as trustees of the Citizens' Co-operative Company, brought suit against said Edward T. Howe for debt, attached his interest in said lots, obtained judgment against him for $3,382.85, and on execution sale John A. Stanwood purchased the interest of said Howe in the property of said estate for $2,500. On May 21, 1909, the Law Credit Company, a corporation, sued said Howe in the justice's court, obtained a judgment, and on August 6, 1909, filed a transcript thereof in the recorder's office of Los Angeles county. On June 20, 1909, said Howe, as administrator, under order of the superior court, sold the said real estate for something over $15,300, and the sale was confirmed. On May 26, 1910, said Stanwood and the Law Credit Company petitioned the court in the matter of said estate for an order requiring said Howe, as administrator, to file his final account, and prayed that on settlement thereof, an order distributing all the interest in said estate belonging to said Howe, as heir, be distributed to them as his successors in interest, alleging as a basis thereof their actions brought against said Howe, their judgments obtained, and the sale of his interest in the property of deceased to Stanwood, and the lien of the Law Credit Company thereon. On June 10, 1910, said Howe filed his final account as administrator, accompanied by a petition for distribution, and on the same day filed his demurrer and answer to the petition of Stanwood and the Law Credit Company. His demurrer was subsequently overruled. His answer asserted the invalidity of the attachment in the suit by Stanwood and others, as trustees, and the invalidity of the judgment sale on execution; denied that certain real property, the proceeds of which Stanwood asked should be distributed to him, was sold under execution; and denied that the Law Credit Company had ever obtained any lien against said real property. He further set up an assignment, made on April 28, 1909, of all his interest as heir of the deceased to Charles C. Sutton as security for the payment of legal services and advancements made by the firm of Porter & Sutton.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

In his final account, as far as its items are pertinent here, he credited himself with $622.75 for services as administrator, and with $805.09 as a portion of his distributive share of the estate paid by him as administrator to himself as heir; both items being credited on September 1, 1909. A balance of $834.41 was shown in the account, to which he claimed he was entitled on distribution as a balance of his distributive share as heir; full payment to the other heirs of their full proportion of the estate being shown in the account. On September 26, 1910, after hearing on the settlement of the account and the petition for distribution and the objections of said Stanwood filed thereto leveled particularly against the items of $622.75, administrator's fees, and $805.09, advancement to himself as heir, for which said Howe asked credit in the settlement of the account, the court made its order and decree in the matter. In the decree the court set forth that said Stanwood claimed the balance of $834.41 in the hands of the administrator, and the $805.09 which the latter sought credit for as an advancement to himself as heir, by virtue of the attachment and sheriff's sale of the interest of said Howe in the property formerly belonging to the estate of said deceased, and that the claim of Stanwood was contested by said Howe and by Messrs. Porter & Sutton; that Stanwood and others, as trustees of the Citizens' Co-operative Company, claimed an interest in or lien upon the $622.75 paid by the administrator to himself as administrator's fees, under a garnishment served on Howe, as administrator, on March 5, 1910, which claim was contested by said Howe and by Messrs. Porter & Sutton; that said Porter & Sutton claimed an interest in all said moneys under an assignment thereof made to them on April 28, 1909, by said Howe, which claim is contested by said Stanwood and others as said trustees. The court then determined that, sitting as a court of probate, it had no jurisdiction to determine the validity of the claims of said Howe, John A. Stanwood, John A. Stanwood and others, as trustees, and Messrs. Porter & Sutton to the interest of said Howe in the estate of his deceased wife, and ordered that the petition of Stanwood praying for the distribution to himself of the interest of said Howe in the estate be dismissed and denied, without prejudice to his right to assert his claim to the moneys remaining in the hands of the administrator in a proper action and in the proper court. The court then ordered that the final account as presented be allowed and approved, "excepting as to the item of $622.75 paid by said administrator to himself as administration fees in the settlement of said estate, on the 1st day of September, 1909, and excepting as to the sum of $805.09 paid by said administrator to himself as an heir, on the 1st day of September, 1909, the amounts of which items are hereby found to be correct; but the right of said administrator to make said payments is not determined because of the conflicting claims thereto of said Edward T. Howe, John A. Stanwood, John A. Stanwood et al., trustees for said Citizens' Co-operative Company, and Messrs. Porter & Sutton; that the payment of $622.75 by said administrator to himself, as commissions on the settlement of said estate, is ratified and approved, subject to the rights, if any, of John A. Stanwood, John A. Stanwood et al., trustees of the Citizens' Co-operative Company, and Messrs. Porter & Sutton; that the sum of $838.41, cash on hand, as shown by said account, and said sum of $805.09, advancement made to said Edward T. Howe, making together the sum of $1,643.50, be, and the same is hereby, distributed to Edward T. Howe, subject to the rights, if any," of all the last-named parties. This appeal is taken by John A. Stanwood and John A. Stanwood and others, as trustees of the Citizens' Co-operative Company, from the said decree settling the account ond ordering distribution.

It is insisted by appellants that the sale of the real property belonging to the estate of Cora C. Howe, deceased, to Stanwood on October 6, 1909, based on the attachment levied on September 12, 1908, transferred and conveyed to Stanwood the interest of Howe as heir in the property of the estate, subject to the payments of the debts thereof, and that the interest of Howe in the estate as of the date of the levy of the attachment and under the execution sale based on it should have been distributed to appellants under section 1678 of the Code of Civil Procedure, which provides that distribution of an estate may be made, although some of the original heirs, legatees, or devisees may have conveyed their shares to other persons, "and such shares must be assigned to the persons holding the same in the same manner as they otherwise would have been to such heirs, legatees or devisees"; that the sale by the sheriff of the interest of Howe in the property of the estate on execution had the same effect as a conveyance made by the judgment debtor, which would have entitled appellants to have had the interest of Howe distributed to them in kind, if the property had not been sold, and though the real property was sold under probate sale still the proceeds were subject to the lien of the attachment and execution, and appellants were entitled to have the share of Howe in such proceeds distributed to them.

But, assuming that the certificate of sale of the interest of Howe in this real property, which is all that appellants held at the time of distribution, was equivalent to a conveyance by the judgment debtor Howe, we do not perceive that appellants were entitled to any other consideration under the decree than the court gave them. The court, sitting as a court of probate, simply refused for want of jurisdiction to determine the disputed and conflicting claims to the interest of Howe between appellants and Howe and Porter & Sutton, remitting the former to a court of competent jurisdiction, where they could assert their rights to the interest of Howe in the estate, and, while settling the accounts of the administrator as to the amounts to which appellants asserted their claims, and ordering distribution to Howe, made such approval and distribution subject to the rights of appellants.

[1] While section 1678, relied on by appellants, authorized the court to distribute the share of "heirs, legatees or devisees" to those who have received conveyances thereof, this section only applies where no question arises on the distribution as to such conveyances having been made. When, however, the fact of conveyance is in dispute, or where its validity or effect is an issue upon the distribution, the determination of that question is not a matter within the probate jurisdiction of the court. As said in Martinovich v. Marsicano, 137 Cal. 354–356, 70 Pac. 459: " 'Matters of probate' include the ascertainment and determination of the persons who succeed to the estate of a decedent, either as heir, devisee, or legatee, as well as the amount or proportion of the estate to which each is entitled, and also the construction or effect to be given to the language of a will, but do not include a determination of claims against the heir or devisee for his portion of the estate arising subsequent to the death of the ancestor, whether such claim arises by virtue of his contract or in invitum; nor is the determination of conflicting claims to the estate of an heir or devisee, or whether he has conveyed or assigned his share of the estate, a 'matter of probate.' "

[2] In the matter at bar, a question of the validity of the attachment proceedings under which appellants claim to have acquired the interest of said Howe in the estate of the deceased was raised, as well as the effect of the execution and transfer of any interest by Howe in the estate, and what portion of the property of the estate in which he had an interest was sold under the execution; it being alleged, as we understand the answer of Howe, that one-half in value of the real property of the estate had been sold under order of sale of the court long before the entry of judgment against him in either the Stanwood suit or the Law Credit Company case, and the rest was not sold under the execution at all; while appellants claim that the interest of Howe in all the real property of the estate was attached and sold under the execution. In addition is the claim by Porter & Sutton of an assignment by Howe to them of all his interest in the estate long prior to the alleged sale under execution. All these matters would necessarily have to be settled, before it could be determined who of the claimants, if any of them, had acquired the interest of Howe in the estate. While these matters might have been of ready solution, the court in a strictly probate proceeding, could not determine them, and properly remitted appellants to a court of competent jurisdiction, wherein, in a proper action, these conflicting claims might be settled, while at the same time by its decree the probate court secured their rights while being asserted as far as it possibly could.

The decree appealed from is affirmed.

We concur: HENSHAW, J.; MELVIN, J.

161 Cal. 149

MERCHANTS' TRUST CO. v. WRIGHT et al. (L. A. 2,606.)

(Supreme Court of California. Oct. 11, 1911. Rehearing Denied Nov. 10, 1911.)

1. TAXATION (§ 679*)—TAX SALE—STATUTORY PROVISIONS—"HIGHEST BIDDER."

Under Pol. Code, § 3897, which provides that, when the state shall become the owner of property sold for taxes, the tax collector in reselling it shall sell the property to the highest bidder for cash, etc., the term "highest bidder" means the one who will make the highest cash bid for all the property, and not the person who will pay all the tax for the least amount of the land.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 679.*

For other definitions, see Words and Phrases, vol. 4, p. 3291.]

2. TAXATION (§ 40*)—TAX SALE—CONSTITUTIONAL PROVISIONS—UNIFORM TAXATION.

Pol. Code, § 3897, which provides that, when the state becomes the owner of property sold for taxes, the tax collector may resell the property or any part thereof to the highest bidder, and which makes no provision for the return to the owner of the property of any excess of the selling price above the accrued taxes and penalties, is not in conflict with the constitutional provision that taxation shall be uniform, and that a person shall bear only his proportionate share thereof.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 40.*]

3. CONSTITUTIONAL LAW (§ 285*)—"DUE PROCESS OF LAW"—TAXATION—TAX SALE—NOTICE.

Pol. Code, § 3897, which provides that, when the state becomes the owner of property sold for taxes, the tax collector, upon giving the notice prescribed thereby, may resell the property or any part thereof to the highest bidder, although authorizing the sale of the entire tract when the sale of a portion thereof would be sufficient to enforce the lien of the state, is not unconstitutional as a deprivation of property without "due process of law," which, as to tax sale proceedings, means only that due notice of sale shall be given to the delinquent owner.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 285.*

For other definitions, see Words and Phrases, vol. 3, pp. 2227–2256; vol. 8, p. 7644.]

4. TAXATION (§ 679*)—TAX SALE—PURCHASE BY STATE—RESALE—INTEREST ACQUIRED BY PURCHASE.

When an owner delinquent in taxes has been accorded the constitutional right to due process of law by a publication of a notice of sale to the state, and the state thereunder acquires title to the property, it takes an absolute title to it and may dispose of it in any manner it may choose, subject to the rights given to the delinquent owner to redeem it any time before an actual sale by the state.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 679.*]

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by the Merchants' Trust Company, as executor of the last will and testament of Edwin R. Fox, against W. S. Wright and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Charles Lantz, for appellants. L. M. Fall and Webster Davis, for respondent.

LORIGAN, J. This is an action to quiet title asserted under tax deeds from the state of California issued to plaintiff's intestate. The case was here before on appeal by the plaintiff from a judgment in favor of the defendants, and was reversed. Fox v. Wright, 152 Cal. 59, 91 Pac. 1005. Upon a new trial judgment went for plaintiff, and defendants appeal.

[1, 2] When this case was here before, one of the points urged by the present appellants, then respondents, in support of the judgment in their favor was that section 3897 of the Political Code, which provides that the tax collector in making sales of property by the state which it is required of delinquent taxes "shall sell the property * * * at public auction to the highest bidder," was unconstitutional. His argument was that if section 3897 was to be construed as requiring a sale of the entire property of the delinquent owner to the purchaser who would pay the higest cash price for it, and not as under former statutes, to the person who would pay the tax for the least quantity of the land, then, as the law made no provision for the payment to the former owner of the surplus money over the accrued taxes, charges, and penalties, there was imposed on the delinquent owner an excessive burden for the support of the government in violation of the constitutional provision requiring taxation to be uniform and compelling a person to bear only his proportionate share thereof.

This contention was decided adversely to the then respondents, the court holding that, "when the law speaks of a sale of the 'property,' it means all of the land, and, when it says that the land shall be sold to the 'highest bidder,' it means him who will make the highest cash bid for all the property," and that so construed the section is not unconstitutional, although the law makes no provision for the return to the owner of the property of any excess of the selling price above the accrued taxes, charges, and penalties.

[3] On this present appeal, where they are now the appellants, they make another attack upon this same section 3897, but on a different constitutional ground than urged by them as respondents on the former appeal, and it is the only point they make. Their claim now is that the sale of the entire tract of land when the sale of a smaller portion thereof would be sufficient to enforce the lien of the state is unconstitutional as being a deprivation of a citizen of his property without "due process of law." We do not, however, perceive any more force in this contention than there was to the other constitutional objection to the same section disposed of on the former appeal. In fact, the same reasons which are set forth at length in the opinion above referred to on the former appeal dispose as effectually of this constitutional objection as they did of the other.

That the Legislature may provide for the present system of taxation under which the state acquires title to the property of one who permits the taxes thereon to become delinquent and may authorize a subsequent sale thereof is not open to question. While it is undoubtedly true that a delinquent owner cannot be deprived of his property under such proceedings without due process of law, this due process of law, as far as tax proceedings are concerned, means only that due notice of sale shall be given to the delinquent owner, and this is fully accorded him by sections 3764–3767 of the Political Code, which provide for a notice to him by publication of the sale to the state. This is all the notice he is constitutionally entitled to, and when this is provided for by law, as it is here, he has been accorded the full measure of his constitutional right in that respect. Bank of Lemoore v. Fulgham, 151 Cal. 234, 90 Pac. 936; Fox v. Wright, supra.

[4] As held in this latter case, when the delinquent owner has been accorded his constitutional right to due process of law by publication of the notice of sale to the state and the state thereunder acquires the property, it takes (save as to the rights given to the delinquent owner to redeem at any time before an actual sale by the state) an absolute title to it, and may dispose of such property in any manner it may choose. These matters as to the nature of the title vested in the state under sale to it for delinquent taxes and its power to dispose of such prop-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

erty are fully considered in the case referred to. While no particular discussion was there had of the precise point as to "due process of law" made now, it was declared that such process consists of the notice provided by law to be given to the delinquent taxpayer of the intended sale of his property to the state. As that notice is provided for and there is no pretense that appellants did not have it and no other attack is made on the validity of the tax proceedings or the manner in which the property formerly owned by them was sold, this appeal presents nothing for further consideration.

The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; MELVIN, J.

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161 Cal. 77

WEAVER et al. v. HOWATT. (S. F. 5,489.)

(Supreme Court of California. Oct. 4, 1911. Rehearing Denied Nov. 3, 1911.)

1. BOUNDARIES (§ 8*) — UNITED STATES SECTIONS—SECTION SUBDIVISIONS—ESTABLISHMENT—PROPORTIONAL METHOD.

Where the boundary lines of United States sections and sectional subdivisions cannot be ascertained by locating the original monuments on the ground, and the objects, referred to in the record of the official survey, furnish no means of finding the actual location of the original lines or corners, the line and subdivisions may be established by the proportional method; but this method should not be applied if there are data in the field notes and maps from which the court may find and declare the actual position or location of the line.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 66–76; Dec. Dig. § 8.*]

2. BOUNDARIES (§ 10*)—UNITED STATES SUBDIVISIONS—MAPS AND FIELD NOTES—PATENT DESCRIPTIONS.

The maps and field notes of a United States survey constitute parts of the description in the original patents.

[Ed. Note.—For other cases, see Boundaries, Dec. Dig. § 10.*]

3. BOUNDARIES (§ 3*)—MONUMENTS—COURSES AND DISTANCES.

Monuments and objects referred to in the field notes of an original survey of a United States section line control courses and distances, as provided by Code Civ. Proc. § 2077.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 3–41; Dec. Dig. § 3.*]

4. BOUNDARIES (§ 37*)—SECTION LINE—LOCATION—PROPORTIONAL METHOD.

Evidence *held* insufficient to authorize the court to determine the location of a section boundary line and subdivisions thereof by the proportional method, but to require its location from the field notes, according to monuments referred to approximately.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 184–194; Dec. Dig. § 37.*]

5. BOUNDARIES (§ 3*) — LOCATION — NATURAL OBJECTS.

In determining the location of a boundary line, circumstances may be such that distances will control the location of natural objects, especially where such objects do not definitely fix a point, but leave it to be fixed within certain limits.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 3–41; Dec. Dig. § 3.*]

Department 1. Appeal from Superior Court, Humboldt County; Clifton H. Connick, Judge.

Action by J. H. Weaver and another against Theodore H. Howatt. Judgment for plaintiffs, and defendant appeals. Reversed.

Rehearing denied; Beatty, C. J., dissenting.

G. W. Hunter and Denver Sevier, for appellant. E. W. Wilson, J. H. G. Weaver, and W. F. Clyborne, for respondents.

SHAW, J. This is an appeal from a judgment in favor of plaintiffs. It was taken less than 60 days after the judgment was rendered, and consequently the evidence is subject to review.

In form, the action is to quiet title to land, but the sole object in the suit is to determine the location of the boundary line between the lands of plaintiffs and the lands of the defendant. All the lands are situated in township 2 S., range 3 E., Humboldt base and meridian. The plaintiffs own the N. ½ of the N. E. ¼ of section 11, and the N. W. ¼ of the N. W. ¼ of section 12. The latter adjoins the eastern end of the first tract. The defendant owns the S. W. ¼ of the S. W. ¼ of section 1 and the adjoining S. E. ¼ of the S. E. ¼ of section 2. The north line of sections 11 and 12 forms the north line of plaintiffs' land. The same line, being also the south line of sections 1 and 2, forms the south line of the defendant's land. The location of this common boundary is the point in dispute. The location claimed by plaintiffs is, according to the findings of the court, several chains north of its position as claimed by the defendant. A tract 10 chains wide, north and south, and about 40 chains long, or the full extent of defendant's two tracts, east and west, comprises the disputed territory.

The location of this common section line was fixed by the official survey of the United States, from whom both parties derive title. The court found that the monuments set by the United States surveyors at the common corner of sections 1, 2, 11, and 12, to show the position of this line, have disappeared, and that the original location thereof could not be ascertained. The same finding was made as to the quarter section corners on the line dividing sections 1 and 12 from sections 2 and 11. The north common corner of sections 1 and 2 and the south common corner of sections 11 and 12 were accurately ascertained and located by the government monuments there set. No attempt was made to locate the position of the east and west line in question by reference to monuments set elsewhere thereon, as, for instance, at the northeast corner of section 12 on the range line, or at the northwest corner of section 11. It was apparently agreed that those corners could not be found. The court found, in effect, that the north and south line actually run by the government surveyors between the common corner of sections 11, 12, 13, and 14, and the common corner of sections 1, 2, 35, and 36, cannot be retraced, found, or located on the ground by any of the monuments set thereon, or by any of the natural objects mentioned in the field notes, and that the distances therein given between the natural objects mentioned are not accurate. Having decided that it was impossible to find the actual position of the monument set at the common corner of sections 1, 2, 11, and 12, or the positions of the monuments set at the quarter section corners on this north and south section line, the court concluded that they were "lost corners," and that it must remeasure the whole line, divide it into four equal parts, and set monuments accordingly, without regard to the government survey. This was done, and the portions falling to plaintiffs and defendant, respectively, by this method, were adjudged to them; the result being to take from defendant a large part of the land he claims.

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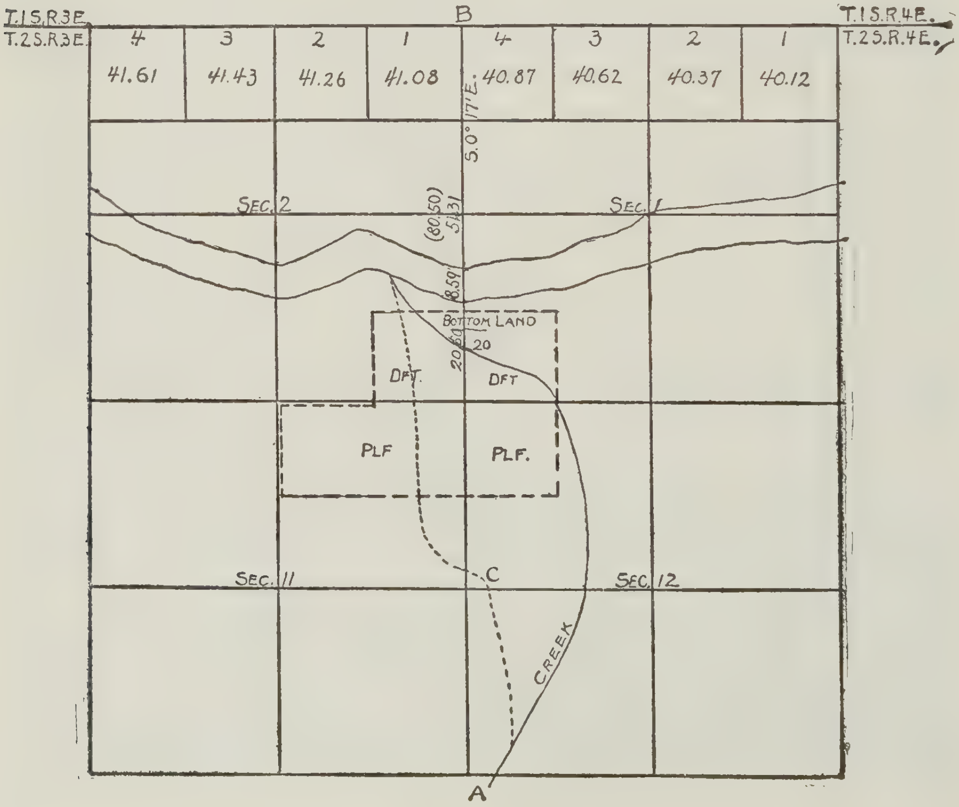
*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1-3] The propriety of this mode of adjusting boundary lines of United States sections and sectional subdivisions, in a case where the places where the original monuments were set cannot be located on the ground, and the objects referred to in the record of the official survey furnish no means of finding the actual location of the original lines or corners, is not seriously disputed. The defendant's claim is that this is not such a case, and that there were data in the notes and maps from which the court could and should have found and declared the actual position or location of the line in controversy. If this is true, of course the rule for re-establishing lost corners or lines does not apply. Yolo v. Nolan, 144 Cal. 448, 77 Pac. 1006. The decision of the case, therefore, depends on the question whether, from the records of the official survey (that is, the maps and field notes) and the evidence as to the present conditions and positions of natural objects, the position of the line can be lawfully located, and should be fixed at a point more favorable to defendant. The maps and field notes constitute parts of the descriptions in the original patents. Foss v. Johnstone, 158 Cal. 128, 110 Pac. 294, and cases cited. These monuments and objects, so far as they can be located, are controlling, and usually prevail over courses and distances. Code Civ. Proc. § 2077; Kimball v. McKee, 149 Cal. 450, 86 Pac. 1089.

The following map shows approximately the outlines and relative positions of the tracts and some of the important markings, as shown on the map returned with the government survey:



The dotted lines are not shown on the government map.

The line upon which the chief dispute arises is the line from A to B on the map, and dividing sections 1 and 12 from sections 2 and 11. The section lines of the official survey were run by S. W. Foreman, in July, 1875. In running the aforesaid line AB, he began at the south common corner of sections 11 and 12, and ran north to the township line. The following is a copy of his field notes of the survey of that line:

North bet. secs. 11, 12, Var. 18° 30′ E.
40.00 Old ¼ sec. post 4 ft. long and 4 in. dia., 4 in. stone mound made mound 4½ ft. at base and 2 ft. high for ¼ sec. cor. No trees near. Brushy.
55.00 Begin steep descent.
80.00 Old sec. cor. post 4 ft. long and 4 in. square and made mound 4½ ft. at base and 2 ft. high, with pits 18x18x12 in. for the cor. to secs. 1, 2, 11, 12.
No trees near.
Land hilly, N. W. slope.
Soil 2d rate.
Timber fir, oak, redwood & Madrone.
Brush some and chaparral.
North on a random line bet. secs. 1, 2, Va. 18° 30′ E.
11.85 A creek 20 lks. wide runs N. W.
13.00 Enter bottom land bears E. & W.
20.60 To a point 10 links E. of old meander post on left bank of Eel River bet. secs. 1, 2, from which post I run a base West 300 lks. to a point from which the old meander post on right bank of Eel River on line bet. secs. 1, 2 bears N. 19¼° E. which gives 8.59 chs. for the distance across the river, to which add 20.60 chs. the distance S. of river gives.
29.19 To a point 10 lks. E. of old meander post on right bank of river.
40.00 Set temporary ¼ sec. cor.
80.50 Intersect the N. Bdy. of Tp. 40 lks. E. of the cor. to secs. 1, 2, 35, 36, which cor. agrees with the notes furnished by the office and from which I run S. 17° E. on a true line bet. secs. 1, 2.
40.50 Set a ¼ sec. post 4 ft. long and 4 in. dia. in old stone mound made 4½ ft. at base and 2 ft. high.
No trees near.
51.31 Old meander post 4 ft. long and 4 in. dia. in a mound 4 ft. at base and 2 ft. high with pits 18x18x12 in. and from which old bearing tree an alder 10 in. diam. bears N. 18° W. 86 lks. dist.
59.90 Old meander post on left bank of Eel River on line bet. secs. 1, 2, with mound and pits.
80.50 The cor. to secs. 1, 2, 11, 12.
Land broken, hill slopes N. & S. to River.
Soil 2d & 3d rate.
Timber, oaks, fir, redwood and madrone.

The distances given in these notes as those at which the natural objects were reached are all found to be inaccurate. The total length of the line was not 160.50 chains. It was only 151.01 chains, or 9.49 chains short. The distance from the south end, the common corner of sections 11, 12, 13, and 14 to the place marked "begin steep descent," was not 55 chains. It was 56.10 chains. The place marked "enter bottom land" was not a total distance of 93 chains from this corner. It was only 65.42 chains, as the court found, a difference of 27.58 chains. The total distance to the south bank of Eel river was 88.35 chains, not 100.60 chains, as the notes make it, a difference of 12.25 chains. To the north bank of Eel river it was 97.37, not 109.19, a difference of 11.82 chains. From the north boundary of the township south to the north bank of the river was not 51.31 chains, but was 53.64 chains, or 2.33 chains longer.

The creek shown on the official plat as crossing the south line of section 12 east of the southwest corner, and running northerly through the west half of the section, and thence into section 1 and through the defendant's land to Eel river, does not exist as delineated. It could not run along the slope between the point where the steep descent begins and the bottom land, as the notes would have it. The course of the creek that crosses the south line of section 12 is shown on the map attached hereto by the dotted line crossing the west line of section 12 at the place marked "C," a point only 41.60 chains north of the south common corner of sections 11 and 12, and, according to the official measure, 50.25 chains south of the place referred to in the field notes by the words "11.85. A creek 20 lks. wide runs N. W." It is also south of the "steep descent" mentioned in the notes at 55 chains. No such creek as this is mentioned in the field notes of the survey of this line. On the notes of the survey of the south line of section 12, Sonoma creek is mentioned as crossing the line 6.50 chains east of the southwest corner. The government surveyor does not make these official plats. They are prepared in the General Land Office at Washington. U. S. Rev. Stats. § 2395 (U. S. Comp. St. 1901, p. 1471). It is suggested as a possible explanation, that the draughtsman supposed that the "creek" noted as crossing the line between sections 1 and 2 was the same creek as Sonoma creek crossing the south line of section 12 and delineated it on the plat accordingly. It is clear from the evidence, at all events, that the call for a creek in the field notes on the line of sections 1 and 2 is a false call, and that it should be rejected as a means of locating the division line in question.

[4] The effect of the judgment of the court, dividing the common line of the four sections arbitrarily into four equal parts, regardless of the natural objects referred to in the field notes, is to place the section corner, locating the line dividing plaintiffs' land from that of the defendant, at a point in the "bottom land" noted on the plat, 13.09 chains south of Eel river, and in the midst of a thick forest of large redwood trees. We do not think the evidence justifies such wholesale disregard of the official survey. While it is true that the errors in the field notes and plat make it impos-

sible to locate the exact spot fixed by the official survey as the common corner of sections 1, 2, 11, and 12, in the absence of the monument set to mark it, yet there is ample evidence to show that it was not fixed at or near the place selected by the court, upon its theoretical subdivision of the line. It is not the province of the court to determine where the corner should have been fixed. This is not an action to vacate the government survey. It must be assumed that the line was measured and the monuments set. Their positions as set fix the rights of the parties, regardless of the inaccuracy of the measurements and the errors in distance found in the field notes. The court must ascertain, as near as may be, where this monument was set by the government surveyor. If the exact spot cannot be found, it must, if possible, decide from the data appearing in evidence its approximate position, and the proportional method is to be used only when no other reasonable method is possible, and it must be so used that it does not contradict or conflict with the official data that are not impeached, and which, if not impeached, confine the actual position within certain limits. The application of the proportional method must, in that case, be also confined to the same limits.

The country between the corner of sections 11, 12, 13, and 14 and the place of "steep descent," and also between Eel river and the north township boundary is very hilly and rough. It is stated in the evidence, without contradiction, that the discrepancies in distance between the official survey and the private survey between these points (1.10 chains in the first instance, and 2.33 chains in the other) is not an unusual difference between successive surveys over such ground. The distance of the place where the steep descent begins was therefore stated in the field notes with substantial accuracy. The field notes state that at the common corner there are no trees near, that the soil there is second or third rate, that the land is hilly, that it is on a northwest slope, and that what timber there is near consists of fir, oak, redwood, madrone, and brush or chaparral. They also show that the government surveyor in his progress north arrived at the corner post and monument before he entered the "bottom land." The distance given is apparently wrong, but the natural object—the bottom land—is there, and the field notes describe it as having been encountered after passing north of that corner. The court fixed the corner, not on the slope before reaching the bottom land, nor where the land is hilly, but nearly ten chains into the bottom land, and on practically level land; not in second or third rate soil, but on first-class rich soil; not where the timber is fir, oak, redwood, madrone, brush, and chaparral, as is the case on the slope, but in the midst of a thick forest which is all redwood. It is obvious from these facts that the original corner is not near the place fixed by the judgment. Furthermore, the field notes show that the line between sections 1 and 2 was established by surveying two lines: First, a random line run north to the township line at a point 40 links, or less than 3 feet, east of the old township monument set as the section corner; and, second, by a true line run south from that monument to the south section corner, stated to be 20.60 chains south of Eel river. The true line was, of course, the line officially established. The notes of this survey of the true line show that the surveyor again found the meander posts on Eel river at the same distance from the township line as before, and again found the south section corner, here involved, at the same distance from the river as before, and again noted that it was situated on hilly land, on a slope, in second and third rate soil, that the timber about it was oak, fir, redwood, and madrone, and that it was 20.60 chains south of Eel river.

[5] These natural objects and conditions still exist, and they are all found a considerable distance south of and not at the place in the redwood forest selected by the court. They indubitably show that the court's location is wrong, and that the true corner must be located farther south, where it is not in a redwood forest, nor in first-rate soil, nor in distinctly "bottom land." The distance of 20.60 from the corner to the river may be incorrect. Under the rule established, it must give way, as evidence of location, to the natural objects mentioned in the field notes as descriptive, of the true location, so far as the two conflict. They do describe the actual location with some certainty and within ascertainable limits. The false calls and inaccurate measurements being rejected, those objects referred to which are found to exist must control, so far as they point to or circumscribe the location. The case is, in this respect, very like Chapman v. Polack, 70 Cal. 487, 11 Pac. 764, where a similar conclusion was reached. We cannot determine the place. It is for the trial court, upon all the evidence, to fix the place at a point where it will best accord with the natural objects described in the field notes as being about it, and found to exist on the ground, and which is least inconsistent with the distances mentioned in the notes and plat. It may be that, under all the circumstances, the distance of 20.60 chains, measured from the south bank of Eel river and noted on the plat, affords the most reliable means of ascertaining the approximate position, but as upon a new trial there may be different evidence, we lay down no rule to that effect. Circumstances may be such that distances control, especially where the natural objects do not

definitely fix the place, but leave it to be fixed within certain limits. Kimball v. McKee, supra, 149 Cal. 450, 86 Pac. 1089; Code Civ. Proc. § 2077. Other cases supporting our conclusion are Wise v. Burton, 73 Cal. 170, 14 Pac. 678; Whiting v. Gardner, 80 Cal. 80, 22 Pac. 71; Tognazzini v. Morganti, 84 Cal. 161, 23 Pac. 1085; Yolo County v. Nolan, 144 Cal. 449, 77 Pac. 1006; Los Angeles, etc., Co. v. Thompson, 117 Cal. 602, 49 Pac. 714; Galbraith v. Shasta I. Co., 143 Cal. 96, 76 Pac. 901.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

161 Cal. 142

In re KENT'S ESTATE. (L. A. 2,884.)

(Supreme Court of California. Oct. 11, 1911. Rehearing Denied Nov. 10, 1911.)

1. WILLS (§ 302*)—EXECUTION—EVIDENCE—SUFFICIENCY.

Evidence *held* to establish the due execution of a will containing no attestation clause.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 700–710; Dec. Dig. § 302.*]

2. WILLS (§ 289*)—EXECUTION—PRESUMPTIONS.

Where a will shows on its face that it was signed by testator and witnesses, and such fact is proved, it will be presumed on the death of the witnesses to the will or on the failure of their memory that all the other details of the statute, proof of which depends on the recollection of the witnesses, were duly observed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 653–661; Dec. Dig. § 289.*]

Department 2. Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Proceedings for the probate of the will of Mary Ashbury Kent, deceased. From a judgment denying probate, and from an order denying a new trial, proponent appeals. Reversed.

Marshall Stimson and Hugh T. Gordon, for appellant. L. M. Chapman and Ward Chapman, for respondents.

LORIGAN, J. This was a contest of a will before probate, and from a decree refusing its admission to probate and from an order denying the motion of the proponent of the will for a new trial these appeals are prosecuted.

The alleged will does not appear anywhere in the record on appeal, and the only matters concerning its execution or as to its contents are contained in the petition for its probate. It appears from that petition that the deceased died in the county of Los Angeles on August 30, 1904, a resident thereof. She left no property in California, but left a small tract of land in the state of Ohio which by her will she devised to her mother. The will purported to have been executed on August 9, 1904, in Los Angeles county, but no attempt was made to have it admitted to probate until April 10, 1910, nearly six years after her death.

The contest of the will was inaugurated by certain relatives of the deceased, who alleged that, as the Ohio land left by her was ancestral property acquired by deceased from her father, they would, under the laws of Ohio, if deceased had died intestate, take it as her heirs at law, to the exclusion of her mother. The grounds of contest, among others, were that the deceased at the time the alleged will was executed was of unsound mind and incompetent to make it, and that said will was not executed in accordance with the laws of this state in that it was not subscribed by the testatrix nor declared by her to be her last will, nor did the two attesting witnesses, or either of them, sign the same as witnesses thereto at the request of testatrix or in her presence.

On the trial, which was had before the court without a jury, two witnesses were called by proponent. One of these, a physician—Dr. Lewis—who had been called in to see the deceased during her last illness, testified that on or about August 12, 1904, his first visit, her mind was clear and she was perfectly rational, but that on or about August 24, 1904, when he called again, she was not so clear and rational, and was physically weak. The other witness—Dr. E. B. Alexander—was the regularly attending physician of the deceased, had drawn her will, and was one of the witnesses thereto. He was examined solely with reference to the preparation and execution of the will and the circumstances surrounding it.

He testified on direct examination that he had known the deceased during nearly all the time of his residence in Los Angeles, about 18 years; that he was making her a visit one afternoon when Miss Kent (the testatrix) asked him to draw her will for her; that the materials for that purpose were brought; that he sat by her bedside and prepared her will at her dictation; that the only other person present in the room at the time was Miss Bergheer, the attending nurse of the deceased; that after drafting the will the testatrix asked him to sign her name to it for her, saying she was too weak to sign it, and he did so; the testatrix then asked him and Miss Bergheer to sign it as witnesses, which they did, both signing immediately after it was drawn, at the side of the bed occupied by testatrix; that, after the will was signed by himself and Miss Bergheer, he left it with testatrix, and did not see it again until about a month before the trial of the contest. On cross-examination the witness stated that he could not recollect whether testatrix at the time the will was executed made any declaration as to the instrument being her will nor did he remember definitely whether the testatrix asked him and Miss Bergheer to sign it as witnesses, that they were the only ones present when he drafted the will or when it was witnessed, and that she must have asked him and Miss Bergheer to sign it as witnesses or they would not have done so, that the matter did not impress itself upon his memory particularly, and that on account of the length of time that had elapsed since the transaction he had no recollection as to these matters.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

At the close of the testimony of this witness the court said: "I do not see that there is any use in taking up any further time with this woman's mental condition. It seems to me that you have not shown any execution of the will unless you have some other witness to prove it." The attorney for proponent responding that he had no further witnesses except on the question of the mental capacity of the testatrix, the court announced its conclusion that under the evidence the will was not entitled to probate and a decree to that effect was entered accordingly. The proponent moved for a new trial on the ground, among others, that the evidence did not justify the decree of the court denying probate, which motion being denied, an appeal from such order of denial, and the judgment are taken.

[1] We are satisfied that the point made by the proponent that the decision of the court denying probate of the will on the evidence adduced was not warranted must be sustained. In other words, that the testimony of Dr. Alexander as a subscribing witness to the will, as it stood when the court practically ordered a nonsuit against the proponent, constituted a sufficient showing of the due execution of the will of the testatrix. It does not appear (because, as we have said, a copy of the will is not in the record) whether it contained an attesting clause such as is usually attached to wills, and the presence of which, when the memory of the attesting witnesses fails, may be resorted to as presumptive evidence that the statutory requirements recited therein to have been performed were complied with, as, for instance, when it recites that the will was signed by the testator in the presence of the attesting witnesses, declared to be her will, and that their signatures to the will as witnesses were signed at the request of the testator in his presence and in the presence of each other. For the purposes of this discussion, it may be assumed that there was no such attesting clause, and that the attesting witnesses simply signed their names thereto without even designating on the instrument that they signed as witnesses.

Considering now the evidence adduced, it is not necessary to go into any elaborate consideration of this matter or to discuss the authorities referred to by the respective counsel in the case arising in other jurisdictions, because the sufficiency of the testimony of Dr. Alexander to sustain the due execution of the will is clearly settled in this state by the case of Estate of Tyler, 121 Cal. 405, 53 Pac. 928, to which doubtless the attention of the trial court had not been directed. This case was the converse of the one before us as to the ruling of the superior court. In the Tyler Case the court held that the due execution of the will was sufficiently proved and the contention on appeal was that the evidence did not sufficiently show it. Here the trial court held that the evidence was insufficient to show due execution and the claim on this appeal is that it did. Yet it will be seen that in the Tyler Case and in this the evidence relied on to prove due execution was practically of the same character, though in some particulars the evidence tending to show due execution of the will in the present case is somewhat stronger than appears in the case referred to.

In the Tyler Case the objections of appellant to the sufficiency of the evidence sustaining the probate of the will were (among others not involved here) that such evidence did not sufficiently show that the testatrix had declared to the subscribing witness that the instrument was her will or that she requested one of the subscribing witnesses—Berger—to sign his name as a witness. Comparing the facts as stated in the Tyler Case with those in this case: There was no attesting clause to the will under consideration in that case. There the signature of the testatrix was proven as so it was proven here. There, there were two subscribing witnesses—Hurd and Berger. At the time of the contest Hurd was dead, and his signature proven. Here the witness Bergheer could not be produced and her signature was proven. Berger, the other subscribing witness to the will, was called as a witness in the Tyler Case. He remembered signing the will and swore to his signature, but he had no definite recollection of certain things which occurred at the time he attested the will. He could not remember whether the testatrix actually signed the instrument or verbally acknowledged her signature to it in his presence, or whether she declared the document to be her will in the presence of the attesting witnesses, or whether she requested him to sign as an attesting witness. He did not testify, however, that these things were not done, nor was there any evidence impeaching the execution of the will or to throw upon it the shadow of any kind of suspicion. Here Alexander necessarily remembered the signature of the testatrix because he wrote her name at her request, and, like Berger, he did not remember whether she published the will or requested him to sign it as a witness. But neither did Berger in the Tyler Case nor Alexander here testify that these things had not been done; nor was there any evidence impeaching the execution of the will involved here or to throw upon it the shadow of any kind of suspicion. Having stated the further fact that Berger was called as a witness a dozen years after the making of the will, the court in the Tyler Case then discusses the rule which must govern when the question of the due execution of a will is presented under such evidence. It says: "Appellants contend that the will must fall merely because the memory of the witness failed. The court held that as one attesting witness was dead and the other unable to recollect, as above stated, and as there was no evidence tending in any way to invalidate the will, proof of the signatures of the testatrix and the attesting witnesses was, under the circumstances described, sufficient to establish the due execution of the instrument. We see no valid reason for disturbing this conclusion. * * * It is our view, both upon reason and authority, that the finding of the trial court that the will was duly executed is beyond disturbance here. While the Code provides that certain things are necessary to the making of a valid will, it does not prescribe how those things shall be proven. It leaves that to the general rules of evidence. There is provision, it is true, that if the attesting witnesses are alive and present in the county, they must, in the event of a contest, be called. This is a very natural and just provision; for in such case the failure of the proponent of a will to call his attesting witnesses would be a very suspicious circumstance. But there is no statutory declaration, and no principle of law, to the effect that a will executed in due form shall go for naught unless an attesting witness after the lapse of many years shall continue to recollect anything material that occurred at the time he subscribed his name to it. Such a rule would make the validity of the will dependent, not upon the disposing mind of the testator, nor his freedom from duress, undue influence, or fraud, nor upon his clear expression of his intention in the body of the instrument, nor upon its execution in conformity to the form and ceremony prescribed by the statute; but upon the fullness, accuracy, and persistency of the recollection of one of the persons who signed it as a witness. Such a rule cannot be maintained either upon principle or precedent. What constitutes a sufficient execution of a will is prescribed by the statute. What constitutes sufficient proof of such execution is not so prescribed, and is a different question —a question to be solved by the general principles of evidence. In the case at bar there was no person other than Berger present at the making of the will, who was capable of testifying, at the time of the trial, to its execution. * * * The fact that the instrument was signed by the testator and the attesting witnesses was proven. There was no evidence tending to disprove the proper execution of the will, or to impeach it in any way. These are the facts of the case; and it is not necessary for the purposes of this decision to go beyond them. We are satisfied that upon these facts the court was warranted in holding the will duly executed. Where an attesting witness has no recollection as to certain matters connected with the making of the will, the case is, upon principle, in the same condition as where he is dead, insane, or absent; and in such case 'proof of the handwriting of the testator and of the subscribing witnesses, or any of them, may be admitted as evidence of the execution' (Code Civ. Proc. § 1315); and such evidence is sufficient in the absence of any countershowing to prove the execution."

[2] The court then proceeds to refer to and discuss authorities (text and adjudications) abundantly sustaining the principle that where a will shows compliance with other provisions of the law which must appear upon its face—that is, it purports to be signed by the testatrix and witnessed—upon proof of the fact of such execution it will be presumed on the death of the witnesses to the will being shown, or on the failure of their memory, that all the other details of the statute, proof of which depends upon the recollection of the witnesses, were duly observed.

Appellant as one of his grounds for a new trial set up newly discovered evidence. He made a clear showing that he had used extreme diligence in endeavoring to discover the whereabouts of the other subscribing witness to the will—Miss Bergheer—and was unable to find her until after the judgment of the court denying probate of the will was entered. He discovered her in Seattle and obtained an affidavit from her that she would testify that in the execution of the will to which she was a witness that all the statutory requirements had been complied with. In view, however, of the conclusion that we have reached that the evidence of Dr. Alexander, as the case stood when the court of its own motion nonsuited appellant, was sufficient of itself to show due execution of her will by testatrix and hence a new trial must be ordered, it is unnecessary to discuss the matter of the newly discovered evidence as a further alleged ground why appellant should have been granted a new trial.

Some points of practice as to the validity of the appeal taken by appellant are raised on this hearing, but we consider them without merit.

The judgment and order appealed from are reversed.

We concur: HENSHAW, J.; MELVIN, J.

161 Cal. 118

HIBERNIA SAVINGS & LOAN SOCIETY (UNRUH, Intervener) v. DORAN.

(S. F. 5,826.)

(Supreme Court of California. Oct. 9, 1911.)

1. APPEAL AND ERROR (§ 634*)—RECORD—DEFECTS—AFFIRMANCE.

A party appealing from an order determined in part by affidavits must, to perfect his appeal, follow the method prescribed by Code Civ. Proc. §§ 953a–953c, and file a request for the transcript of the testimony, with a bond, and the court must require a transcript of the reporter's notes, which transcript must consist of copies of the affidavits, the rulings of the court, and any other evidence taken at the hearing; or he must have the papers and evidence used on the hearing authenticated by incorporating the same in a bill of exceptions, as provided by Supreme Court rule 29 (78 Pac. xii); and where neither method is pursued, but jurisdiction is vested by the notice of appeal, the order must be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2775; Dec. Dig. § 634.*]

2. APPEAL AND ERROR (§ 797*)—DISMISSAL—MOTION.

Though ordinarily the Supreme Court on appeal will not entertain a motion to dismiss involving an examination of the record in advance of a hearing on the merits, yet, where a mere inspection of the record shows, that no relief can be given to appellant, the motion will be decided and the appeal dismissed, or the order or judgment affirmed for want of record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3149–3154; Dec. Dig. § 797.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; George Cabaniss, Judge.

Action by the Hibernia Savings & Loan Society against W. J. Doran, in which H. A. Unruh, Executor of E. J. Baldwin, deceased, intervened. From an order denying a motion for change of place of trial, defendant appeals. Affirmed.

S. V. McClure, for appellant. Tobin & Tobin, Bradner W. Lee, and F. S. Brittain, for respondent.

HENSHAW, J. This is a motion to dismiss an appeal taken from an order denying defendant's motion for change of place of trial. Attempting to appeal under the new method, defendant gave the clerk of the trial court the notice contemplated by section 941a of the Code of Civil Procedure, and, seemingly under the belief that nothing further was required of him, did no more. The clerk of the trial court prepared a purported transcript for the use of this court, and certified thereto that it contained "true and correct copies as the same are on file in my office of the following papers and pleadings in the above-entitled action." The subjoined list of papers and pleadings contained notices of motion and affidavits.

[1] This being an appeal from an order heard and determined, at least in part, upon affidavits, to perfect it, it became necessary for appellant to follow either the method prescribed by sections 953a, 953b, and 953c, of the Code of Civil Procedure, or the method prescribed by rule 29 of this court (78 Pac. xii). But appellant did neither. Treating the attempted appeal as one taken after trial, by authority of section 953a, it became appellant's duty, in addition to giving the notice prescribed by 941b, to file his request for a transcript of the "testimony offered or taken, evidence offered or received," etc., as prescribed by 953a, with the undertaking contemplated by 953b. Thereupon it would have become the duty of the court to require a transcript of the reporter's notes taken at the "trial." In the case of an appeal from an order such as this, this transcript would have consisted of copies of the affidavits, the rulings of the court, and any other evidence taken at the hearing. It would there have become the duty of the judge to examine the transcript, and, satisfying himself of its correctness, so to have certified. But, as has been said, appellant in this case took no one of these initiatory steps, either by filing his request or his undertaking. As little did he comply with the second method outlined by rule 29 of this court. For, admittedly, there is in this record no authenticated bill of exceptions, and, indeed, no bill of exceptions at all. Appellant, therefore, having pursued neither method to perfect his appeal, it results that that appeal stands here upon a record making it impossible for the court to review the order appealed from.

[2] It is a rule of convenience for the expedition of the business of this court that it will not ordinarily entertain a motion to dismiss involving an examination of the record in advance of the hearing upon the merits. But where, as in this case, a mere inspection of the record discloses that no relief can be given to the appellant, this court will consider the question, to save unnecessary delay and expense to litigants. Ordinarily it can matter little whether the form of the order made in the premises be one of dismissal, or one of affirmance for lack of proper record. In the present case, however, jurisdiction over the appeal having been vested under the new system by the notice given by appellant to the clerk, the proper order would be one of affirmance of the order upon appeal for lack of record showing error.

It is ordered accordingly.

We concur: ANGELLOTTI, J.; SHAW, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(161 Cal. 189)

ALLEN v. HANCE, City Treasurer (HUBER, Intervener). (L. A. 2,687.)

(Supreme Court of California. Oct. 13, 1911.)

1. MUNICIPAL CORPORATIONS (§ 538*)—STREET IMPROVEMENTS — ASSESSMENT — WAIVER OF OBJECTIONS—FINDINGS.

In a suit to restrain the foreclosure of a street assessment, evidence *held* to sustain findings that a waiver of objections executed by plaintiff and her husband related to a defect in the contract according to the law as previously defined in a particular case by the Supreme Court, and that the work had been completed in accordance with the specifications and ordinance.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 538.*]

2. MUNICIPAL CORPORATIONS (§§ 488, 489*)—STREET IMPROVEMENTS—LIEN—OBJECTIONS—WAIVER—INDEPENDENT SURVEY.

Where plaintiff expressly waived any right to refuse to pay an assessment lien, under a recent case decided by the Supreme Court, if an independent survey should demonstrate that the work was constructed on the grade established by the ordinance fixing the grade of the street, etc., such waiver did not require that a "joint" independent survey be made at the instance of both parties; and hence plaintiff, by paying prior installments on the improvement bond, and by failing to offer any evidence of error in an independent survey subsequently made, waived any right she originally had to participate in such survey.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. §§ 488, 489.*]

3. MUNICIPAL CORPORATIONS (§§ 488, 489*)—STREET IMPROVEMENTS — CONTRACT—PUBLIC POLICY.

Where a street improvement contract was held invalid because the specifications contained the provision that all loss or damage arising from the nature of the work should be sustained by the contractor, such holding did not involve public policy, but was for the benefit of the property owner; and hence he could waive the right to rely on such objection, as provided by Civ. Code, § 3268.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. §§ 488, 489.*]

4. ESTOPPEL (§§ 12, 52*)—JUDGMENT (§ 634*) —DEFINITION.

An estoppel, whether resting in judgment, deed, contract, or in pais, means only that a man is forbidden to show the existence of a fact where, by his past conduct, declarations, agreement, deed, or judgment, it would work an injustice and an injury to his adversary to permit him to do so.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 121-127; Dec. Dig. §§ 12, 52;* Judgment, Cent. Dig. § 1150; Dec. Dig. § 634.*]

5. MUNICIPAL CORPORATIONS (§§ 488, 489*)—STREET IMPROVEMENTS — ASSESSMENT — ESTOPPEL—LIEN.

That the levy of a street assessment for improvements creates a lien on the property assessed, and not a personal liability against the owner, does not prevent the operation of an estoppel against the owner, preventing him from showing that there had not been a strict compliance with the statute.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. §§ 488, 489.*]

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Mary W. Allen against C. H. Hance, Los Angeles City Treasurer, and Mrs. I. B. Huber, Intervener. Judgment for defendants, and plaintiff appeals. Affirmed.

W. H. Morris, for appellant. Edward Judson Brown, for respondents.

HENSHAW, J. This action was brought by plaintiff against defendant, the treasurer of the city of Los Angeles, to restrain the sale of plaintiff's property in the foreclosure of a lien for certain street assessment work.

The city of Los Angeles had entered into a contract with one Whittier for the performance of certain street work on Pasadena avenue. The specifications for the work contained the following clause: "All loss or damage arising from the nature of the work to be done under this agreement * * * shall be sustained by the contractor." The firm of Tryon-Brain Company succeeded to Whittier's rights and obligations under the contract, and were proceeding with the work. When it was more than half completed, the contractors became aware of the decision of this court in Blochman v. Spreckels, 135 Cal. 662, 67 Pac. 1061, 57 L. R. A. 213, which held that the clause in the specifications above quoted rendered the proceeding void. Tryon-Brain Company then prepared and presented to the owners of the property affected by the street work an agreement whereby, in consideration of their completing the work in a good and workmanlike manner, the property owner waived "any and all objection in law which he may have or be entitled to make to the legality or validity of the assessment for said improvement, or the legality or validity of any street improvement bond that shall be issued to represent the cost thereof"; the waiver applying to and binding the executors, administrators, grantees, and assigns. Mr. Tryon, of the Tryon-Brain Company, presented this waiver to plaintiff and her husband, explaining the purport of it, and explaining that his corporation feared the effect of the decision in Blochman v. Spreckels, and was unwilling to expend more money on the unfinished work, saving under this assurance from the property owners. Plaintiff's husband then retired to an adjoining room, and wrote the specific waiver which follows; it being signed both by himself and his wife, plaintiff herein: "I am unwilling to waive any question dependent upon the acceptance of the street supt. or counsel but if an independent survey shall demonstrate that the work from Ave. 48 to Ave. 50 is constructed upon the grade established by the ordinance fixing the grade of the street, I am willing to waive any right involved in the recent case decided by the Supreme Court, the San Diego case.—Nothing here being construed as a waiver of damage to our property on account of injury to the property by the change of grade, by ordinance or otherwise." This waiver was recorded with the others. The contractors finished the work according to the specifications; it was duly accepted by the street superintendent; and the bond on plaintiff's property for the amount of the assessment thereon was duly issued. Plaintiff made no objection to the issuance of the bond, and never demanded the survey contemplated by the waiver, and paid the installments on the bond as they became due from January, 1904, to January, 1908, without protest. In February, 1905, the bond was purchased by Mrs. I. B. Huber, intervener herein, and she received the payments made after that date until January 2, 1908, when plaintiff refused to make further payments. Such was the situation until August, 1908, when the intervener, still the owner of the bond, requested the city treasurer to advertise the property for sale to satisfy the bond. The plaintiff then instituted against the city treasurer this action to restrain him from making the sale. The intervener caused a survey to be made, which established the fact that the work had been done according to the grade fixed by the ordinance, and this and other matters were pleaded both in the answer of the treasurer and in the complaint in intervention filed by the intervener. The answer and the complaint in intervention thus pleaded waiver and estoppel by contract. The findings of the court are outlined in the above statement of facts. As conclusion of law, it found that plaintiff was estopped by contract, and judgment was rendered accordingly. From this judgment, plaintiff appeals.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] It is contended that the finding to the effect that the case of Blochman v. Spreckels, 135 Cal. 662, 67 Pac. 1061, 57 L. R. A. 213, was the case meant by plaintiff's language in waiving "any right involved in the recent case decided by the Supreme Court, the San Diego case" is unsupported by the evidence. Upon this subject plaintiff's case rests wholly upon the testimony of Mrs. Allen, the plaintiff. Her testimony does not negative the finding. She admits her signature to the waiver, and her husband's and that the handwriting of the waiver is her husband's but further than that her recollection fails to go. The admission of her attorney is: "She signed it. She is bound by it. What more?" The testimony of Mr. Tryon for the defendant and intervener, however, established without contradiction that he presented the waiver to Judge Allen, husband of plaintiff, explained the fear he felt as to the effect of the decision of the Supreme Court in the Blochman-Spreckels Case (which was a case arising in San Diego county), and that after this explanation Judge Allen himself wrote the waiver above quoted, signed it himself, and procured his wife to sign it. The finding is therefore clearly supported.

The same is true of another finding of the court which is here attacked—the finding to the effect that the work had been completed in accordance with the specifications and ordinance. Indeed, it can hardly be said that there is an issue upon this proposition, since plaintiff's complaint alleges that it was under the contract and specifications in her complaint set forth, and under no other contract or specifications, that the contractors performed and completed the street inprovement work. There is no denial of this in either the answer or in the complaint in intervention, but both contain averments to the same effect. Moreover, the issuance of the bond afforded prima facie evidence of the regularity of the proceedings, the acceptance of the work, and, consequently, that it was done according to the specifications. Statute 1899, p. 43. And, finally, the whole course of conduct of plaintiff's attorney under defendant's offer to prove in detail the performance of the work in accordance with the plans and specifications amounted to a specific waiver of any more formal proof than was actually made at the trial. Thus, says plaintiff's attorney, when offer of proof on this matter was made: "I have got my idea of it. They assert, and we deny. I don't know of any better way of their proving it than to prove the city accepted it. I think that is all the proof that is absolutely necessary." This invited proof was made.

[2] The third objection of the plaintiff is that, treating the waiver as valid, there was a noncompliance with its terms which relieves her from the enforcement of it. This noncompliance, it is urged, comes from the fact that the "independent survey" which demonstrated that the work was constructed upon the grade estabished by the ordinance was not made by the parties jointly. But to this it must be answered that plaintiff's waiver does not in terms declare that a joint independent survey be made at the instance of both parties, and, whatever may have been her original right to participate in the making of such a survey, she waived it by her acquiescence in the issuance of and the payment of the installments upon the bond, and, when proof of the independent survey made by the intervener was offered to establish the true grade, by her failure even then to establish its error.

[3] Appellant argues that under the authority of Blochman v. Spreckels the assessment was void as against public policy, and that such being the case a waiver of the right to assert this is itself invalid. But in this appellant errs. It was not upon the ground of public policy that the specifications, such as those considered in Blochman v. Spreckels, were held to invalidate the contract. It was because they were in violation of and not authorized by the statute, and because the effect of permitting them might be illegally to increase the burden upon the property owner; but this determination was one for the protection and benefit of the property owner, and one which, therefore, he could waive. Civ. Code, § 3268.

[4] The last contention of appellant is that she was not estopped, because, "there being no personal liability, the doctrine of estoppel in pais has no application." Waiving the fact that the estoppel in this case is founded on contract, and does not rest in pais, it must be conceded that appellant's position finds support in the language of Heft v. Payne, 97 Cal. 108, 31 Pac. 844. There the asserted estoppel was in pais. In an action to enforce a street assessment lien for work that had been completed after the time fixed for its performance, it was alleged that the defendant owner had expressly waived all objections which he might have by reason of the failure of the contractors to complete the work within the time fixed, and that he had stated that all he wanted was a completion of the improvement to the satisfaction of the council, and when that was accomplished no further objections would be made, and the assessment for the work would be paid; that, relying upon this, the council set aside the assessment and warrant, and ordered further work to be done, and that the contractor, relying upon the good faith of the promises, proceeded with the work and completed it to the satisfaction of the proper officers. Upon this statement, it is said by this court in department: "It is contended that the defendant is estopped by his representations and promises from claiming that the work was not done within the time required. But this is an action purely to foreclose a lien on the land for the cost of a public improvement. There is no personal liability, and under such proceedings the doctrine of estoppel in pais has no application. Meuser v. Risdon, 36 Cal. 239." A reading of Meuser v. Risdon, cited as the sole support for the doctrine thus announced, will disclose not only that it does not support the doctrine, but contains nothing in reference to it. In Meuser v. Risdon, the contractor had failed to perform the work, and it became necessary to relet the contract for it. The clerk of the board of supervisors, without authority from the board (even if such authority could be vested in him), undertook so to relet the contract. This court held under that state of facts, in an effort to collect the assessment for the work, that the reletting of the contract was a separate and independent proceeding, that the board of supervisors could not transfer its duties and powers to call for bids to the clerk, and that the board of supervisors had not the power to ratify the invalid act of its clerk under the circumstances, so as to give validity to these invalid proceedings. It would seem that the learned author of the opinion in Heft v. Payne, supra, must have read Meuser v. Risdon as meaning a ratification by the property owner, for only upon the theory of such ratification could the doctrine of waiver or estoppel have any application. But in Meuser v. Risdon it was not contended that the property owner had by silence or by speech, or by action or inaction, done anything in the nature of waiver, ratification, or assent. The language in Heft v. Payne, therefore, stands absolutely without support in the authority cited to uphold it. In Union Paving Co. v. McGovern, 127 Cal. 638, 60 Pac. 169, language similar to that in Heft v. Payne is used as follows: "In an action to foreclose a lien upon land for the cost of a public improvement in which there is no personal liability, and where the proceedings are purely statutory, and the lien exists by virtue of a strict compliance with the provisions of the statute, the doctrine of estoppel in pais has no application." The sole authority adduced in support of this declaration is Heft v. Payne. We think it will be found impossible to sustain these declarations, either in reason or by authority. Whatever of the varying definitions of an estoppel may be accepted, they differ not at all in the one essential, namely, that by an estoppel a man is precluded from pleading or proving the truth, because, in the language of Coke (Coke on Lit. 352a), "a man's owne act or acceptance stoppeth or closeth up his mouth to allege or plead the truth." Whatever may have worked the estoppel, whether the estoppel rests in judgment, deed, contract, or in pais, in its essence it amounts to but this: That a man is forbidden to show the existence of a fact because, by his past conduct, his declarations, his agreement, his deed, or a judgment, it would work an injustice and an injury to his adversary to permit him to do so.

[5] The fact that in street assessment cases there is a lien upon property, and not a personal liability, has no bearing upon the question of an estoppel, whether arising in pais or by any other recognized method. One may estop himself from denying the existence of a lien upon his property as well as he may estop himself from denying a personal liability; and, while it is true that in street assessment cases the lien exists only by virtue of a strict compliance with the provisions of the statute, if a property owner has estopped himself from showing that there has not been a strict compliance with the statute, then as to his property there has been such strict compliance, and the lien exists. The declarations above quoted in Heft v. Payne and Union Paving Co. v. McGovern must therefore be overruled, and, indeed, they have been overruled, though tacitly, in the later decision of this court in Cummings v. Kearney, 141 Cal. 156, 74 Pac. 759, where the doctrine that estoppel, even in pais may be successfully invoked against the owner of property in the case of a street assessment is recognized and approved by this court in bank. But that elsewhere the rule is universally recognized may be seen from a reading of 2 Elliott's Roads and Streets,

§ 731, and in the note to the section, where a very great number of cases are collated.

It follows, therefore, that the court was correct in its conclusion that plaintiff had estopped herself by her written waiver of her contract, and the judgment appealed from is therefore affirmed.

We concur: SHAW, J.; ANGELLOTTI J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.

(161 Cal. 106)

WILLIS v. LAURIDSON et al. (Sac. 1,857.)

(Supreme Court of California. Oct. 9, 1911. Rehearing Denied Nov. 8, 1911.)

1. INJUNCTION (§ 144*) — PROCEEDINGS TO PROCURE—VERIFIED COMPLAINT.

Where injunctive relief is sought by a verified complaint, the complaint takes the place of an affidavit, and the facts stated therein must stand the same test as oral testimony.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 316, 317, 321; Dec. Dig. § 144.*]

2. INJUNCTION (§ 144*) — PLEADING — COMPLAINT AS EVIDENCE—VERIFIED COMPLAINT.

Averments in a verified complaint upon which an injunction is sought which are mere conclusions of law are not competent as evidence, though they might be sufficient as a matter of pleading.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 316, 317, 321; Dec. Dig. § 144.*]

3. INJUNCTION (§ 118*) — SUFFICIENCY OF COMPLAINT.

Unless conclusions of law alleged in a verified complaint praying an injunction are supported by allegations of fact, the complaint is insufficient to support an injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 223–242; Dec. Dig. § 118.*]

4. CORPORATIONS (§ 283*)—DIRECTORS—ELECTION.

Failure to file with the county clerk until 1909 corporate by-laws adopted in 1900, making the number of directors 11 instead of the 7 provided for in the articles of incorporation, pursuant to St. 1895, p. 221, as amended in 1905 (Civ. Code, § 653c), would not invalidate the by-laws so as to make the election of additional directors thereunder on January 14, 1909, as provided by statute, illegal.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 283.*]

5. CORPORATIONS (§ 101*)—ISSUANCE OF CERTIFICATES—FRAUDULENT ISSUE—REMEDY OF STOCKHOLDER.

Notwithstanding Civ. Code, § 653c, providing that no member of a co-operative business association can have or acquire a greater interest therein than any other member, the issuance to a member of more than one share would not constitute fraud authorizing an injunction prohibiting the issuance of certificates at the suit of a member, where the member receiving the several shares assigns his excess shares to persons qualified to hold them before attempting to benefit by the excess issue.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 450, 451; Dec. Dig. § 101.*]

6. CORPORATIONS (§ 155*) — DIVIDENDS—AUTHORITY TO COLLECT.

That authority from the holders of certificates in a co-operative business association to collect dividends is not on file does not imply that no such authority was given.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 155.*]

7. CORPORATIONS (§ 155*)—DIVIDENDS—DISPOSITION.

The bona fide holder of a certificate in a co-operative business association has the right to dispose of his dividends.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 155.*]

8. CORPORATIONS (§ 189*)—CERTIFICATES—WRONGFUL ISSUANCE—REMEDIES OF STOCKHOLDER.

An allegation of the complaint in a suit by a member of a co-operative business association for an injunction to prevent the recognition of the validity of membership certificates issued that a certain certificate was issued to a member who was under the age of 18 years, when the statute fixes the minimum age of members at 18, was not sufficient to authorize the injunction, since such member might have been 18 years of age when the suit was brought, and also for want of a showing that she ever claimed any rights under the certificate.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 189.*]

9. CORPORATIONS (§ 189*) — CERTIFICATES OF MEMBERSHIP — WRONGFUL ISSUANCE — INJUNCTION—RIGHT OF ACTION.

The complaint in an action to enjoin a co-operative business association from recognizing the validity of certain membership certificates alleged that the dividends paid on account of a certain certificate were paid to the mother-in-law of one of defendants, when there was nothing on file authorizing her to receive the dividends. *Held*, that the allegation did not authorize an injunction, since the mere payment of dividends to defendant's mother-in-law would not be ground therefor, and authority to receive the dividends might have been subsequently filed or the receipt ratified.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 189.*]

10. CORPORATIONS (§ 101*)—ISSUANCE OF CERTIFICATES—SIGNING BY-LAWS.

That the name of a holder of a certificate in a co-operative business association was signed to the by-laws by another was not fraud authorizing an injunction inhibiting the recognition of the validity of such certificate, if her name was signed by authority of the holder.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 101.*]

11. CORPORATIONS (§ 56*)—BY-LAWS—AMENDMENTS.

If the by-laws of a co-operative business association permitted their amendment by the written consent of two-thirds of the members filed with the secretary, the directors could not adopt by-laws without such consent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 152; Dec. Dig. § 56.*]

12. CORPORATIONS (§ 189*)—STOCKHOLDERS—RIGHTS OF STOCKHOLDERS — ACTIONS—ALLEGATIONS OF COMPLAINT.

Complaint in a suit against a co-operative business association and certain stockholders and directors *held* not to state facts authorizing an injunction forbidding the recognition of the validity of certain membership certificates, the adoption of by-laws, payment of dividends, and the election of an increased number of directors, on the ground that certain stockholders desired to do such acts to fraudulently procure control of the association.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 189.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

13. CORPORATIONS (§ 189*)—STOCKHOLDERS—ACTION BY STOCKHOLDER—PARTIES.

All of the stockholders of a co-operative business association should be represented in an action by one of them against the corporation and certain officers and stockholders to enjoin the recognition of the validity of certain certificates, the adoption of by-laws by the directors, the payment of dividends on such certificates, and the election of an increased number of directors.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 189.*]

14. INJUNCTION (§ 118*) — SUFFICIENCY OF COMPLAINT.

A complaint for an injunction is bad if it does not state facts sufficient to determine how plaintiff's property will be permanently injured by the acts complained of, but merely states general conclusions as to irreparable injury, etc.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 223-242; Dec. Dig. § 118.*]

15. INJUNCTION (§ 9*)—RIGHT.

To authorize an injunction, the right thereto should be clear, and the alleged injury be imminent, and such that it can only be avoided by the injunction.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 9.*]

In Bank. Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

Suit for injunction by Frank Willis against N. A. Lauridson and others. From a decree for plaintiff, a part of defendants appealed to the District Court of Appeal, whence the cause was certified to the Supreme Court upon disagreement of the justices of the District Court of Appeal. Reversed, with directions to vacate injunction.

Grove L. Johnson and Wahrhaftig & Shinn, for appellants. F. F. Atkinson, for respondent.

PER CURIAM. By reason of the disagreement of the justices of the District Court of Appeal for the Third Appellate District, the above-entitled cause was certified to this court.

In the District Court of Appeal, Chipman, J., prepared the following opinion, which, meeting the views of this court, is hereby adopted, and, for the reasons in that opinion given, the order appealed from is reversed, with directions to the trial court to grant defendants' motion to vacate the injunction:

"A temporary injunction was granted upon plaintiff's verified complaint. Defendants, other than Lauridson and Barry, moved to dissolve the injunction on the grounds (1) that the facts alleged are insufficient to constitute a cause for an injunction; (2) that the court had no jurisdiction to issue said injunction; (3) that said injunction suspends the general and ordinary business of a corporation, and the same was granted without notice.

"The complaint, which is the basis of the order, is composed of 28 paragraphs, and, with its exhibits, embraces 360 odd folios. It is not possible to present a satisfactory analysis or fairly comprehensive statement of its material averments in a brief compass. Before examining the complaint, it may be well to state some established rules of law which must govern us in determining its sufficiency as a basis for the extraordinary remedy of injunction.

[1] "Where the verified complaint is the basis for the relief sought, it takes the place of an affidavit and must be treated as such; and the facts so stated must stand the test to which oral testimony would be subjected.

[2] "Averments which are but conclusions of law are not competent testimony, though they might stand as matter of pleading.

[3] "Unless the statement in the nature of a conclusion is supported by the facts or circumstances on which it rests, it is insufficient to sustain an application for injunction. If the complaint, otherwise unsupported, is open to attack on general demurrer, it is insufficient. Howard v. Eddy, 56 Kan. 498, 43 Pac. 1133; State v. Parsons, 77 Kan. 774, 95 Pac. 391; 22 Cyc. 941. The action is brought by plaintiff, as a stockholder, in his own right alone and in the interest of no others. The defendants are the association in its corporate capacity, and certain 11 alleged stockholders. It is averred that the association filed its articles of incorporation with the county clerk on December 10, 1900, and filed the same with the Secretary of State; that its objects are set forth in said articles, a copy of which is attached to the complaint as Exhibit A; that, among other things, said articles provide that the number of directors shall consist of seven members and shareholders of the association; that on the ——— day of December, 1900, the association, and the members thereof, purported to adopt a code of by-laws for its government, which was never filed in the office of the county clerk until about September 3, 1909, when it was so filed, a copy of which is attached to the complaint as Exhibit B; that said by-laws provided that the number of directors should consist of 11 members; that on January 14, 1909, the members of the association met and voted for and purported to elect the defendants, other than defendant the association and defendant Chappell, as directors, and that said Chappell claims to have been elected a director about the ——— day of November, 1909, and is now acting as such; that no other persons have been elected directors, since said January 14th, except as before alleged, and ever since said date said defendants have purported to act as such directors and have managed the affairs of said association; that the said articles provide for the selection of seven directors, and no more, and said articles have never been amended but are as set forth in Exhibit A; that said code of by-laws is not a legal code of by-laws. It is then alleged that de-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

fendant Reed, 'for the purpose of carrying out his fraudulent intention to control the management and operation of the said defendant association, on or about the 9th day of December, 1909, caused to be filed' with the county clerk 'the purported by-laws claimed to have been adopted by said alleged board of directors, * * * so controlled by the said defendant Reed, as herein alleged,' a copy of which is attached to the complaint as Exhibit D; and 'the said by-laws were never adopted at any regular or any meeting of the said alleged board of directors, * * * and the said by-laws * * * are not legal by-laws of said association;' that, under the law by which said association was incorporated, and under its articles, no member can hold more than one share of the stock, and no person can become a member who is under the age of 18 years.

[4] "To this point the only averment of any irregularity is that the by-laws adopted in 1900 were not filed with the county clerk until 1909. By these by-laws it was provided that there shall be eleven directors, whereas the articles provided for seven. The statute of 1895 (Stats. 1895, p. 221) also amended in 1905 (C. C. § 653e) requires the association, within 40 days after it becomes an association, to adopt a code of by-laws, and a copy must be filed with the county clerk, but no time is prescribed within which this must be done. It then appears that under said by-laws the persons named as defendants were on January 14, 1909, elected as directors of the association, and have since managed its affairs. The statute authorizes the association by its by-laws to provide for the number of directors (C. C. § 653e); and the directors were chosen as thus provided, and have since been and are now acting as such. They were therefore legally chosen, and the failure to file a copy of the by-laws with the county clerk until in 1909 does not invalidate their selection, nor does it render the by-laws void or illegal. Under the existing by-laws the members had a right to elect 11 directors.

"The by-laws (Exhibit D) do not differ materially from the by-laws first adopted and on their face appear to have been 'duly adopted by the written consent of a majority of the members of said association, filed with the secretary thereof.' They were therefore legal by-laws, and the averment that defendant Reed, 'for the purpose of carrying out his fraudulent intention to control the management and operation of the said defendant association, on or about the 9th day of December, 1909, caused to be filed' the said by-laws, shows no fraud or attempted fraud on his part.

[5] "It is then alleged that certificates of membership Nos. 91, 92, 93, and 94 were issued to one Josephine Keith, and that she assigned Nos. 92, 93, and 94 to three different persons, and hence they were never legally issued by said association. The statute provides that 'the rights and interest of all members are equal, and no member can have or acquire a greater interest therein than any other member has.' C. C. § 653c. We see no evidence of fraud in issuing to one person more than one share where that person, before attempting to benefit by such issue, assigns his excess shares to persons qualified to hold the shares. There is no averment that the issuing of the shares to Josephine Keith and her subsequent assignment of three of them was done with any fraudulent intent, or that the assignees were not qualified to hold the shares.

"It is next averred that certificate No. 59 was issued to one S. E. May and certificate No. 64 was issued to one Sam May, and 'that plaintiff is informed and believes, and upon such information and belief alleges, that the said S. E. May and the said Sam May are one and the same person, and upon such information and belief alleges that certificate of membership No. 64 in said defendant association in the name of Sam May has been illegally issued.'

"There is no averment of fraudulent intent in the alleged irregular issue, or that there has been or is intended any illegal use of the certificate No. 64.

"It is next alleged that certificates 72, 73, 74, and 75 appear separately in the names of Aliace Lawson, Frank Lawson, Margaret Lawson, and Leahe Lawson, and it is alleged on information and belief that said persons did not sign the book of by-laws, and that 'the signatures of said persons on said book of by-laws appear to have been written by one and the same person,' and, upon information and belief, it is averred 'that the dividends paid to the holders of said certificates or paid on account of said certificates of membership have been paid to E. D. Keith or Josephine Keith, each of whom is a bona fide member of the said defendant association' and that there is no authority on file from said persons to said Keiths to represent them or to collect any dividend 'on behalf of said aforenamed persons.'

[6] "The fact that authority from the holders of these certificates is not on file does not necessarily or inferentially imply that no such authority was given.

[7] "The bona fide holder of a certificate would have the right to dispose of his dividend.

"It is next alleged that certificate 82 was issued in the name of F. J. Keith, number 83 to George Keith, 84 to Roscoe Keith, 85 to L. M. Keith, 86 to G. S. Keith, 87 to Lillian Keith, 88 to Edwin Keith, 89 to Lulu Keith, 102 to May Keith, and 103 to Harry Keith. On information and belief it is alleged that said certificates were 'illegally issued by said defendant association and the same are not now legal shares of said defendant association'; and upon information and belief it is averred that 'said E. D. Keith has drawn the dividends payable and paid on the said certificates hereinbefore in this paragraph mentioned,' and on information and belief it is alleged that there is no authorization on file authorizing him to receive said dividends. There is no averment of any fact from which it would appear that the certificates were illegally issued, and it is not alleged that E. D. Keith received any dividends without authority so to do. Besides, these certificate holders are not complaining.

"It is next alleged that certificate No. 80 'issued in the name of Robert I. Reed was issued to a minor under the age of 18 years, to wit, of the age of about seven years and the said Robert I. Reed, at the time of the issuance of said certificate, did not sign the by-laws' and 'the dividends paid on account of said certificate or standing in the name of Robert I. Reed have been paid to defendant P. F. Reed,' and that said certificate was illegally issued and said dividends illegally paid. There is no distinct averment that Robert I. Reed, in whose name the certificate was issued, is the minor of seven years referred to. The statute fixes the eligible age for membership at 18 years. C. C. § 653c. Assuming that this certificate was improperly issued, this fact alone would not justify the injunction.

[8] "It is next alleged that certificate 105 was issued to Ruth Slocum, and that at the time of its issue she was under the age of 18 years, and hence was illegally issued. She may have been 18 years of age the next day or when the action was brought, and, besides, no injury to plaintiff is shown by its issuance. It does not appear that the holder ever claimed any right under it.

[9] "It is next alleged that certificate 115, 'issued in the name of Ruth Ann Reed, was issued to a minor under the age of 18 years'; that she did not sign the by-laws, 'and that dividends paid on account of said certificate No. 115 have been paid to the said defendant P. F. Reed by said defendant association.' There is no distinct averment that any dividends have been paid on this certificate, and, if it sufficiently appears that any were paid, no such injury has been shown as would warrant the issuance of an injunction. As in the preceding case, she may have been of age the day after the certificate issued or when the action was commenced.

"It is next alleged that certificate No. 116 was issued to Eve G. Lewis, and at the time she did not live in this state, and did not sign the by-laws, and 'that the dividends paid on account of said certificate have been paid to one Mrs. Ingraham, the mother-in-law of defendant P. F. Reed,' and that 'at the time of the payment of said dividends * * * there was nothing on file * * * authorizing said Mrs. Ingraham to receive said dividends.' We find nothing in the statute requiring residence in the state as necessary to eligibility to become a member of the association. That Mrs. Ingraham happens to be the mother-in-law of defendant Reed would hardly be urged as ground for an injunction. If there was no authority on file for her to draw dividends at the time, it may have been subsequently filed or the act ratified.

[10] "It is next alleged that certificate 128 'was issued in the name of John Gilbert and subsequently transferred to one Mary E. Jones.' On information and belief it is alleged 'that at the time of the issuance of said certificate number 128 there was no such person in existence as the said John Gilbert who was entitled to own a share of said defendant association' and on information and belief it is alleged that the transfer to said Mary E. Jones was illegal and on information and belief it is alleged 'that the name of Mary E. Jones appearing on the book of by-laws of the defendant association was signed by the defendant J. J. Ruggles.' It is not alleged that John Gilbert never existed; the averment is that no such person existed 'who was entitled to own a share of said defendant association.' Why he was not entitled does not appear. Nor does it appear why the transfer of this share to Mary Jones was illegal. No fraud can be imputed if it be admitted that Ruggles signed the by-laws for Mary Jones and no injury is shown.

"A very similar case is certificate 129, alleged to have been issued to Fred Gilbert, and was transferred to Maggie Yuell.

"It is next averred that certificates 135 and 217 'are shown by the records of said association to have been issued in the name of Frank Fox,' certificate 211 'in the name of one F. Fox,' 134 'in the name of one Frank Fox,' and 136 'in the name of F. C. Fox'; that 'the names of the parties to whom the said certificates * * * were issued were signed on the book of by-laws by one Frank Fox; that the dividends paid for or on account of said shares * * * have been paid to one Frank Fox,' and there is nothing of record to show that 'the said Frank Fox was authorized to receive said dividends on account of said shares numbers 218, 154 and 136.' As heretofore observed, it does not follow that the dividends were illegally paid because there was at the time they were paid no authority on file. This may have been subsequently furnished or may have been exhibited at the time, but not filed. There is no averment that the certificates were illegally issued, or to fictitious persons.

"It is next alleged that certificate 225 was issued to one Baby Bagge; that the said Baby Bagge 'was at the time of the issuance of said certificate a minor' and said certificate was illegally issued. So far as appears, Baby Bagge might have been a minor, and, being 18 years of age, be eligible to membership. Whether Baby Bagge was a male or female does not appear.

"It is alleged that the directors 'have treated, recognized, and counted, and do treat, recognize, and count, as valid, the said illegal certificates, * * * and will continue to treat, recognize, and count as valid said illegal certificates of membership, unless restrained.' Clearly, unless it be shown that the certificates are illegal, the directors should so treat them.

"Then follow paragraphs 23 to 38, both inclusive, which may be thus summarized: That for the purpose of carrying out the said fraudulent intent to control said association said P. F. Reed, who is secretary thereof, by and through the names of said illegal shareholders, caused to be elected directors of said association, a majority of whom have done the bidding of said Reed; that he has caused said directors to elect him manager of said association, and as such manager he has selected as employés certain of his relatives. No facts are shown why the directors exceeded their authority or violated any duty in electing Reed as manager, and no facts are stated showing that his relatives were unworthy employés. It is alleged that he has caused certain shares to be canceled which were owned by persons who would not do his bidding, naming none such and stating neither time nor circumstance of such alleged action; that he has caused a new code of by-laws to be prepared, 'giving to the said Reed and to said alleged board of directors absolute control and management of the affairs of said association, and to take over the rights and privileges of all members, * * * who will not act in accord with the wishes of said defendant P. F. Reed,' as appears by Exhibit C; and that at the next monthly meeting of said directors as fixed by the by-laws filed on September 3, 1909, to be held on the second Monday of December, 1909, the defendants other than defendant association have determined and will, unless restrained, adopt said by-laws (Exhibit C), and will 'without right vote to adopt and will adopt' said last-named by-laws. We have examined this Exhibit C and compared it with the by-laws (Exhibit B), and find no such power given as is claimed. The changes proposed are not many nor are they such as the members may not adopt.

[11] "The indorsements on Exhibit C show that they were to be adopted upon the written consent of members in accordance with 'article XII, sec. 3 of the present by-laws,' which provide that 'they may be amended upon the written consent of two-thirds of the members filed with the secretary.' Without such consent the directors could not adopt a code of by-laws. But if they did assume to do so, and thereafter attempted to be governed by them, it does not appear, either by averment or from a comparison of Exhibit B with Exhibit C, that any injury would come to any shareholder.

"It is alleged that defendant P. F. Reed, acting by authority of said directors, has announced his intention of declaring a dividend among the members 'and particularly to the said illegal shareholders hereinbefore mentioned,' and, unless restrained, he will make such distribution 'and the portion of the said * * * funds distributed by (probably means to) said illegal shareholders will be received and retained by the defendant P. F. Reed and converted to his own use.' It does not sufficiently appear that the alleged illegal shares can be so classed or considered, and, unless illegally issued, the plaintiff cannot complain if Reed appropriates their dividends.

"It is then alleged that Reed 'has conceived the idea and intent to control * * * the affairs of the defendant association by and for himself,' and this he will accomplish, it is averred, by voting said 'fictitious and illegal stock issued by said defendant association as hereinbefore described, at a meeting of said defendant association or of said alleged board of directors * * * to be held December 13, 1909, as alleged in paragraph 32 hereof, unless restrained.' It appears that there are outstanding 250 shares—i. e., there are 250 members—each having an equal voice with all the others. It is not made to appear how Reed could accomplish his alleged purpose if it be admitted that all these alleged illegal votes are illegal, and that he could control them, 29 in all.

"It is next alleged that he intends to carry out his alleged purpose by voting these alleged illegal shares at the annual meeting to be held on January 11, 1910, in the election of a board of directors, who when elected 'will do and vote in regard to the conduct and management of said association as directed by said Reed.' It does not appear that he can work his purpose any more successfully in this regard than in his other alleged schemes for self-aggrandizement.

"Finally, it is alleged that if the said Reed votes such illegal certificates at said election, and if said directors treat, recognize or receive said illegal stock as legal, the said acts of defendants will cause plaintiff great and irreparable injury, and 'no compensation can afford plaintiff adequate relief.'

[12] "Upon a more careful examination of the complaint, and after disjointing it and finding out the full force of its several parts, I am convinced that the trial court was not justified in issuing the restraining order complained of. The court did not stop with its command not to recognize the validity of the certificates especially named in the preliminary injunction, which in my judgment was not authorized by any showing made, but the court forbade defendants from attempting to adopt any code of by-laws, or from attempting to declare any dividend or distributing any money of the association to any of the shareholders or members. Also forbade the election of any number of directors greater than seven, although the by-laws, which the complaint shows were adopted, provided for eleven directors, a number not forbidden by the statute. There is no statement of facts such as would warrant the court in preventing by its order the discharge of duties devolved upon the directors by statute and the by-laws duly adopted. There is no show-

ing that would warrant the court in prohibiting all payments of dividends.

[13] "Before the court could thus so seriously invade the rights of all the stockholders they should have been represented in some way in the action. Morawetz on Priv. Corporations (2d Ed.) § 258; Minn. v. Northern Securities Co., 184 U. S. 235 [22 Sup. Ct. 308, 46 L. Ed. 499]. It has been held that in a suit to enjoin the voting of a stockholder's stock for the election of directors he is an indispensable party. Taylor v. S. P. Co. [C. C.] 122 Fed. 147. The question is not one alone of jurisdiction. 'We put it,' said the United States Supreme Court, 'on the ground that no court can adjudicate directly upon a person's rights, without the party being actually or constructively before the court.' Mallow v. Hinde, 25 U. S. 194 [6 L. Ed. 599].

"The court has not only made an order affecting all the shareholders in respect of certain of their rights, but it has specifically undertaken to pass upon the legality of certain 20 odd certificates, the holder of no one of which is a party to the action or has had his day in court.

[14] "Upon the general question, this court said, in Bishop v. Owens, 5 Cal. App. 83 [89 Pac. 844]: 'A complaint for an injunction which does not state facts sufficient to determine how plaintiff's property will be permanently injured by the acts complained of, and which states merely general conclusions, as to multiplicity of suits and irreparable injury, not warranted by any pleading of facts, does not state facts sufficient to constitute a cause of action for equitable relief to enjoin the acts complained of.' (Syl.)

[15] "To issue an injunction is the exercise of a delicate power, requiring great caution and sound discretion and rarely, if ever, should be exercised in a doubtful case. 'The right must be clear, the injury impending and threatened, so as to be averted only by the protecting preventive process of injunction.' St. Louis S. F. M. Co. v. Sanitary S. F. M. Co., 161 Fed. 725 [88 C. C. A. 585].

"The complaint in this action, I think, falls far short of measuring up to these requirements."

(161 Cal. 718)

TAYLOR v. LAURIDSON et al. (Sac. 1,858.)

(Supreme Court of California. Oct. 9, 1911. Rehearing Denied Nov. 8, 1911.)

In Bank. Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

Action by D. W. Taylor against N. H. Lauridson and others. From an order granting a temporary injunction, a part of the defendants appeal. Reversed, with directions to vacate injunction.

Grove L. Johnson and Wahrhaftig & Shinn, for appellants. F. F. Atkinson, for respondent.

PER CURIAM. The questions involved herein are substantially the same as those in the case of Willis v. Lauridson et al., 118 Pac. 530, this day decided. For the reasons therein given, the order appealed from is reversed, with directions to the trial court to grant defendants' motion to vacate the injunction.

(161 Cal. 120)

LAKE et al. v. BONYNGE et al. (L. A. 2,662.)

(Supreme Court of California. Oct. 9, 1911. Rehearing Denied Nov. 8, 1911.)

1. JUDGMENT (§ 713*)—RES JUDICATA—ISSUES.

The state having recovered judgment foreclosing a purchaser's certificate of purchase of state land, and no appeal having been taken, an assignee of the purchaser's interest, after the land had been sold by the state to defendant, moved to vacate the judgment for want of service of process on the original purchaser. An order was made granting this relief, which was afterwards vacated at the instance of the state, on the ground that the court had no jurisdiction to vacate the judgment. An appeal was taken from this order, on which the principal question was whether the judgment showed that the trial court had acquired jurisdiction of the defendant. It was held that it had, and the judgment was therefore affirmed. *Held,* that such judgment was res adjudicata of that question as against the original purchaser and his privies.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 713.*]

2. JUDGMENT (§ 642*)—APPEAL—MOTION—SUBSTANTIAL RIGHT.

Where a substantial right or the merits of a case are involved, the judgment is res adjudicata, notwithstanding the decision is made on appeal from an order granting a motion.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 642.*]

3. JUDGMENT (§ 279*)—JUDGMENT ROLL—CONTENTS.

Under Code Civ. Proc. § 670, prior to its amendment in 1895 (St. 1895, p. 45), providing that the judgment roll in a case where the complaint was not answered by any defendant should consist of the summons, with the affidavit and proof of service, and the complaint, with memorandum indorsed thereon that the default of the defendant in not answering was entered, together with a copy of the judgment, an affidavit and order for the publication of the summons constituted no part of the judgment roll.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 279.*]

4. STATUTES (§ 267*)—RETROACTIVE OPERATION.

The validity of a judgment is to be determined by the law in force when it was rendered, and if valid then subsequent changes in the law will not affect it.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 267.*]

5. TRIAL (§ 54*)—EVIDENCE.

Where defendants persistently resisted the offer of any evidence tending to a collateral attack on the judgment relied on as res adjudicata, and an affidavit and order of publication of the summons prior to the rendition of such judgment were admitted over their objections, and the affidavit of the original defendant, denying service, was introduced by defendants, not as independent evidence in the case, but only as one of the papers used on and in relation to the motion to set aside the judgment, and in connection with an order therefor, and with the appeal from an order setting aside the order vacating the judgment, in support of defendant's plea of res adjudicata, the admission of such evidence was unavailable to show that the judgment was void for lack of proper service.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 126–128; Dec. Dig. § 54.*]

In Bank. Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Action by Fred W. Lake and another against Mary A. Bonynge and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

Chas. C. Boynton, F. D. Brandon, R. P. Henshall, and J. A. Cooper, for appellants. Frank H. Short, Frank Garrett, Wm. J. Hunsaker, G. E. Whitaker, Hunsaker & Britt, and J. W. McKinley, for respondents.

LORIGAN, J. On March 20, 1889, a certificate of purchase for 640 acres of land belonging to the state of California, located in Kern county, was issued by the state to S. Davis, after payment by him of 20 per cent. of the purchase price, together with interest for the first year on the balance of the purchase price as required by law. On August 25, 1892, an action was commenced in the superior court of Kern county by the people of the state of California against said S. Davis, to obtain a decree and judgment foreclosing and annulling said certificate of purchase on account of the failure of the said Davis to pay the interest on the unpaid balance of the purchase price, which was payable January 1, 1892. On December 28, 1892, a decree and judgment, foreclosing and annulling said certificate of purchase and all rights of said Davis therein was entered. No appeal was taken from said judgment, and it became final on December 27, 1893. At the time said action of foreclosure was commenced, no assignment by Davis to any one of any interest in the said certificate of purchase had been filed with the registrar of the state land office, nor has any ever been filed there. On July 22, 1899, the defendant Mary A. Bonynge applied to purchase the said land from the state, and a certificate of purchase therefor was issued January 21, 1900. On December 7, 1900, Davis executed to Charles H. Gilman a conveyance of said certificate of purchase issued to him, which was recorded December 11, 1900, in the office of the county recorder of Kern county and on the same day Gilman conveyed to plaintiffs herein a certain proportion of his interest in the certificate to said land and the patent therefor, under an agreement on their part to take all necessary legal proceedings to assert and maintain title as it originally accrued from the state of California under the certificate of purchase issued to Davis. On December 31, 1900, one of the plaintiffs—F. W. Lake—claiming to be a successor in interest of said Davis, moved the superior court of Kern county, in said action of the People of the State of California v. Davis, to vacate and set aside the judgment of foreclosure entered therein, on the ground that no service of summons had been actually or constructively served on Davis in said action, and that the judgment was therefore void. The motion was made on the record, proceedings, and files in said case, and the affidavits of said Lake, C. H. Gilman, and said Davis, and on the same day the motion was made the court granted it, and made an order purporting to set aside and vacate said judgment and the service of summons on the defendant Davis and his default entered in pursuance thereof in said action. On October 29, 1901, the people of the state of California, plaintiff in said action, moved said court to vacate and set aside its above order made on December 31, 1900, on the ground that the court had no jurisdiction to vacate it; said motion being based on the judgment roll and records in said cause. On November 11, 1901, this latter motion was granted and an order made, annulling and vacating the order of December 31, 1900, and adjudging and declaring that the judgment made and entered in the case of the People, etc., v. Davis was in full force and effect. An appeal to this court was taken by said Lake from said order of November 11, 1901, and the order was by this court affirmed on June 23, 1904 (People, etc., v. Davis, 143 Cal. 673, 77 Pac. 651). On January 25, 1909, the defendant Mary A. Bonynge, having paid to the state the full amount of the purchase price of said land, received from the state a patent therefor. On March 1, 1909, plaintiffs brought this action against said Mary A. Bonynge and her codefendant, alleging in their complaint the issuance of the said certificate of purchase from the state to said Davis and assignments thereof to plaintiffs; that said certificate of purchase had never been vacated, annulled, or set aside, and was, when the patent was issued to the defendant Mary A. Bonynge, and now is, the only valid subsisting certificate of purchase issued by the state of California, and entitled plaintiffs to a patent for the land on payment to the state of the purchase price thereof; that the patent to said Mary A. Bonynge under her certificate of purchase and payment of the purchase price thereof was inadvertently made by the state.

The prayer is for a judgment and order that the said defendants hold the naked legal title to said land in trust for plaintiffs; and that upon payment of the amounts which the court may determine due from plaintiffs to defendants by reason of the payment by the latter of the purchase price of the land to the state the defendants be required to convey to plaintiffs their several interests in said land acquired under the patent.

The answer of the defendants admitted the issuance of the certificate of purchase to

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Davis, and, among other defenses, set up the judgment, in the case of the People, etc., v. Davis, of December 27, 1902, foreclosing and annulling his certificate of purchase; the motion and order of December 31, 1900, setting aside and vacating said judgment; the proceedings and order of November 11, 1901, vacating this latter order; and the fact of an appeal therefrom to this court, and the judgment of affirmance here of the order of November 11, 1901; and averred that the said judgment of December 28, 1892, was "duly given and made and entered," and was a valid, subsisting, and final judgment, under which said certificate of purchase issued to Davis was foreclosed and annulled, and all his rights thereunder terminated; and, further, that the judgment of this court on the appeal from the order of November 11, 1901, was res adjudicata as to the validity of said original judgment.

The court found in favor of the defendants as to the validity and effect of these respective judgments, and entered a decree in their favor, sustaining the validity of the patent to the defendant Mary A. Bonynge.

On this appeal, the main questions presented for review are whether the finding that the original judgment of December 28, 1892, was a valid judgment, and the further finding that the judgment on appeal here from the order above referred to was res adjudicata, estopping the defendants from attacking it in this action, are supported by the evidence.

[1] In the view we take of this case, it is unnecessary to consider both of these points, because we are satisfied that the judgment rendered here on the appeal from the order of November 11, 1902 (People, etc., v. Davis, 143 Cal. 673, 77 Pac. 651), is res adjudicata on the subject of the validity of the original judgment, and conclusive against collateral attack upon it, which was sought to be made in the present action in the court below.

It is insisted by appellants that on the appeal from the order of November 11, 1901 (to be referred to hereafter as the Davis appeal), this court "merely determined that Davis (or his successor in interest, Lake, one of the plaintiffs here) could not move to set aside the judgment more than one year after its entry, unless the judgment was void on its face. It did not determinte the question whether or not the court had acquired jurisdiction of the person of Davis." But in this assertion we are satisfied that counsel is in error, and that the very question which was determined, and which was the essential point involved on the appeal, was whether the original judgment entered against Davis was or was not valid. The appeal which was taken from the order of November 11, 1901, vacating the order of December 31, 1900, which had set aside the judgment against Davis, may have involved incidentally the question whether the order setting aside the original judgment was invalid because application therefor had not been made within a year after its entry (Code Civ. Proc. § 473), but it involved principally the question whether the order could be supported on the ground asserted by appellant on that appeal, namely, that an inspection of the judgment roll showed on its face that the judgment was invalid.

The record on that appeal showed that the motion of December 31, 1900, was based on the judgment roll and records in the case, with the affidavits of Lake, Gilman, and Davis, and the ground generally alleged was that the judgment was void on its face, accompanied by the particular ground that there was no service of summons, either actual or constructive, made on Davis, and that for these reasons, and on other grounds, the judgment was void. On the hearing, the superior court made a general order, setting the judgment aside. The record further shows that the motion upon which the order of November 11, 1901, setting aside the previous order of December 31, 1900, was that the original judgment against Davis was valid on its face, and that the court had no jurisdiction to make an order setting it aside. So it is apparent that the hearing here of the Davis appeal involved not merely whether the superior court had jurisdiction after the lapse of more than one year to set aside the judgment for an asserted failure to serve the defendant Davis, but whether the judgment which was attacked on the original motion of December 31, 1900, was void upon the face of the judgment roll on account of a failure to show that the court had acquired jurisdiction of defendant Davis by service of process. This latter question was essentially involved in the appeal, because if from an inspection of the judgment roll by the superior court the judgment in question appeared to be void on its face that court had jurisdiction to set it aside at any time, and it would have been error to have made the order of November 11, 1901, appealed from, annulling the previous order doing so. And the very matter which the court in the Davis appeal, in the discussion of that appeal, addressed itself to was a determination of whether the judgment of the superior court, entered on December 27, 1892, was or was not void. The court, after discussing the powers generally of a court to set aside judgments and disposing of some other questions presented on the appeal, and after declaring that "what has been said disposes of all questions on this appeal, except the single one as to whether the original judgment was void upon its face," proceeded to discuss and determine that question. 143 Cal. 677, 77 Pac. 652. It said:

"Was the judgment void upon its face? This question as we have already seen, must be determined from an inspection of the judgment roll. Under the statute, as it was at the time of the entry of this judgment and for several years thereafter, the judgment roll, in cases where the complaint was not answered by any defendant, consisted of the summons, with the affidavit and proof of service, and the complaint, with a memorandum indorsed thereon that the default of the defendant in not answering, was entered, and a copy of the judgment. Code Civ. Proc. § 670, subd. 1, as it stood prior to amendment to 1895 [St. 1895, p. 45].

"Neither the affidavit for publication of summons nor the order for publication constituted any part of the judgment roll under the law then in force, and cannot therefore be considered, notwithstanding the fact that they have been placed in the bill of exceptions. People v. Temple, 103 Cal. 447, 453 [37 Pac. 414]. The case in which the judgment in question was rendered was one in which service by publication was authorized, and it must be conclusively presumed, upon the attack made upon it, that there was a sufficient affidavit and a sufficient order. There is therefore nothing in the point that the affidavit and order for publication were insufficient.

"It is further urged in support of the claim that the judgment was void on its face; that the summons was not published as issued.

"While a comparison of the original summons with the copy attached to the affidavit of publication shows a few discrepancies, they are very slight, and not capable of misleading the defendant as to the nature of the proceeding, the land affected, and the relief demanded. As was said in regard to a similar objection in Sharp v. Daugney, 33 Cal. 505, 513: 'In sense and meaning, the original summons and the published version of it are identical, and that is enough.'

"It is further urged that the original summons was returned and filed with the clerk five days after the date of its issuance, and that the attempted service by publication was thereafter had without withdrawing it from the files, or having an alias summons issued. There is nothing in this contention. The judgment roll does not show that no alias summons was issued, but simply contains the original summons, with the return of the sheriff that he was unable to find the defendant, dated and filed August 30, 1892, and the affidavit of publication, which does not show that an alias summons was not issued prior to the publication. The judgment recites that the defendant had been 'regularly served with process as required by law.' There is nothing in the judgment roll tending to rebut this recital of the judgment. People v. Harrison, 84 Cal. 609 [24 Pac. 311]; Whitney v. Daggett, 108 Cal. 235 [41 Pac. 471].

"These are the only points made in favor of the contention that the judgment was void upon its face. The lower court did not err in holding that the judgment was upon its face a valid judgment, and that the order purporting to vacate it, made after the lapse of eight years, was a mere nullity and should be vacated."

From this quotation, as to what was decided in that case, it appears clearly that the pivotal question upon which the validity of the order under review in the Davis appeal turned, was whether the judgment roll showed that the trial court had acquired jurisdiction of the defendant. It was held that it had, and such decision is res adjudicata. Under this decision, the status of the judgment as a valid one was settled forever, as against any collateral attack upon it by the parties to the appeal or their privies. Gilman had succeeded, by the agreement of December 7, 1900, to the rights of Davis under his certificate of purchase, and on the same day conveyed to Snow an undivided one-fourth and to Lake an undivided one-half interest in said certificate and the lands described in it. An agreement was entered into at the same time by Snow and Lake with Gilman, which recited that, "as the Davis certificate had been foreclosed and a decree annulling the same entered in a suit brought for that purpose, it is necessary, in order to maintain the claim of present title under said certificate of purchase, to take proceedings to set aside and annul the judgment and decree of foreclosure in said suit entered," and that Snow and Lake agreed "at their own expense and cost to take all necessary proceedings * * * to claim, assert and maintain the title to said land as it originally accrued * * * by reason of said certificate of purchase, and to recover and take the same as if no judgment of foreclosure had been entered," and that the services to be performed by them towards that end was the true consideration for the conveyance from Gilman to them. Pursuant to that agreement, Lake moved the court to vacate the judgment, and took the appeal from the order annulling the previous order obtained by him, vacating it. As successors of Davis through mesne conveyances, Lake, Gilman, and Snow, as their interests were injuriously affected by the judgment in People, etc., v. Davis, although not parties to the original action, had a right to make themselves parties to that action by moving to set aside the judgment, and on the denial of their motion had a right to appeal to have the proceedings of which they complained reviewed, not only for excess of jurisdiction, but for error. Elliott v. Superior Court, 144 Cal. 501, 77 Pac. 1109, 103 Am. St. Rep. 102. In making himself a party by moving thereunder and taking that appeal pursuant to the agreement made by him and Snow with Gilman, Lake was acting in behalf of Gilman, Snow, and himself in attacking the validity of the judgment in favor of the people of the state, plaintiff in that action, and under and through whom the respondent here (Mary A. Bonynge) acquired her title. While the parties of record on appeal were the people, Davis, and Lake, still the parties to the present action in which the conclusiveness of the judgment on appeal is involved are the same, or are parties who were in privity with them as parties to that appeal, and so are bound by the judgment therein. As said in Koehler v. Holt Manf'g Co., 146 Cal. 335, 337, 80 Pac. 73, 74: "The case comes clearly within the principle that a judgment operates as an estoppel to preclude the 'parties and privies from contending to the contrary of that point or matter of fact which, having been once distinctly put in issue by them, has been, on such issue joined, solemnly found against them.'"

[2] It is contended that because the decision in the Davis appeal was upon a motion that the principle of res adjudicata does not apply; that it can only apply where the decision is by final judgment in an independent action. This may be true where the appeal on the motion does not involve any substantial right of the parties, or where the merits of the controversy are not in review upon the appeal, and are undecided. When, however, a substantial right or the merits of the case are involved and determined, the judgment is res adjudicata, notwithstanding the decision is made on an appeal from a motion.

Freeman on Judgments, § 323, declares: "The tendency of the recent adjudications is to inquire whether an issue or question has been in fact presented for decision and necessarily decided, and, if so, to treat it as res adjudicata, though the decision is the determination of a motion or summary proceeding, and not of an independent action. This is especially true when the decision did not involve a mere question of the proper form or time of proceeding, but was the determination of a substantial matter of right, upon which the parties interested had a right to be heard upon issues of law or fact, or both, and these issues, or some of them were necessarily decided by the court as the basis of the order which it finally entered, granting or denying the relief sought."

In Com'rs of Wilson County v. McIntosh, 30 Kan. 234, 1 Pac. 572, it is said: "We think there is a growing disposition to enlarge the scope of the doctrine of res adjudicata, and to place more regard on the substance of the decision than on the form of the proceedings. * * * It used to be the practice that no ruling of the trial court went up for review until after final judgment; any preliminary rulings, if erroneous, might up to that time be corrected by the trial court. Then it was assumed that a final examination in that tribunal had been had, and the whole record was ready to be transferred to the appellate court; and hence it was argued that no prior decision should be considered as final or as res adjudicata. * * * Now, that the decision of a motion can be preserved in a separate record, and taken up by itself, presupposes a full and careful consideration in both the trial and the appellate courts; and when that is had it would seem that the question thus separately and carefully considered should be finally disposed of, and not be thrown back for further litigation at the mere caprice of either party." While the court in the excerpt from the opinion just quoted speaks of appeals from rulings made prior to the final judgment, the principle announced is equally applicable to appeals taken from orders after final judgment, such as the order which was involved in the Davis appeal.

Boylan v. Bock, 60 Wash. 423, 111 Pac. 454, involved the point under consideration here. Judgment in a tax proceeding had been entered, and a motion was made to vacate the judgment, on the ground that no summons was served on the defendants, and that the court was therefore without jurisdiction to enter the tax judgment. The motion was denied in the lower court, for the reason that "the defendants should have appeared by petition and not by motion." An appeal was prosecuted from the order and affirmed; the court holding that as the judgment in the tax proceeding recited that due service of process was made on the defendants this was conclusive against alleged defects in the record. Bock v. Sanders, 46 Wash. 462, 90 Pac. 597. It will be noted that the order of the trial court, denying the motion, was based solely on a ground of procedure, and the affirmance was on the merits. After this affirmance of the order, an action was commenced to set aside the tax judgment on the same ground set out in the motion. Defendants pleaded the order denying the motion to vacate the judgment as a bar, which plea was sustained by the trial court. On appeal from the judgment, the only question involved was the effect of the previous judgment of the superior court, affirming the order denying the motion to vacate the judgment, and the court, speaking with reference thereto, said: "The affirmance was on the merits, however, and not upon the particular ground on which the order was based in the court below. * * * The appellant contends, however, that the former judgment was not on the merits for two reasons, and was therefore not a bar, first, because the motion to vacate was denied, on the ground that the moving party had adopted the wrong procedure; and, second, because the motion to vacate was based on the face of the record; whereas the present action was based on matters dehors the record. Conceding for the purpose of the argument that these distinctions are sound, they are not supported by the record. While the court below denied the first motion on the ground stated, this court passed on the merits of the application, regardless of the form of the action or proceeding; and an examination of the record in the two cases shows that the motion and accompanying affidavit filed on the first application set forth the identical grounds for vacating the judgment which are set forth as the basis for relief in the present complaint. Such being the case, the former judgment is a complete bar to this action." The same situation is presented here as in the case cited. On the Davis appeal, the decision was on the merits; the court determined that an inspection of the judgment roll showed a recital of due service in the judgment, and was conclusive evidence that the court had acquired jurisdiction of Davis, and the judgment was valid as against any collateral attack.

Appellants, in support of their position that a judgment rendered on a motion cannot be invoked as res adjudicata, cite Pioneer Land Co. v. Maddux, 109 Cal. 633;[1] Estudillo v. Security Land, etc., Co., 149 Cal. 564, 87 Pac. 19; and Bacon v. Bacon, 150 Cal. 484, 89 Pac. 317. In the first case cited, the defendant pleaded as res adjudicata a judgment of affirmance by this court on an appeal from an order refusing to set aside a judgment annulling a certificate of purchase which was involved in that action. The superior court had denied the motion on the ground of laches in making it (People v. Goodhue, 80 Cal. 199, 22 Pac. 66), and the order of denial was affirmed here on that same ground. No question as to the regularity or validity of the judgment was presented or decided on the appeal in the Goodhue Case, and, of course, the affirmance of the order there could not be invoked as res adjudicata on a matter which was neither involved nor decided. In the two other cases cited, the attack upon the decrees was not a collateral attack as here, but a direct attack upon them, upon the ground that they had been procured, the one by fraud, the other by mistake. In such cases it is well established that the principle of res adjudicata invoked here does not apply.

[3, 4] In addition to the points made and discussed, appellants insist that the decision in the Davis appeal cannot be considered res adjudicata, because the entire judgment roll in the case of the People, etc., v. Davis was not before this court, as they assert that there were not contained therein the affidavit and the order for the publication of summons which, over the objection of the respondents, the court admitted in evidence in this case; that this affidavit for publication failed entirely to comply with the law as to what should be shown therein warranting an order for publication, and hence there was no authority for the publication of summons, and that the presumption of jurisdiction from the recital in the judgment that defendant "was regularly served with process as required by law" is of no effect, when the record shows what was actually done to give the court jurisdiction, and that as so done it was insufficient in law to confer it. This point of appellants is grounded solely on the claim that the affidavit and order for publication constitute part of the judgment roll in People, etc., v. Davis. But they do not. In 1895 the Legislature amended section 670 of the Code of Civil Procedure so as to thenceforth make the affidavit and order for publication a part of the judgment roll, but when the judgment in People v. Davis was entered in 1892 these papers did not constitute any part of such judgment roll. Under the Code section as it existed then, the judgment roll in a case where the complaint was not answered by any defendant consisted of the summons, with the affidavit and proof of service, and the complaint, with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment. The judgment roll as so made up was before this court on the Davis appeal, and it was found on inspection of the face of that judgment roll that the judgment was valid. In fact, it was expressly held there that the affidavit for publication and the order therefor constituted no part of the judgment roll under the law in force when the judgment in question was entered. People v. Davis, supra; People v. Temple, 103 Cal. 447, 37 Pac. 414; Estate of McNeil, 155 Cal. 333, 100 Pac. 1086; People v. Mulcahy, 112 Pac. 853. The validity of the judgment is to be determined from the law in force when it is rendered, and if valid then subsequent changes in the law cannot affect it. Railroad Co. v. Twombly, 100 U. S. 78, 25 L. Ed. 550; Anderson v. Hygeia Hotel Co., 92 Va. 687, 24 S. E. 269.

[5] It is further insisted by appellants that, as this action is one in equity, and the evidence introduced on the part of appellants, and likewise by respondents, shows that no sufficient affidavit was filed to warrant a substituted service; and the affidavit of Davis shows that no personal service of process was made upon him, the court should have found that the judgment was void for failure to obtain jurisdiction to render it. We may assume, purely for the purposes of this decision, that, while a party relying on a judgment which is valid on its face may successfully resist any attack upon it which is collateral and not direct, still where the attack might be resisted as collateral, if he admits facts which show that a service of summons, constructive or personal, was not made on the defendant to the judgment, and allows evidence to be introduced without objection showing this fact, as it is then established that the judgment is void, it is the duty of the court to so declare. Hill v. City Cab, etc., Co., 79 Cal. 188, 21 Pac. 728; People v. Harrison, 107 Cal. 541, 40 Pac. 956. But this rule has no application here. The respondents persistently resisted throughout the trial the offer of any evidence tending to a collateral attack on the judgment. The affidavit and order for publication were admitted in evidence over their objections, and the affidavit of Davis was introduced by respondents, not as independent evidence in the case, but as one of the various papers used on, and in relation to, the motion of December 31, 1900, to set aside the judgment in People v. Davis, and in connection with the order therefor and the appeal from the order annulling and setting aside the latter order; all the papers in relation thereto, including the Davis affidavit, were offered and admitted for the purpose only of supporting the plea of respondents that the matter of the validity of

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[1] 42 Pac. 295, 50 Am. St. Rep. 67.

the judgment in People v. Davis was res adjudicata by the decision in the Davis appeal.

While some other points are made on this appeal, we do not think them of sufficient merit to require mention or discussion.

As the only appeal in this case is from the order denying the motion of appellants for a new trial, that order is affirmed.

We concur: HENSHAW, J.; MELVIN, J.; SHAW, J.; ANGELLOTTI, J.; SLOSS, J.

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161 Cal. 158

JONES v. VAN NUYS et al. (L. A. 2,688.)

(Supreme Court of California. Oct. 13, 1911.)

1. WATERS AND WATER COURSES (§ 156*)—WATER CONTRACTS — CONSTRUCTION — WATERS GRANTED.

A contract, in terms granting "all the water now flowing or hereafter to flow" from three certain wells on a certain five acres, and covenanting that the water flowing from the wells at the date of the contract measures more than 110,000 gallons a day, and that, if the water flowing therefrom shall decrease to less than 105,000 gallons a day, the grantor will, "from the water rising or flowing from or on said five acres, or that can be developed from said five acres," increase the flow to 110,000 gallons a day, but that he shall not be obliged to furnish more than one-third of all the water that may be flowing on or from said five acres, or that can be developed or obtained therefrom, is not a contract to furnish 110,000 gallons of water a day, or a specific quantity, but is a grant of all the water flowing from the three wells, with an agreement to endeavor to keep that flow up to 110,000 gallons by certain means, and to the extent of one-third of the water obtained by such means.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 156.*]

2. WATERS AND WATER COURSES (§ 156*)—CONTRACTS—CONSTRUCTION—MEANS FOR DEVELOPING WATER.

A contract, granting all the water flowing from three artesian wells on a certain five acres, with the right to conduct it, at the expense of the grantees, from the wells by pipes inserted into the wells between two and three feet below the surface of the ground, and providing that, if the wells fail to supply 110,000 gallons a day, the grantor will, "from the water rising or flowing from or upon said five acres, or that can be developed or obtained from said five acres, immediately at his own expense" increase the stream of water for the grantees to a flow of 110,000 gallons a day, but that the grantor shall not be obliged to furnish the grantee more than a third of all the water that "may be flowing on or from said five acres, or that can be developed from or obtained by putting down as many wells as can be safely made * * * to a depth of from 20 to 50 feet, at least one-half of said wells to be 50 feet deep"; and that, if after sinking them sufficient water shall not be developed to furnish the grantees with 110,000 gallons, they may demand that the wells shall be so deepened as to obtain such supply for them, they to bear a third of the expense thereof; and nowhere mentioning the employment of artificial means to furnish the grantees water from the wells to be sunk or deepened, or the expense of any such thing—does not contemplate that the grantor shall install a pumping plant, if sufficient water cannot be developed without it, though with it enough can be developed.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 156.*]

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by E. W. Jones against I. N. Van Nuys and another. From an adverse judgment and order, plaintiff appeals. Affirmed.

Frank W. Burnett and J. W. McKinley, for appellant. O'Melveny, Stevens & Millikin, for respondents.

LORIGAN, J. This is an appeal by plaintiff from a judgment entered against him after demurrer sustained to his amended complaint.

Kate W. Dobbins is made a party defendant, under an allegation that she is a proper party plaintiff who refused to join with plaintiff as such, and hence is made a defendant. No relief is asked against her; the real parties to the action being the plaintiff and the defendant I. N. Van Nuys.

The complaint alleged the making of a contract, or water deed, on June 3, 1880, between James Foord, of the first part, and William H. Stephens, Kate W. Dobbins, Henry P. Tallant, and V. S. Owen, of the second part, and the instrument was set out in full in the complaint. It provided that in consideration of certain amounts of money which had been paid by the parties of the second part to the agreement, to said Foord (Stephens, $2,000; Kate W. Dobbins, $1,714.28; and Tallant and Owen jointly, $2,285.73) "the said Foord does hereby grant, bargain, sell and convey to the said parties of the second part, to be owned and held and enjoyed by them in proportion to their said respective payments and to their heirs, representatives and assigns forever, all the water now flowing and hereafter to flow from three wells located on said grantor Foord's land in said county and hereinafter described (5 acres) the said wells being each found by driving into the ground an iron pipe of seven inches in diameter. Also the full and perfect right to conduct the water from said wells by means of pipes which shall be inserted into the said wells at a point not less than two feet nor more than three feet below the surface of the ground immediately around such well, and which conducting pipes shall be so inserted or attached as not to interfere with the free use of a sand pump in said wells, and as not to create a siphon." Then follow provisions granting the right to the second parties to conduct their water pipes to their tract of land through the land of Foord, but at their own expense, and other provisions regarding said pipes, their repair and removal at the expense of the grantees, all immaterial to the question of the construction of the contract here involved, so far as requiring any detailed statement.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is then further provided in the contract that: "The grantor stipulates and covenants that the total quantity of water flowing from said three wells measures at this date more than 110,000 gallons in each successive twenty-four hours (measured by cubic feet and the gallon estimated at 231 cubic inches) and for himself, his heirs, representatives and assigns, he covenants and agrees with the grantees, their heirs, representatives and assigns, that if at any time or times hereafter the water flowing from said wells shall so decrease as to measure less than 105,000 gallons in each period of twenty-four hours and shall so continue for a period of thirty days, he and his said heirs, representatives and assigns, shall and will from the water rising or flowing from or upon said five acres, or that can be developed or obtained from said five acres, immediately and at the expense of said grantor, his heirs, representatives and assigns, increase the stream of water for the grantees to the flow of 110,000 gallons in each period of twenty-four hours so as to deliver to them the quantity stipulated for. But the grantor, his heirs, representatives and assigns shall not be obliged to furnish and deliver to the grantees more than two-thirds of all the water that may be flowing on or from said five acres, or that can be developed or obtained by putting down as many wells as can be safely made without interfering one with another, and to a depth of from twenty to fifty foot, at least one-half of said wells to be fifty feet deep. Provided, however, that if at any time or times hereafter one-third of all the water flowing or developed or to be developed in the manner aforesaid, and at the expense of the grantor, shall still fall short of 110,000 gallons in each twenty-four hours, and the grantor shall fail to furnish the grantees that quantity, then the grantees shall have the right to demand that of the said wells then on the said five-acre tract one or more shall be so deepened as to obtain such supply for the grantees and one-third of the expense thus incurred shall be paid by the grantees, and the remainder by the grantor. And if in such case the grantor shall fail or refuse to make such deepening as would be necessary to furnish the grantees with the said 110,000 gallons in twenty-four hours, then the grantees shall have the right to enter upon said five acres and to make said deepening, and two-thirds of the expense thereof shall be adjudged a legal charge against the grantor, his heirs, representatives and assigns to the extent of the value of the said five acres of land and no further, and against said five acres of land and against whomsoever shall own the same or any part thereof and to the same extent and no further. And all the water so added to the flow up to the said 110,000 gallons for each twenty-four hours shall go and belong to the grantees, their heirs, representatives and assigns in like manner and in the same proportions as the original quantity heretofore conveyed in the operative part of this conveyance. The grantor shall bear the expense of removing from said wells all accumulations of sand so far as may be necessary or desirable and of repairing and removing and renewing the pipes forming said wells, whenever necessary, and he shall do said repairing, removing and renewing whenever necessary to the preservation of the flow of water."

Foord then covenants that all the property interests and rights conveyed to the parties of the second part and stipulations in their favor shall survive and pass to their heirs, representatives, and assigns; that the covenants and stipulations shall run with the said five acres of land and are declared a burden thereon and in whomsoever's hands the same may come; and that all persons who take said five acres, or any part thereof, shall be held personally responsible to the extent of the value of said five acres herein charged with the performance of all the covenants and stipulations made in favor of the parties of the second part. Then follows a description of the five acres of land, referred to as wholly swamp, with a particular description by monuments and distances of the exact location on the tract of the three wells mentioned in the contract or deed, followed by a final provision therein that the parties of the second part, mentioned as grantees, shall take as between themselves their proper interests as tenants in common, and not as partners, and in proportion to their said payments—Stephens seven twenty-first parts, Dobbins six twenty-first parts, and Tallant and Owen the remaining eight twenty-first parts.

The complaint, after alleging that the contract above referred to was duly acknowledged by the parties thereto and recorded, proceeds to allege that plaintiff is, and for more than four years has been, the assignee of the interest therein reserved to said Henry P. Tallant and V. S. Owen, and to six-seventeenths of the interest of said Kate W. Dobbins, who still owns the remainder of her interest under said contract; that said defendant Van Nuys for more than four years last past has been the owner of the five-acre tract described in the contract as successor in interest of said James Foord, and has also acquired the interest reserved under the contract to said Wm. H. Stephens, and the whole of the latter has been merged into the fee; that the flow of the three wells mentioned in the contract gradually diminished and more than four years ago practically ceased; that plaintiff, without objection from defendant, up to a year last past made efforts to restore said flow by deepening said wells and by the use of a siphon, but without success; that beneath the surface of said five acres and reaching within 50 feet thereof there exists a large body of water which, while it will no longer flow naturally to the surface through wells sunk therein, is capable of being developed by pumping, and that by installing and operating pumping plants upon said five acres a quantity of water could be developed, one-third of which would be equal to the quantity reserved to said grantees by said contract, and that this condition has existed at all times since the execution of the contract; that defendant Van Nuys has installed a pumping plant on said five acres and within the last four years has pumped a large quantity of water thereby, but has failed to deliver any to the plaintiff under said contract; that in 1907 plaintiff undertook to install a pumping plant upon said five acres for the purpose of pumping water for his use, but defendant Van Nuys objected, and secured an injunction against the erection of said pumping plant by plaintiff; that when the above-recited contract was executed each of the grantees therein was the owner of land in the vicinity of said five acres, and said water was purchased for use on said lands respectively, and was so used as long as the same was furnished; that plaintiff now owns the land then owned by Tallant and Owen, and also six-seventeenths of the land owned by said Kate W. Dobbins.

It is then alleged that plaintiff has expended $1,000 and upwards in attempting to obtain water due under said contract, and a further sum of $1,200 in purchasing water elsewhere to supply his needs, and that by reason of lack of sufficient water his trees and crops have been damaged in the last four years to the extent of $1,000 and upwards; that all these damages accrued through the neglect and failure of the defendant Van Nuys to secure water upon said five acres by pumping in accordance with said contract, or to deliver water already secured by him through pumping.

The prayer of the complaint is for damages in the sum of $3,200, and a judgment that defendant Van Nuys be ordered to forthwith install and operate a pumping plant or plants upon said five acres sufficient to develop water to supply plaintiff with the proportion of water due him under the aforesaid contract, or to supply him with water from the pumping plants already installed, and that if defendant fails to comply with said order, a receiver be appointed to take possession of a sufficient portion of said five acres, and supply water by pumping therefrom sufficient to supply plaintiff with the proportion due under said contract; the expense of said receivership to be borne by defendant Van Nuys, and be a charge upon said five-acre tract. The defendant demurred generally and specially to the complaint. The demurrer was sustained, and, plaintiff declining to amend and electing to stand upon his pleading, the judgment from which he appeals was entered against him.

The only point involved on this appeal is the proper construction to be given to the contract, or water deed, upon which plaintiff bases his right of action, and this narrows down to what was the nature of the "development" of the water which Foord and his successors in interest agreed to make, in order to keep the flow of water for the benefit of the grantees up to 110,000 gallons at any time when the water flowing from said three wells so decreased as to measure a flow of less than 105,000 gallons.

In the contract, Foord is uniformly designated as the grantor, and the several parties who are given proportionate rights to the water mentioned therein are designated as the grantees, and these terms will be used by us in discussing the rights of the parties under the contract.

It is insisted on the part of appellant that by the terms of the contract Foord conveyed to the grantors, and covenanted to deliver to them a specific quantity of 110,000 gallons of water; that, while it was provided in the first instance the supply should be furnished from the three wells then existing upon the five-acre tract, it was contemplated by the parties thereto that the flow therefrom might at some time diminish, and in contemplation of this possibility Foord covenanted and agreed that if the quantity decreased to less than 105,000 gallons during a period of 30 days that he would, "from the water rising or flowing from or upon said five acres, or that can be developed or obtained from said five acres," immediately, at his own expense, "increase the stream of water for the grantees to the flow of 110,000 gallons * * * so as to deliver them the quantity stipulated for"; that this contract to supply the decrease in the stipulated quantity from "water that can be developed or obtained from said five acres" is to be construed as a covenant to develop water in any such manner as might secure the supply; and that, if by installing a pumping plant such supply can be secured, the covenants of Foord embrace such a method. In so insisting that this is the proper construction to be put upon the contract, appellant relies particularly on the case of Garvey, etc., v. Huntington, etc., 154 Cal. 232, 97 Pac. 428. The trial court in sustaining the demurrer generally necessarily held that the contract was not susceptible to this construction; that it did not provide or contemplate the development of water by the installation of a pumping plant when the amount supplied from the three wells decreased in flow, but solely a development whereby a natural artesian flow from the wells could be obtained.

In construing a contract, the basic rule is to be adopted that each clause is to be considered with reference to every other clause upon which it has any bearing, and all the clauses and provisions are to be construed together as the unified medium whereby the intent of the parties to the instrument is to be reached, and this rule is to be applied here.

[1] Appellant, as we have said, insists that under the grant from Foord there was conveyed to the grantees a specific quantity of water amounting to 110,000 gallons during each 24 hours. This, however, is certainly not the fact as far as the operative part of the conveyance—the granting clause—is concerned; no specific quantity is there mentioned; the amount being of all the waters of the three wells "now flowing or hereafter to flow" therefrom. Under this granting clause, the grantees were entitled to no specific quantity of water; they were entitled to all the waters flowing therefrom, whether the flow amounted to less than 110,000 gallons or exceeded it.

In this connection, too, it is to be noticed as bearing materially on the construction to be placed on subsequent provisions of the contract that these wells were artesian wells. It is evident, not only from use of the term "water now flowing or to flow" from the wells, but also from the manner in which the supply pipes of the grantees were to be connected with them—three feet below the surface—and this was the only method provided for obtaining the water.

Now, while it is clear that there is no conveyance of any specific quantity of water in the granting clause of the contract, it is insisted by appellant that a subsequent provision thereof amounts to such a grant. The provision on which this claim is based is the one where Foord covenanted that the quantity of water flowing from the three wells at the date of the contract measured more than 110,000 gallons, and in which he agreed that if the flow decreased, so as to measure less than 105,000 gallons, he would, "from the water rising or flowing from or upon said five acres, or that can be developed or obtained from said five acres," increase the flow to 110,000 gallons. But this provision contains no grant of a specific quantity of water to the grantees, either directly or inferentially. All that it amounts to is a covenant that at the date of the contract the wells to which the grantees acquired the entire flow of water therefrom flowed more than 110,000 gallons, and that if it decreased the grantor would increase the flow up to 110,000 gallons. That there was no definite or specific quantity of water is further apparent from the subsequent provision of the contract immediately following the one last referred to, where it is provided that of the waters to be furnished from said five acres, or that can "be developed or obtained" therefrom, the grantor shall not be required to furnish more than one-third thereof. Under this provision, as the flow from the three wells and the further quantity to be furnished by the grantor under the contract might be less than 110,000 gallons, it is evident that no specific quantity of water was contracted to be furnished. What the grantor did convey was all the water flowing from the three wells, whatever that amount might be, with an accompanying agreement that he would endeavor to keep that flow up to 110.000 gallons by certain means to be taken by him for that purpose, and to the extent of one-third of the water obtained by such means; but this falls far short of a grant of a specific quantity of water.

[2] Now as to the means which were to be employed by the grantor to provide the grantee with this quantity of water. Appellant insists that it is a matter of common knowledge that the flow from wells and springs may not be permanent, and, as the five-acre tract contained a nonfailing supply of water which, if it ceased to run by gravity or natural pressure, could be by artificial means made to flow, the parties to the contract must have had in contemplation a resort to such means—that is, pumping—if the natural flow from the wells should cease; that the terms "developed," "obtain," and "increase the stream of water" employed in the contract are words and phrases capable of broad signification, and, taken in connection with the fact that the grantees paid a valuable consideration for the water to be furnished them, as it is capable of being furnished by the artificial means of pumping, there is no reason why a construction to that effect should not be given to the contract.

There would be much force in the position of appellant if, after granting all the waters flowing from the three wells, there was nothing further in the contract than an agreement that if these wells failed to supply 110,000 gallons that the grantor would, "from the water rising or flowing from or upon said five acres, or that can be developed or obtained from said five acres, immediately, at his own expense," increase the stream of water for the grantees to a flow of 110,000 gallons. The difficulty, however, in giving to these terms of the agreement the broad signification sought by appellant is found in subsequent provisions of the contract immediately following the clause above referred to, defining just how the water to keep up a supply of 110,000 gallons is "to be developed and obtained." In the first subsequent proviso, it is declared that the grantors shall not be obliged to furnish the grantees more than one-third of all the water that "may be flowing on or from said five acres, or that can be developed or obtained by putting down as many wells as can be safely made * * * to a depth of from twenty to fifty foot, at least one-half of said wells to be fifty feet deep." Here the provision defines exactly how the water shall be developed and obtained; it is to be by the sinking of a number of shallow wells, and by this means only. The parties evidently contemplated that as the wells already sunk, and the waters of which the grantees were entitled, were of artesian flow, that, in case of a decrease in their supply, other wells sunk on the tract would likewise produce an artesian flow. As such a result would be obtained by simply sinking wells to open the artesian flow, this affords an all-sufficient reason why nothing was said in the contract about pumping or the employment of mechanical or artificial means by the grantor to furnish the supply.

And that it was in contemplation of the parties that the sinking of these wells by the grantor would supply an artesian flow, and that such sinking alone was to be the maximum work to be done by the grantor at his own expense, is very evident from the next following provision of the contract. This provision referred to was inserted on the theory that the sinking of the shallow wells might not produce an artesian flow, so it was there provided that, if after sinking them sufficient water was not developed to furnish the grantees with 110,000 gallons, then the grantees might demand that one or more of the wells on the tract should be so deepened, so as to obtain such supply for the grantees; the expense thereof to be borne by the grantor and the grantees in certain proportions. All that is required on the part of the grantor by the terms of the contract is the sinking of wells or the deepening thereof, and as to the last provision the only purpose of deepening the well would be to obtain an artesian flow thereby. There is no suggestion in or inference to be drawn from any of these provisions that any artificial means of supplying water was contemplated or provided for. What the parties had in mind when the contract speaks of water to "be developed or obtained," in the event the artesian flow in the three wells should decrease beyond a given quantity, was the obtaining of an artesian supply by sinking other wells, or deepening those that had been sunk. It is impossible to explain the entire absence in the contract of any mention of the use or employment of artificial means to furnish grantees water from the wells to be sunk or deepened upon any other ground than that an artesian flow was all that was contemplated to be obtained by the particular means which it was provided that the grantor should adopt to secure the supply.

But, as further confirming the fact that the parties were relying for the supply of water under the contract upon the development of an artesian flow by the sinking of the shallow additional wells, or the deepening of them, is the fact that if the establishing of a pumping plant for the purpose was in contemplation by the parties no provision is made in the contract for the expense of installing, operating and maintaining it. In providing for what each was expressly to do under the contract, the parties were very careful to stipulate as to who were to bear the expense or the proportions in which it was to be borne. To illustrate: The conducting pipes from the wells to the lands of the grantees were to be laid down, and repaired, and renewed at the expense of the grantees; the expense of removing and repairing the casing pipe of any of the wells, the sinking of new wells, and removing sand accumulations therefrom are to be borne by the grantor, and the expense of deepening the wells, should it become necessary, are to be borne, two-thirds by the grantor, and one-third by the grantees. All the work to which it should apply was particularly provided for, and the specifications of the contract in that regard are entirely consistent with the idea that what was intended in providing for the sinking of additional wells and deepening existing ones, if the three original wells decreased in flow, was to obtain a similar flow, such as had proceeded from the three wells, namely, an artesian flow. On the other hand, if, as contended by appellant, it was the intention of the parties, if an artesian flow was not obtained by the means specified to be taken to accomplish that end, that the artificial means of pumping was to be resorted to, then we have an absence in the contract of any provision for the payment of the expense thereof. It is to be noted that whatever rights the grantees acquired under the contract were not for any limited period, but were perpetual. If the installing of a pumping plant was in contemplation of the parties, then necessarily there was a perpetual expense in its maintenance and operation, and yet, not a word is said in the contract as to who shall bear this expense. In face of the fact that as to all operations or means which the contract specifically requires to be taken or done by either party to the contract the expense of doing so is particularly imposed upon one or the other of the parties thereto, it is not within the realm of reasonable probability that if it were intended that a pumping plant should be established and maintained perpetually to obtain a flow of water that not a word should be said in the contract about the expense of its installation or operation, or by whom the burden of that expense should be assumed. The entire absence of any such provision only strengthens the construction which the provisions of the contract disclose that resort to such artificial means as pumping was not within the contemplation of the parties, but that the only thing contemplated by the sinking of the shallow wells, or the deepening of some of them was to obtain an artesian flow similar to that supplied by the three original wells, and that the sinking of the shallow wells or, on demand, the deepening of some of them was the maximum of development and the kind of "development" work to be done by the grantor under the contract.

There is nothing in Garvey, etc., v. Huntington, etc., 154 Cal. 232, 97 Pac. 428, relied on by appellant, which requires a different construction of the contract here under consideration. The contract in the Garvey Case and the contract here are essentially different. In the Garvey Case, the Shorbs, owners of the Shorb ranch, granted to Garvey a first or prior right to a full, uninterrupted, and perpetual flow of 30 inches of any water then or thereafter to be developed or flowing upon or from their lands. It was expressly covenanted that they did not warrant a continuance of the flow of 30 inches, but they did covenant that water was on the land, and that it was their intention to continue to develop the flow therefrom, reserving the privilege of doing so by boring wells and driving tunnels, and such other means as engineering skill might suggest; they further stipulated that if the flow of water then or thereafter developed upon the land should decrease, so that Garvey should not receive the quantity granted, that Shorb, at the expense of Garvey, would "do or perform such work towards restoring the flow of water as any competent engineer" that Garvey might select "shall direct to be done"; the necessary money "to carry on such work of development" to be advanced by Garvey. It was held that under the last provision of the contract the installment of a pumping plant for the restoration of the supply of water from one of the artesian wells from which Garvey had been getting his specific quantity of water was "development work" within the meaning of the contract. There can be no question but that pumping is a means for the development of water, and that, as the Shorbs had agreed to do "such other work" as an engineer might determine would restore the development of the waters which Garvey was to receive, the determination of the engineer that a pumping plant should be installed for that purpose we held was in the contemplation of the parties "development work." But here Foord had not agreed to be governed by the suggestion of anybody, or to do anything upon such a suggestion. The parties, as the contract showed, had in view the restoration of an artesian flow, such as the original three wells were supplying under the contract so made. If this supply decreased, what Foord was to do to restore it to the grantees was clearly and definitely specified in the contract. He was simply to sink other shallow wells, or deepen those already existing, to the end that an artesian flow might be obtained. He did not stipulate that any other means would be taken by him for that purpose, or that it should be left to anybody else to determine any other way in which it might be done, all of which distinguishes this contract from that under consideration in the Garvey Case.

Under this construction of the contract between the parties, the complaint stated no cause of action against the defendant thereunder; and hence the demurrer was properly sustained.

The judgment and order appealed from are affirmed.

We concur: MELVIN, J; HENSHAW, J.

161 Cal. 134

MAYR v. MAYR. (L. A. 2,542.)

(Supreme Court of California. Oct. 9, 1911. Rehearing Denied Nov. 8, 1911.)

1. DIVORCE (§ 93*)—PLEADING—CROSS-COMPLAINT.

Defendant's answer in a suit for divorce, as first filed, contained no prayer for affirmative relief, but an amendment contained such a prayer. The cross-complaint alleged various acts of cruelty "wrongfully" inflicted, with the express purpose of harassing defendant and inflicting intense mental suffering, and that such purposes were fully accomplished. It was also alleged that prior to 1904 plaintiff had resolved to so conduct herself toward defendant as to compel a separation, to render his life miserable, and, if possible, to force him into the appearance of deserting her. Also that plaintiff's recital to defendant of her misconduct in another state was intended to cause defendant great distress, and that she had in almost every respect failed to conduct herself as a loving and dutiful wife, but had done innumerable things that could not be specifically recalled, with the purpose of continually harassing, and that such was her general course of treatment. *Held*, that such cross-complaint, as amended, in the absence of demurrer, was sufficient.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 292–307; Dec. Dig. § 93.*]

2. DIVORCE (§ 150*)—FINDINGS—MISCONDUCT OF PARTIES.

In a suit for divorce, findings of misconduct on the part of both parties *held* to justify denial of a divorce to either.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 150.*]

3. DIVORCE (§ 150*)—DESERTION—SEXUAL INTERCOURSE.

Civ. Code, § 96, provides that persistent refusal to have reasonable sexual intercourse, when health does not make such refusal reasonably necessary, or the refusal of either party to dwell in the same house with the other, when there is no just cause for such refusal, is desertion. *Held*, that the qualifying clause, "when there is no just cause for such refusal," applied to both refusal to have sexual intercourse and refusal to dwell together in the same house; and hence a finding that plaintiff had refused to have reasonable sexual intercourse with defendant, but which failed to find whether there was just cause for such refusal, was insufficient.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 150.*]

4. DIVORCE (§ 150*)—FINDINGS—CONSTRUCTION—"ACQUIESCENCE."

In an action for divorce, the court found that plaintiff had persistently refused to have reasonable sexual intercourse with defendant, but that defendant at all times acquiesced in such refusal. *Held*, that the term "acquiesced" as so used did not mean approval, but rather "submission."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 150.*

For other definitions, see Words and Phrases, vol. 1, pp. 110–112.]

5. DIVORCE (§ 231*)—ALIMONY—RIGHT ON DENIAL OF DIVORCE—DUTY TO SUPPORT.

Civ. Code, § 159, provides that a husband and wife cannot, by any contract with each other, alter their legal relations, except as to property and except that they may agree, in writing, to an immediate separation, and may make provision for the support of either of them and of their children during such separation. In a suit for divorce, the court found that nearly two years after plaintiff refused to have sexual intercourse with defendant he ceased to dwell in the same house with her, but that such separation was agreeable to plaintiff, and was consented to by her. The court also found that plaintiff did not at any time separate herself from the defendant with the intent to desert him, and that defendant did not at any time or place desert or abandon plaintiff; nor had he without cause, or at all, refused or neglected to live with plaintiff as her husband. *Held*, that such findings only showed a mutual agreement to live apart and abandon marital relations, after which defendant was not bound to support plaintiff during such separation.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 661; Dec. Dig. § 231.*]

In Bank. Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by Ann Etta Mayr against Walter Albert Mayr. From a decree denying defendant, as cross-complainant, a divorce from plaintiff, but awarding a judgment requiring him to pay $150 a month alimony for the support of plaintiff and her minor child, she also having been denied a divorce, defendant appeals. Amended and affirmed.

Stephens & Stephens, for appellant. Earl Rogers and Paul W. Schenck, for respondent.

MELVIN, J. This appeal, founded on the judgment roll alone, is taken by defendant as cross-complainant from a judgment denying a divorce to him. As a part of the judgment, plaintiff and cross-defendant was awarded $150 a month for the support of herself and her minor child, although she also was denied a divorce upon her complaint and proof.

Appellant contends that the court below had no power to enter a decree for alimony under the facts of the case as found, and that upon the findings the cross-complainant was entitled to a decree of divorce on the grounds of cruelty and of desertion; the latter consisting in the refusal of plaintiff to have reasonable matrimonial intercourse with him. Respondent contends that the cross-complaint lacks the essential allegation of marriage; that the answer and its various amendments do not contain any prayer; and that there is no averment of the "wrongful" infliction of any of the alleged acts of cruelty. It appears, however, that after the filing of the written opinion of the judge who tried the case, but before the formal findings had been made, leave of court having been obtained, an amendment to the cross-complaint was filed, whereby the marriage of the parties and their status as husband and wife are sufficiently set forth.

[1] While the answer first filed contains no prayer for affirmative relief, one of the amendments thereto does contain such prayer. We think that the court was justified in treating the answer with its various amendments as one pleading. The cross-complaint contained allegations amounting to the assertion that the various acts of cruelty set forth therein were "wrongfully" inflicted. We find in the cross-complaint the averment: "That all of said acts of plaintiff as aforesaid were, as defendant is informed and believes, done by her with the express purpose and object of harassing defendant and inflicting upon him intense mental torture and suffering, and that such objects and purposes of plaintiff were fully accomplished." There is also the statement that, previous to the summer of 1904, "the plaintiff had resolved to so conduct herself towards the defendant as to compel a separation between them, to render his life miserable, and, if possible, to force him into the appearance of desertion of her." And, after setting forth the narration by plaintiff to defendant of certain alleged improprieties committed by her in South Dakota and elsewhere, the cross-complaint contains the assertion: "That the recitals by plaintiff to defendant of all the said facts as aforesaid caused the defendant, and were intended by the plaintiff to cause the defendant, great mental suffering and distress; that plaintiff has in almost every respect failed to conduct herself as a loving and dutiful wife should, but has done and said innumerable things, which cannot now be specifically recalled by the defendant, with the intention and purpose of continually harassing and annoying defendant, and that such was the general course of treatment of defendant by plaintiff." We think that in the absence of special demurrers the allegations of the answer and cross-complaint were sufficient. There were no demurrers of any kind to any of the pleadings.

[2] The complaint charged defendant with cruelty and desertion. The findings set forth the marriage of the parties, and the birth of their child on or about May 2, 1905. They also negative certain allegations respecting the sale of defendant's property and the concealment of the proceeds. Defendant's earning capacity is found to be $250 per month, and there is a further finding that since coming to California he has not earned enough within $7,000 to pay the expenses of himself, plaintiff, and their child, and to meet

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the costs of this litigation. There are further findings that there is no community property; that plaintiff has $4,000 worth of furniture left in her possession by defendant when he removed to California about April, 1906; that plaintiff is an educated musician, capable of earning her living as a teacher of music, but that her resources are insufficient for the support of herself and child, and that $150 per month is a proper sum to be paid her for that purpose. There are also findings against various allegations of cruelty in the complaint, and, while some of the acts charged against defendant are found to be true, the court finds that none of them was done with intent to inflict cruelty upon plaintiff, and that his acts did not cause her grievous bodily or mental suffering; and that these acts did affect plaintiff's peace of mind, but not to any grievous degree. The court also finds that defendant did not desert plaintiff, but that on April 1, 1906, he separated himself from plaintiff, and that they have not since that time dwelt in the same house. It is found, however, that this living apart was agreeable to plaintiff, and was with her consent. With reference to the averments of the cross-complaint, it may be said that most of them are found to be true. Among these findings were those to the effect that plaintiff was disinclined to domestic life; that against defendant's will she went with a company of professional musicians, remaining away from home about three months; that she abstracted a draft for $55 from defendant's mail, forged his indorsement thereon, cashed the draft, and used the money for a trip to the Adirondacks; that she refused to accompany defendant on a business trip to the Atlantic Coast, but went instead to South Dakota, remaining from a time in July, 1904, to September 12, 1904; that on her return to Chicago (then the home of the parties hereto) she told of a romantic acquaintance with one Joseph Gahm, whom she had met in South Dakota; that she had tried in various ways to induce defendant to divide his property with her, and had commenced suit against him in Illinois for maintenance and support; and that she had wrongfully taken certain letters and documents belonging to defendant, and intended for use as evidence in this case, and had refused to give them up until her own counsel had threatened to withdraw from the case unless she surrendered them. There is also this finding: "The conduct of the plaintiff herein found has for many years embittered the life of the defendant, and has destroyed his peace of mind, seriously impaired his health, and caused him grievous mental suffering and physical pain. But the conduct of the defendant toward the plaintiff has been censorious and not duly considerate, and of a kind calculated to cause such conduct on the part of plaintiff as is hereinbefore described." While plaintiff's conduct was highly reprehensible, and while the dates of her depature for and return from South Dakota, when compared with the birth of her child, might throw grave doubt upon its paternity (although the court found that defendant was the child's father), there are other findings which justify the court's conclusion that defendant's conduct was inconsiderate. He informed his wife that "he would regard her death with satisfaction," and the court also found that "for many years before the separation of said parties the defendant was very irascible, and often displayed great ill temper and ill feeling toward the plaintiff, and treated her with unkindness." Shortly before the birth of the child, after a quarrel in which his wife had asked him to divide the property, defendant went away from home, telling plaintiff on his departure that she had "pulled his leg" for the last time. While the findings, when examined in detail, would indicate that plaintiff's misconduct was much more serious than that of her husband, we cannot say that his acts were so venial as not to justify the court's denial of the divorce to him, as well as to her.

[3, 4] Appellant contends that the finding with reference to persistent refusal to have reasonable matrimonal intercourse is sufficient of itself to establish desertion, under section 96 of the Civil Code. That section provides that: "Persistent refusal to have reasonable matrimonial intercourse as husband and wife, when health or physical condition does not make such refusal reasonably necessary, or the refusal of either party to dwell in the same house with the other party, when there is no just cause for such refusal, is desertion." The finding on this subject in the case at bar is that the plaintiff did not "at any time separate herself from the defendant with the intent to desert him. Since a time on or about the 14th day of September, 1904, the plaintiff has persistently refused at all times to have reasonable matrimonial intercourse with the defendant as husband and wife, although the health and physical condition of either party did not make such refusal reasonable or necessary; but the defendant at all such times acquiesced in such refusal of the plaintiff." If this were a new question, we would be inclined to agree with appellant; but it will be noticed that there is no finding whether or not just cause for such refusal exists. Fink v. Fink, 137 Cal. 559, 70 Pac. 628, is authority for the insufficiency of such a finding. Personally the writer of this opinion would incline to an interpretation of the statute, whereby the words "when there is no just cause for such refusal" would apply only to the refusal of either party to live in the same house with the other. But Fink v. Fink, supra, seems to have settled the law the other way. The finding just quoted appears somewhat difficult at first glance to

understand. Persistent refusal on the part of one spouse to have reasonable matrimonial intercourse with the other involves a continued willingness on the part of the one refused. "Acquiescence" to such refusal cannot therefore mean "approval." It can only be used in the sense of "submission." So employed, it is easily understood.

[5] The court found that in April, 1906 (nearly two years after the refusal of plaintiff to have matrimonial intercourse with him) defendant ceased to dwell in the same house with plaintiff, "but such separation was agreeable to plaintiff, and was consented to by her." There are findings, also, that plaintiff did not "at any time separate herself from the defendant with the intent to desert him," and that defendant did not "at any time or place desert or abandon the plaintiff; nor has he without cause, or at all, refused or neglected to live with the plaintiff as her husband." Taken altogether and construed in the light most favorable to respondent, these findings merely show a mutual agreement by plaintiff and defendant to live apart and abandon marital relations. Does such mutual agreement carry with it the implication that the husband will continue to provide for the wife, and may the court, in the face of such agreement, when a divorce is denied to both parties, compel the husband to support the wife? We think not. While a husband and wife may, in the absence of ground for divorce, agree to live apart, a mere verbal contract that they shall so reside will not place upon the man the duty of support. Section 159 of the Civil Code provides that: "A husband and wife cannot, by any contract with each other, alter their legal relations, except as to property, and except that they may agree, in writing, to an immediate separation, and may make provision for the support of either of them and of their children during such separation." In Volkmar v. Volkmar, 147 Cal. 175, 81 Pac. 413, the rule was thus expressed: "In no case should a court decree permanent alimony to the wife living separate and apart from her husband, in the absence of facts showing an obligation on the part of the husband to support her under such conditions. The effect of the decree here is to compel the husband to support the wife while she continues to live separate and apart from him. It is not intimated by the findings in this case that the original separation between these parties was due to any fault of the plaintiff's husband. The wife, it is true, is found, in response to the allegations of the complaint, not to have deserted the husband, but it was not found, nor was it claimed by the answer, that the husband had deserted the wife; nor was it found that he had been guilty of willful neglect, cruelty, or any other misconduct. So far as appears, they simply voluntarily separated on December 9, 1901, and have since been living separate and apart. Although it is found that she has been ready and willing at all times to live with him as his wife, it is not found that she ever communicated her readiness and wishes in this regard to him, or that he has ever refused to allow her to live with him. If the wife was not guilty of desertion, and was ready and willing to live with the husband, and in good faith offered so to do, and he refused her offer, there would have been some ground for a claim that he had been guilty of desertion, warranting the relief given. Civ. Code, § 101. But the findings present no such case, and we doubt whether the issues made by the pleadings were broad enough to warrant a finding of desertion on the part of the husband, had one been made. A wife, living separate and apart from her husband cannot, in the absence of special agreement therefor, compel him to support her while living so separate and apart, unless such separation is caused by misconduct on his part. The obligations arising from the contract of marriage are mutual. It is as much the duty of the wife to live with the husband, as it is his duty to support her; and the duty of support will not be enforced against the husband in favor of the wife, who, without cause, fails to perform the correlative duty of living with him. See McMullin v. McMullin, 123 Cal. 653, 56 Pac. 554; Civ. Code, § 175. What misconduct on the husband's part would justify a court in requiring him to support his wife while she continues to live apart from him, it is, as already said, not necessary here to consider, for no reason at all why the wife does not return to her husband appears in the facts found by the trial court. It may, however, be said that it has been held that under our statute an action for permanent maintenance, independent of any suit for divorce, can be maintained by a wife only where the husband has been guilty of acts constituting willful desertion on his part. Hardy v. Hardy, 97 Cal. 125, 127, 31 Pac. 906."

The facts in the case at bar are stronger in favor of appellant than those shown by the record in Volkmar v. Volkmar, supra. As in that case, there is no finding that the original separation was due to the husband's fault, but differing from that case we have here the persistent and unreasonable refusal of the wife to sustain proper marital relations with her husband, long preceding any change of domicile on his part; and, although the final breaking up of the home may have occurred through mutual assent, the only overt and unreasonable act, according to the findings, was hers.

From the foregoing it follows that the judgment should be amended by striking out that portion of it whereby Walter Albert Mayr is required to pay to the plaintiff, Ann Etta Mayr, on the 1st day of each month following the entry of the said judgment, the sum of $150 for the support and maintenance of the said plaintiff and of Josef Hardin Mayr, the minor child of the parties to this action, and it is so ordered.

We concur: HENSHAW, J.; LORIGAN, J.; SHAW, J.; ANGELLOTTI, J.; SLOSS. J.

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17 Cal. App. 93

WIDRIN v. SUPERIOR COURT FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 1,045.)

(District Court of Appeal, First District, California. Sept. 13, 1911.)

1. JUSTICES OF THE PEACE (§ 159*)—APPEAL—BOND—EXCEPTIONS—TIME FOR MAKING.

An appeal from a justice's judgment is perfected by appellee's failure to except to the bond within five days after its filing, as authorized by Code Civ. Proc. § 978a; he not being entitled to five days after receiving notice of the filing.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 159.*]

2. MANDAMUS (§ 31*) — CERTIORARI (§ 28*)—SUBJECTS OF RELIEF—COMPELLING ASSUMPTION OF JURISDICTION OF CAUSE.

The remedy against a superior court's refusal to hear an appeal from a justice's court under the erroneous assumption that the appeal was not perfected is by writ of mandate to compel assumption of jurisdiction, and not by writ of review.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 74, 75; Dec. Dig. § 31;* Certiorari, Dec. Dig. § 28.*]

Petition by M. Widrin for writ of review against the Superior Court for the City and County of San Francisco and another. Mandate issued.

Charles S. Perry, for petitioner. Gerald C. Halsey, for respondents.

KERRIGAN, J. This is a petition for a writ of review.

The petitioner was the defendant in a certain action in the justices' court entitled, "L. Bingham versus M. Widrin." Such proceedings were had therein that a judgment was regularly entered in favor of plaintiff and against the petitioner. Within 30 days after the rendition and entry of the judgment, to wit, on November 30, 1910, the petitioner served and filed a notice of appeal, filed an undertaking in proper form, and on December 10th gave notice thereof. On December 12th the plaintiff served a notice of exception to the sureties, whereupon the petitioner gave notice that the sureties would justify on December 16th. At the time and place specified the sureties appeared, and were ready and willing to qualify, but on account of an order theretofore made by the justice of the peace before whom the case was tried, and before whom the justification was noticed to be made, all matters on his calendar for that day were postponed for one week; and by virtue of this order and by reason of the absence of the justice the examination of the sureties went over for one week, at which time other sureties appeared and qualified. Subsequently the papers in the case were transmitted to the superior court; and in the month of June, 1911, said court, upon a motion regularly made, dismissed the petitioner's appeal upon the ground that the sureties had not qualified within five days after exception to their sufficiency, as required by section 978a of the Code of Civil Procedure. The petitioner relies principally upon the doctrine laid down in the case of Dobson v. Dobson, 7 Neb. 296, which holds that, where a party has done all the law requires him to do, he shall not suffer because of the absence or fault of the court; but the view we have reached on another phase of the case renders a decision of this point unnecessary.

[1] The attorney for the plaintiff acted upon the assumption—not without plausible reason—that he had five days after receiving notice of the filing of the bond within which to except to the sureties, and, accordingly, did not except to their sufficiency until twelve days after the filing of the bond. This, according to several recent decisions, was seven days late, for those cases hold that the giving of notice of the filing of the bond is not jurisdictional, and that notice of exception to the sufficiency of sureties must, following the language of the Code, be given within five days from the filing of the bond. W. P. Jeffries Co. v. Sup. Ct., 13 Cal. App. 193, 109 Pac. 147; Golden Gate Tile Co. v. Sup. Ct., 114 Pac. 978; Blake v. Sup. Ct., 118 Pac. 448, decided by this court August 31, 1911. We hold, therefore, that the bond having been duly filed, and the sureties thereon not being excepted to within the time required by law, the appeal was properly perfected, and that the superior court, therefore, had jurisdiction to hear and determine the appeal.

The petition in the present case is for a writ of review; but it has been recently held that, where an inferior court dismisses a cause upon the erroneous assumption that it has no jurisdiction to entertain the same, its action is tantamount to a refusal to hear and determine the cause, and that the aggrieved party's remedy is by a writ of mandate to compel the court to do so. Golden Gate Tile Co. v. Sup. Ct., supra.

It is therefore ordered that a writ of mandate issue from this court, directed to the superior court of the state of California, in and for the city and county of San Francisco, and to Hon. John J. Van Nostrand, judge thereof, commanding said court and judge to proceed to hear and determine the said cause.

We concur: LENNON, P. J.; HALL, J.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(161 Cal. 176)

PIERCE v. UNITED GAS & ELECTRIC CO. (S. F. 5,383.)

(Supreme Court of California. Oct. 13, 1911.)

1. ELECTRICITY (§ 19*)—CONTRIBUTORY NEGLIGENCE—DANGER INCURRED TO SAVE LIFE.

Where the elder of two brothers brought a loose guy wire into contract with a noninsulated electric wire, receiving a fatal shock, and the younger brother in his efforts to pull the elder from the guy wire was killed, he was not as a matter of law guilty of contributory negligence.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 19.*]

2. NEGLIGENCE (§ 23*)—ACTS CONSTITUTING—MACHINERY ATTRACTIVE TO CHILDREN.

One maintaining an attractive, but dangerous, contrivance in a place frequented by children, and knowing that they will be attracted to it and subjected to injury thereby, must use ordinary care to prevent such injury, and hence an electric company which left a loose wire hanging from one of its poles which wire might easily come in contact with an uninsulated wire carrying a dangerous current of electricity, was guilty of negligence, it appearing that the loose wire was one which would attract children and that the company might have ascertained its condition.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 33, 34; Dec. Dig. § 23.*]

3. ELECTRICITY (§ 19*)—ACTIONS—EVIDENCE—QUESTIONS FOR JURY.

In an action against an electric company for the death of two children who, by moving a loose wire against one carrying a dangerous current, received a fatal shock, the questions whether the loose wire would be likely to attract children, whether it might be anticipated that the wire would be brought in contact with the electric wire, and whether the electric company might reasonably have ascertained the condition of the loose wire *held*, under the evidence, to be for the jury.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 19.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. TRIAL (§ 194*)—NEGLIGENT INJURY—ACTIONS—INSTRUCTIONS.

Where the question whether an electric company exercised due care to discover defects was, under the evidence, one for the jury, an instruction that if it conducted a heavy current of electricity over certain wires and maintained a guy wire above them, which was loose, the end lying in the street, so that it might be drawn against the electric wires, it was liable, was, in an action against the company for the death of two children killed in that manner, erroneous as taking the question from the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 439–441, 446–454, 456–466; Dec. Dig. § 194.*]

5. NEGLIGENCE (§ 139*)—ACTIONS—INSTRUCTIONS.

An instruction directing a verdict for the plaintiff in case the jury find certain facts to be true must embrace all things necessary to show the legal liability of the defendant, and hence, in an action against an electric company for maintaining an attractive nuisance, such an instruction authorizing a recovery, without finding that the so-called nuisance was attractive, or that it might have been reasonably anticipated that injury would occur, was erroneous.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 139.*]

6. TRIAL (§ 296*) — INSTRUCTIONS — ERROR CURED BY OTHER INSTRUCTIONS.

Where, in an action against an electric company for the death of two children, an instruction authorizing a recovery upon the finding of certain facts omitted several elements necessary to show legal liability, the giving of instructions at defendant's request which stated the law correctly merely created a conflict of instructions, and did not cure the error; it being impossible to say which the jury followed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705–713; Dec. Dig. § 296.*]

7. ELECTRICITY (§ 19*)—NEGLIGENT INJURY—INSTRUCTIONS.

In an action against an electric company for the death of two children, an instruction that, unless the children were both guilty of contributory negligence, there should be a verdict for plaintiff, was erroneous in authorizing a verdict for the death of both the children, even though one of the children was negligent.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 19.*]

8. TRIAL (§ 240*)—ARGUMENTATIVE INSTRUCTIONS.

In an action against an electric company for the death of boys who brought a loose guy wire in contact with a wire carrying a heavy current and thus received a fatal shock, an instruction that "boys can seldom be said to be negligent when they merely follow the irresistible impulses of their own nature, and instincts common to all boys," was erroneous, being argumentative.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 561; Dec. Dig. § 240.*]

9. ELECTRICITY (§ 19*)—NEGLIGENT INJURY—ACTIONS—INSTRUCTIONS.

In an action against an electric company for the death of boys who brought a loose guy wire in contact with one carrying a heavy current and thus received a fatal shock, an instruction "that if you find that the defendant in arranging its electric wires and permitting the existence of the guy wire in such dangerous proximity as to reasonably anticipate that children from the street might bring the same in contact with the electric wires, and that the wires were improperly insulated, you should find that defendant was negligent," was not only unintelligible, but erroneous in intimating that the defendant permitted the guy wire to hang in such dangerous proximity to the electric wire that it should have anticipated that children might bring it in contact with the electric wires.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 19.*]

10. NEGLIGENCE (§ 136*) — APPLIANCES ATTRACTIVE TO CHILDREN.

Where a boy 13 years of age, upon being dared by his companions, brought a loose guy wire in contact with an uninsulated electric wire, and was killed, he cannot as a matter of law be held to be without the protection of the attractive nuisance doctrine.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 136.*]

11. ELECTRICITY (§ 19*)—CONTRIBUTORY NEGLIGENCE—CHILDREN.

In the above case, *held*, that the boy was not guilty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 19.*]

12. NEGLIGENCE (§ 85*)—CONTRIBUTORY NEGLIGENCE—CHILDREN—CARE REQUIRED.

An infant is only bound to exercise such care as children of his age ordinarily exercise.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 121–129; Dec. Dig. § 85.*]

13. NEGLIGENCE (§ 89*)—NEGLIGENT INJURY—DEFENSES.

The elder of two brothers, on being dared by his companions, pulled a loose guy wire into contact with an uninsulated electric wire, receiving a fatal shock. The younger brother, in his efforts to save the elder, was also killed. *Held* that, unless the owner of the electric wire was guilty of negligence in causing the death of the elder, there could be no recovery for the death of the younger, but that, if the owner was negligent, the mere fact that the older brother's negligence contributed would not bar recovery.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 130–137; Dec. Dig. § 89.*]

14. TRIAL (§ 108½*)—NEGLIGENCE (§ 124*)—CONDUCT OF COUNSEL—REFERENCE TO INSURANCE OF DEFENDANT.

In an action for damages for personal injuries, evidence that the defendant is insured against loss is inadmissible, and, while counsel may ask jurors such questions as are reasonably necessary to determine their freedom from bias, a question by plaintiff's attorney merely for the purpose of getting such fact before the jury is improper.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 108½;* Negligence, Dec. Dig. § 124.*]

In Bank. Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by M. Pierce against the United Gas & Electric Company. From a judgment for plaintiff and an order denying its motion for new trial, defendant appeals. Reversed and remanded.

Samuel Rosenheim and Bernard Silverstein, for appellant. Frank H. Gould and Beasly & Fry, for respondent.

ANGELLOTTI, J. This is an action by the mother of two minor children, Albert Pierce and Walter Pierce, the father being dead, to recover damages for the death of said children, which is alleged to have been caused by the negligence of the defendant. The jury gave a verdict in favor of plaintiff, fixing the damages for the death of Albert at $4,900, and for the death of Walter at $5,100. A motion for a new trial being made, the trial court ordered a new trial, unless plaintiff consented to a reduction of the judgment to $1,500 for the death of Albert and $2,500 for the death of Walter, an aggregate of $4,000. Plaintiff agreed to this reduction, and the court made an order denying the motion for a new trial. This is an appeal from the judgment and from an order denying the motion for a new trial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Albert and Walter were killed on February 12, 1907. At that time they were, respectively, 13 and 11 years of age. They were ordinarily bright and capable boys and obedient and industrious, and Albert, although attending school, assisted in a very small way in the support of the family, consisting of his mother, Walter, another younger brother, and himself. Defendant was a public service corporation engaged in furnishing electric light and power to the city of San Jose and its inhabitants. For the purposes of its business, it maintained a line of poles and electric wires along the northeasterly side of the Alameda, a public highway running between San Jose and Santa Clara. The accident occurred near one of these poles. The pole was 36 feet high. A cross-arm thereof, on which were strung four electric wires, was 18 feet from the ground. This cross-arm extended from the pole out into the street, all the portion used for wires being on the street side of the pole, and the first wire on the cross-arm being 6 feet from the pole. The voltage of the current carried on these wires was between 2,200 and 2,500. A guy wire reaching from the apex of this pole to a stump or tree in the field on the northeasterly side of the Alameda, 40 feet from the pole, where it was fastened, had been maintained by defendant for several years. Some time prior to the accident, two weeks or more according to the findings of the jury, this wire had by some means unknown become detached from the stump or tree. This had not been done by any officer, agent, or employé of defendant, or with its knowledge or consent, and up to the time of the accident defendant had no actual knowledge that it had been so detached. By reason of being so detached, it hung on February 12, 1907, in a natural perpendicular position from the top to the bottom of the pole, its surplus length lying on the ground at the foot of the pole in folds or curves in the manner of a wire which had been rolled. As long as it so hung it was without electricity, and was absolutely incapable of harm to any one touching it, and it could become dangerous only by being carried out some distance in the street and brought into contact with one of the electric wires. If so brought into contact with the electric wire next to the pole, it would at once become as dangerous to one touching it as would the electric wire itself. The insulation on such electric wire had become worn or disintegrated.

Late in the afternoon of February 12, 1907, six boys of the neighborhood, ranging from eight to thirteen years of age, were playing in the vicinity of this pole. Two of the boys, Albert Pierce and Marshall Prosser, were playing together in the field a short distance away, while Sylvester Pierce, an eight year old brother of the deceased boys, Stephen Valdez, aged eleven years, Clark McChesney, aged eight years, and Walter Pierce, were playing with the guy wire by swinging back and forth thereon. These boys had been in the habit of playing with this wire for at least several days. While so playing, Sylvester Pierce took the guy wire sufficiently far into the street to bring it lightly in contact with the electric wire, and received a slight shock. He told the other boys about it, encouraging them to try it. Stephen Valdez started to do so, but dropped the wire before making the contact, being evidently apprehensive. Then Clark McChesney took it and brought the guy wire into contact with the electric wire, and was knocked down by the consequent shock. Thereupon Albert and young Prosser were called over, and told about the discovery. Albert was then dared to try it, and, answering, "Who's afraid?" took hold of the guy wire and drew it taut against the electric wire, and thereby received an electric shock which killed him instantly. He fell to the ground with the guy wire in his hand. Walter, upon seeing his brother fall, at once jumped to his rescue, with the result that he was also killed by a shock of electricity from the wire. Although in answer to special inquiries the jury found that Albert did not know prior to taking hold of the guy wire that Sylvester and Clark had received shocks, or that he would receive a shock if he brought the two wires into contact, the evidence shows without conflict that he must have known both these things. The jury found that he had just been informed of the experience of Sylvester and Clark in that regard and had been dared to try it himself. Of course, he did not appreciate the extent of the danger. But the inference is irresistible that he knew his proposed act would cause him to receive an electric shock, and that he intentionally brought the guy wire into contact with the electric wire for the purpose of receiving a shock.

[1] While Walter also knew that electric shocks had been produced by bringing the wires together, the jury was entirely justified in concluding that it had not been shown that he was guilty of contributory negligence. If the facts detailed are not such as to compel the conclusion as matter of law that Albert was guilty of contributory negligence, we think that a sufficient case was made for the jury to sustain a verdict for plaintiff on account of his death.

It is true that the guy wire hanging suspended from the top of the pole was in no way dangerous as a conductor of electricity, unless put by some trespasser to an unwarranted use. It was devoid of electricity, and could not transmit the same to any one touching it, unless it was brought in contact with the electric wires 18 feet above the street. To accomplish this, it was necessary to carry the wire at least several feet out into the street. But by reason of its character it might reasonably be concluded that, when taken in connection with the proximity of the high power electric wires of defendant, and the ease with which contact between it and the electric wires could be made, it was a dangerous contrivance to children who might lawfully be on the public highway in the vicinity of the pole.

[2] The so-called "attractive nuisance" doctrine has been followed in this state, and it has not been confined to turntables. In Cahill v. Stone, 153 Cal. 571, 96 Pac. 84, 19 L. R. A. (N. S.) 1094, it was applied in the case of a push car heavily laden and left standing on a track in a public street, unfastened in any manner. The doctrine was there stated as follows: "One who places an attractive but dangerous contrivance in a place frequented by children, and knowing, or having reason to believe, that children will be attracted to it and subjected to injury thereby, owes the duty of exercising ordinary care to prevent such injury to them"; and, quoting approvingly from Barrett v. Southern Pacific Co., 91 Cal. 302, 27 Pac. 667, 25 Am. St. Rep. 186: "A child of immature years is expected to exercise only such care and self-restraint as belongs to childhood, and a reasonable man must be presumed to know this and required to govern his action accordingly. * * * And it has been held in numerous cases to be an act of negligence to leave unguarded and exposed to the observation of little children dangerous and attractive machinery which they would naturally go about or upon, and against the danger of which action their immature judgment opposes no warning or defense." Bearing in mind that this pole was located on a public highway, and at a place where children of the neighborhood might reasonably be expected to play, and recognizing the well-known attractiveness to children of anything in the nature of a swing, we are of the opinion that there was enough in the evidence to support a conclusion on the part of the jury that the guy wire, hanging as it did, would reasonably be calculated to attract children and lead them to play with it, and that in such play it might reasonably be expected to be brought into contact with the high power electric wires. There was also enough in the evidence to support the conclusion that the defendant by the exercise of reasonable care would have known of the condition of the guy wire. Under such circumstances, there would be enough to support a conclusion of negligence on the part of defendant in so maintaining the guy wire, for the defendant, as a reasonable person, would be charged, under such circumstances, with notice of all these things.

[3] It cannot be doubted, however, that the question whether this guy wire, hanging as it did, free from danger to any one who did not deliberately pick it up and carry it to a point where it would come in contact with the electric wire, would be likely to attract children and lead them to play with it, the question whether in such play it might reasonably be anticipated that it would be brought in contact with the electric wire, and the question whether the defendant by the exercise of reasonable care would have known of the condition of the guy wire, were, in the condition of the evidence, questions for the jury. The evidence was not such that these questions or any of them could be answered one way or the other as matter of law.

[4] Under the circumstances of this case and in view of what we have said, there can be no question that instruction 6 given at the request of plaintiff, was prejudicially erroneous. That instruction, after declaring the duty of a person or corporation using the public streets for its business to use due care toward the public, proceeded as follows: "If you find that electricity is a highly dangerous and subtle agency, giving no evidence of its existence in deadly quantities until the fatal stroke, if you find that defendant conducted a current of electricity of great intensity and power over wires running along the public street as alleged in plaintiff's complaint, and also maintained a guy wire or rope without insulation attached above said electric wires so conveying said electric current, its lower end reaching to the public streets and lying thereon and such wire or rope hanging in such close proximity to said electric wires that children playing with such guy wire or rope might readily draw it against such electric wires, I instruct you that such act on the part of defendant constituted negligence, and, unless the two children of plaintiff were both guilty of contributory negligence, you should render a verdict for plaintiff." Manifestly this instruction directed a verdict for plaintiff on account of the death of Albert, upon the finding by the jury of the various facts specified therein.

Bearing in mind that there is no pretense that defendant actually knew of the condition of the guy wire, it is clear that the word "maintained" could not be taken by the jury as meaning anything more than a mere failure on its part to obviate the defects in such condition by reason of the end having become detached from the tree or stump, regardless entirely of whether or not its admitted ignorance of the condition was due to a failure on its part to exercise reasonable care in the matter of inspection. In other words, so far as this particular element is concerned, the jury was practically instructed that it was enough to convict defendant of negligence, that the guy wire was hanging from the top of the pole with one end on the ground, although defendant had originally fastened such ground end to a tree or stump, had no knowledge that the condition had been changed, and had exercised due care in the matter of inspection to see that its poles and wires continued in a condition free from danger to others. Whether or not the defendant exercised due care in the matter of inspection to discover defects was, upon the evidence given in this case, solely a question for a jury, and the court could not properly take that question from it. A similar error occurred in the giving of instruction 5, where the word "permitted" was used, instead of the word "maintained." It is barely possible that, in view of the finding of the jury that this guy wire had been detached from the stump or tree "for two weeks or more," these errors might be deemed nonprejudicial, for it may be that, considering the dangerous nature of the agency used by defendant, a failure to discover the change in condition for a period of "two weeks or more" could be held as matter of law to be negligence. But it is not necessary to decide this question, for instruction 6 was certainly in other respects to be noted prejudically erroneous, and on a new trial the errors above referred to may easily be obviated.

[5] This instruction takes entirely from the jury the question whether the guy wire in the locality where it was and hanging as it did would be likely to attract children and lead them to play with it, and the question whether in such play it might reasonably be anticipated that the guy wire would be brought into contact with the electric wire. Unless both of these questions are answered in the affirmative, defendant, under the circumstances shown by the evidence, was not guilty of negligence in any respect material in this case. By omitting these elements from a specification of the things that would warrant a verdict for plaintiff, in an instruction directing a verdict for plaintiff if the jury finds the specified things, the trial judge decided both of these questions against defendant, and directed a verdict in favor of plaintiff regardless of the views of the jury on such questions, and this in a case where clearly the evidence was not such as to compel answers against defendant as matter of law. It is clear that an instruction directing a verdict for the plaintiff in the event that the jury finds certain facts to be true must embrace all the things necessary to show the legal liability of the defendant and to warrant the direction or conclusion contained therein that plaintiff is entitled to a verdict, and such is the rule in this state. See Killelea v. California, etc., Co., 140 Cal. 602, 74 Pac. 157. This instruction practically directed a verdict in favor of plaintiff, although the jury might conclude, upon evidence sufficient to support their conclusion, that the guy wire hanging as it did was not of such a nature and so situated that it could reasonably have been anticipated that it would attract or induce children to employ it as a plaything, or that in such play it would be brought into contact with the electric wire.

[6] We have not been able to find anything in the record that would warrant us in holding that this instruction was not prejudicial to the substantial rights of defendant, nothing to overcome the effect of this explicit direction for a verdict in favor of plaintiff it the jury finds the facts specified therein, and contributory negligence on the part of the children is not shown. It is true that other instructions were given at the request of defendant that stated the law in these respects as favorably to defendant as was warranted, if not more favorably. But the giving of these other instructions simply produced a clear conflict in the instructions given the jury by the court, and it is impossible for us to say which instruction the jury followed in arriving at a verdict in favor of plaintiff. Learned counsel for plaintiff make no reply to the claim of defendant in this behalf.

[7] There is some force in the further contention of defendant that this instruction directs a verdict for plaintiff for damages on account of the death of Albert, even if Albert was guilty of contributory negligence, provided Walter was not so guilty. Such a direction would, of course, be erroneous. In the event of a new trial, such an error will undoubtedly be avoided.

[8] We see nothing, in view of the facts of this case, in the points made by defendant against plaintiff's instructions 8 and 14. Plaintiff's instruction 15 was in part somewhat argumentative and the portion stating that "boys can seldom be said to be negligent when they merely follow the irresistible impulses of their own nature and instincts common to all boys" might well have been omitted, being altogether too uncertain for the purposes of an instruction, and partaking too strongly of the nature of argument.

[9] The concluding portion of plaintiff's instruction 16, the portion purporting to enumerate facts upon the finding of which it would be the duty of the jury to find the defendant guilty of negligence is, as set forth in the transcript, absolutely unintelligible. It is: "And if you therefore find that the defendant in arranging and maintaining its electric wires and in permitting the existence of the guy wire alleged in plaintiff's complaint in such dangerous proximity thereto as to reasonably anticipate that children upon the street might bring the same in contact with the said wires, and that said wires were improperly insulated, it is your duty to find that the defendant was negligent in so maintaining such a condition of affairs." The unintelligibility herein is doubtless the result of a clerical error. As the record shows this instruction, it is also open to the

objection of intimating that the defendant did in fact permit the existence of the guy wire in such dangerous proximity to the electric wire that it should reasonably have anticipated that children upon the street might bring the same in contact with such electric wire.

[10, 11] Upon the question of contributory negligence upon the part of Albert, specific instructions given by the trial court were of such a nature as to absolutely preclude, in view of the evidence, a verdict on account of his death. By instruction 32 the jury was instructed that if the jury found that if the children had not carried the guy wire towards the center of the street for the express purpose of receiving electric shocks, but had simply played with it around the pole, they would not have been killed, and that the only reason for their deaths was their own act in expressly causing the wire rope to come into contact with the overhead electric power wire for the purpose of receiving electric shocks, the act of the children and not the negligence of the defendant, if any there was, was the proximate cause of their death, and its verdict must be for defendant. By instruction 33 the jury was instructed that if simply playing with the guy wire, in ordinary play, would not have caused a contact of the wires, but that they came in contact by reason of the direct and premeditated act of the deceased children, the act of the children was the proximate cause of their death, and verdict must go for the defendant. By instruction 44 the jury was instructed that if it found that the deceased children knew, before they carried the wire rope out toward the street car tracks, that by so doing they would bring it into contact with the live wire, and that they would then receive electric shocks, which might injure them, and that they would not have been killed if they had not committed this act, then it must find that the children came to their death through their own negligence and a verdict must be for the defendant. By instruction 45 the jury was instructed that if it found that neither the wire rope nor the electric wire placed as it was could alone have caused the death of plaintiff's children, and if it found that it was the act of the deceased children themselves that brought the other elements together, thus causing the result complained of, to wit, the charging of the wire rope with electricity so as to cause their deaths, then the proximate cause was the act of the children, and the verdict must be for the defendant. By instruction 57 the jury was instructed that if Albert was warned not to touch the wire rope, and did thereafter take hold of it upon being dared by one of the other boys, and if it further found that he knew that he would get shocked by so taking hold of said rope, but that he nevertheless did so with the result that he was killed, then Albert met his death through his own negligence, and the verdict must be for the defendant. Instruction 45 was practically a direction for a verdict for defendant, so far at least as Albert was concerned, for there never was even a pretense in the case that either the electric wire or the guy wire could cause injury so long as they were not brought in contact with each other, or that it was not the act of Albert that brought them together. While the instruction was too favorable to defendant, unless Albert was shown by the evidence to have been guilty of contributory negligence as matter of law, it was one of those given to the jury. The other instructions referred to, with the possible exception of instruction 44, were practically, as we view the evidence, also instructions for a verdict in favor of defendant, for notwithstanding one or two answers of the jury to questions submitted, the evidence was such, as we view it, to compel a verdict for the defendant if these instructions were followed by the jury. These instructions, according to our opinion, were also too favorable for defendant, for we do not believe that it can be held as matter of law, either that Albert had attained such an age that he was not within the protection of the "attractive nuisance" doctrine, or that he was guilty of contributory negligence. We think that it was a question for the jury whether the defendant should reasonably have anticipated that the contrivance was of such a nature that it would naturally attract children as old as Albert to play with it, even to the extent of endeavoring to obtain electric shocks, without any realization whatever of the extent of the danger to which they were exposing themselves, and that it was also a question for the jury whether Albert did not exercise that degree of care to avoid injury that a child of his age should exercise under the circumstances shown in this case. It is, of course, apparent that as a matter of fact he had no idea of the extent of the danger to which he was subjecting himself, and it would be entirely reasonable to infer that he could have anticipated no serious bodily harm, nothing more serious than his predecessors, Sylvester and Clark McChesney, had suffered.

[12] He was bound to the exercise of such care as children of his age ordinarily exercise, and we think that the evidence was such as to make this question one for the jury to determine. We are not to be understood as declaring that the judgment against defendant should be reversed because instructions too favorable to defendant were given, but have deemed it proper to discuss these instructions for the purposes of a new trial.

For the same purposes, it is proper to say that the evidence as to Walter was such as to warrant a finding that he was not guilty of contributory negligence if, indeed, it did not compel such finding.

[13] Whether or not a recovery could be

had on account of Walter's death, assuming that he was not guilty of contributory negligence, depends entirely, we think, upon the question whether or not there was any negligence on the part of defendant in so far as Albert was concerned, regardless entirely of whether Albert was guilty of contributory negligence. In other words, defendant cannot be liable for Walter's death, caused by his effort to save Albert from injury, however praiseworthy that effort was, unless Albert's dangerous condition was due, in part at least, to defendant's negligence. Unless defendant was guilty of negligence toward Albert, it could not be liable at all under the undisputed facts of this case. But if it was guilty of negligence toward Albert, in maintaining the condition of affairs shown by the evidence in this case, then the mere fact that Albert's negligence, if there was such negligence on his part, contributed to his death, would not free defendant from liability as to Walter, unless Walter was also guilty of contributory negligence.

[14] Evidence that a defendant in an action for damages is insured against loss by reason thereof is not admissible (Roche v. Llewellyn Iron Works, 140 Cal. 563, 74 Pac. 147), and it would undoubtedly be improper for counsel for plaintiff to endeavor to get such a fact before the jury by question designed solely for that purpose. While it is entirely proper for counsel to ask jurors such questions as may reasonably be necessary to ascertain whether they are free from bias or interest that may affect their verdict, we do not think that it is ordinarily essential to ask questions in such a way as to bring the fact of such insurance before the jurors. Counsel should be fair toward the court and the defendant in such matters, and unfairness on their part having the effect of bringing the fact of insurance to the attention of the jury might well be regarded as prejudicial misconduct. We are not to be understood as intimating that the attorneys for plaintiff were intentionally unfair in this respect, for the record does not so indicate to us.

As to the matter of the measure of damages in an action by a mother for the death of her minor child, it is unnecessary, for the purposes of a new trial to do more than to cite the recent case of Bond v. United Railroads, etc., 113 Pac. 366.

There is no other matter that appears to require discussion.

The judgment and order denying a new trial are reversed.

We concur: HENSHAW, J.; MELVIN, J.; SHAW, J.

SLOSS, J., deems himself disqualified to participate herein and therefore declines to act.

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161 Cal. 197

LEGAULT v. BOARD OF TRUSTEES OF CITY OF ROSEVILLE et al.

(Sac. 1,859.)

(Supreme Court of California. Oct. 17, 1911.)

1. MUNICIPAL CORPORATIONS (§ 154*)—REMOVAL—POWER.

A municipality has no common-law power to remove municipal officers in the absence of an express grant, either in the charter or by general law, so that, where the Legislature has provided a specific form of proceeding for the removal of officers, the power within the corporation ceased to be indispensable to corporate existence, and its exercise at most a mere convenience.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 350; Dec. Dig. § 154.*]

2. MUNICIPAL CORPORATIONS (§ 154*)—OFFICERS—DISMISSAL—PROCEEDINGS—POWERS.

Pol. Code, § 4386, empowers the mayor of cities to suspend, and, with the common council, to remove, any nonelective officer, and Municipal Corporation Act (Gen. Laws 1910, Act 2348) § 852, empowers the board of trustees of a city to appoint an attorney, poundmaster, superintendent of streets, civil engineer, and such police and subordinate officers as they may deem necessary, and to fix their compensation, each of such officers holding at the pleasure of the board. *Held*, that Pen. Code, §§ 758–772, providing for the removal of civil officers otherwise than by impeachment, prescribes an exclusive method for the removal of elective officers of a city governed under the municipal corporation act, and hence the city's board of trustees had no power to remove its marshal for dereliction of duty on a hearing before the board.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 350; Dec. Dig. § 154.*]

Department 2. Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Petition by Oscar L. Legault for writ of review against the Board of Trustees of the City of Roseville and others. From an order granting the relief prayed, defendants appeal. Affirmed.

James D. Meredith, J. B. Landis, and P. H. Johnson, for appellants. Harris & Gibson, for respondent.

HENSHAW, J. The city of Roseville is a city of the sixth class. Oscar L. Legault, petitioner, is or was the duly elected, qualified, and acting marshal of the city. The board of trustees preferred charges against the marshal for dereliction of duty, and cited him to show cause why he should not be removed from office. After a hearing, the board of trustees formally ordered the petitioner to be removed from the office of marshal of the city of Roseville. Legault then petitioned for a writ of review, seeking to have it declared that the action of the board of trustees in the premises was in excess of its powers and jurisdiction, and therefore void. The trustees interposed a general demurrer to this petition. This being overruled, the petition admittedly setting forth the facts, and, the trustees consequently being unable to join issue by denial, they filed no answer, and judgment passed for petitioner as prayed for.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] The trustees appeal, and the appeal presents for consideration a single question: Where the charter of a municipality is silent upon the matter, does the corporation, acting through its trustees, possess the power to remove an elective officer of the municipality?

It is not questioned but that the charter in terms confers no such power. But the argument for appellants is that at common law this power was regarded as a necessary incident to the functions of all municipal corporations; that, not having been prohibited to this corporation, it exists and is to be exercised with other powers by the board of trustees; and that the provisions of the Penal Code (§§ 758–772) must be considered as fixing an alternative, and not an exclusive, method for amotion of municipal officers.

Since the decision of Lord Mansfield in Rex v. Richardson, 1 Burr. 539, it has become an accepted doctrine that this power, based upon necessity, is a common-law incident to the powers of English municipal corporations. Considering the nature of the origin of such corporations, resting in some instances in a royal charter, in others on parliamentary grant, and in others in immemorial custom, with rights wrung through stubborn resistance to oppression, it must at once be recognized that the municipal powers of such corporations stand upon an entirely different plane from those of the state of California, where in every instance the municipal powers are measured by the express terms of written grants issued directly or indirectly from the state. This is pointed out in Herzo v. San Francisco, 33 Cal. 143, where it is said: "It should not fail to be noted that there is a clear distinction between most municipal corporations as they exist in Great Britain and those of more recent date in the United States. The former depend upon prescription for their existence and capacity; while the latter find every element of their jurisdiction within their respective charters." Full assent is given to the rule of necessity, upon which the English decisions rest, that rule being that it is necessary that a corporation shall have the power to purge itself of offending officers. But this language was addressed to conditions here nonexistent, to conditions where Parliament had never attempted to pass a law to meet the needs of such corporations, and where, therefore, if the power of amotion did not exist in the corporation itself, it did not exist at all excepting when a municipal officer might be guilty of an indictable crime and could be proceeded against accordingly. It was to this condition that the language of Lord Mansfield was addressed. But if Parliament had passed a law applicable to all municipal corporations, providing in terms a method for the removal of derelict or recalcitrant officials, only then would there have been any sort of parallel between the English condition and the condition of this state, and even in such a case the parallel by no means would have been perfect. Judge Dillon ventures the opinion that the common-law power of English municipal corporations is possessed by American corporations "in the absence of any express or implied restriction in the charter." Dillon, Mun. Corp. § 242. While Judge Dillon declares that the question is not judicially settled, support is found for his view in certain jurisdictions, and notably in such cases as Mayor of Savannah v. Grayson, 104 Ga. 114, 30 S. E. 693, and Richards v. Clarksburg, 30 W. Va. 491, 4 S. E. 774. These and the cases of their class go to the extent of declaring that such power exists in the corporation as a necessary incident to the objects and purposes for which it is created, in the absence of any prohibition in the law upon the exercise of such powers. But, so far as our investigations have disclosed, in no one of these cases has the state made provision, applicable to all municipal corporations, for the removal of officers by judicial proceeding. We are not in this to be understood as declaring that the removal of a municipal officer by the municipality is such a judicial proceeding as to require the action of formally organized courts of judicature, but indisputably such amotion is the exercise of a judicial function, and the Legislature may have thought that it could, therefore, with greater propriety be intrusted exclusively to the judicial branch of the government. Thus says Mechem (Pub. Offices and Officers, § 455), "proceedings for the removal of an officer for cause are judicial in their nature and must be had before tribunals clothed with judicial power. The fit and appropriate tribunal, therefore, in ordinary cases is the court of law, but the judicial power may be, and even is conferred on the Governor, the mayor, or other officer or board having power of removal." Undoubtedly the Legislature of this state has done this precise thing in the sections of the Penal Code above cited. The case presented then is not the case of necessity. It is not the case where a municipality must be declared to have the power to remove its officers, or it can never clean its house. It is the case where the law has provided general machinery, full and complete, to meet the case of any and all municipal officers, where the necessity for the exercise by the municipality of such power within itself is removed, and where the final question for determination is whether the Legislature in the enactment of laws vesting the general power of amotion in the courts nevertheless designed (by its mere silence) still to leave the full power of amotion with all municipalities, and by these positive enactments to declare only that the municipality could resort to the courts if it desired.

While the question here stated has never been formally presented for determination, this circumstance itself must be construed as in the nature of an admission that throughout the history of the state the power asserted was not supposed to exist. And indeed, the existence of such power is contrary to the whole trend of judicial decision and legislative enactment. Thus, in Von Schmidt v. Widber, 105 Cal. 151, 38 Pac. 682, it is declared by this court in bank, quoting from Dillon on Municipal Corporations that "it is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: (1) Those granted in express words. (2) Those necessarily or fairly implied in or incident to the powers expressly granted. (3) Those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied." And to the same effect is Hyatt v. Williams, 148 Cal. 585, 84 Pac. 41. The necessary deduction to be drawn from this language is that where the Legislature, as in this state, has provided a specific form of proceeding for the amotion of officers, the power of amotion within the corporation ceases to be indispensable to the corporation, and its exercise by the corporation becomes at the most but a convenience.

Moreover, the decisions of this court will be found to rest upon the decided assumption at least that the power of removing municipal officers does not rest within the municipality, unless there be an express grant to this end either in the charter or by general law. Thus in Lorbeer v. Hutchinson, 111 Cal. 273, 43 Pac. 896, where the trustees of the city of Pomona declared the office of city marshal vacant and appointed to fill the vacancy, this court said: "If Lorbeer (the petitioner) was lawfully in office, the trustees could not by declaring the office vacant deprive him of his office. They have no power to remove from office or by any judicial inquiry to declare a vacancy." In Matter of Carter, 141 Cal. 316, 74 Pac. 997, the whole discussion is based upon the power of removal granted by the charter. The same is true in the case of Coffey v. Superior Court, 147 Cal. 525, 82 Pac. 75, where is found such language as this: "Provisions of the charter seem to apply only to some officers and the scheme for the removal of delinquent officers is to that extent incomplete. * * * There is nowhere in the charter any provision which in terms confers exclusive jurisdiction upon the board of trustees to proceed to remove municipal officers, nor is there apparent in any charter provision an intent that this provision should supersede the provisions of the general law found in the Penal Code relative to the removal of delinquent officials from office. * * * The power conferred under the charter is, strictly speaking, the power of expulsion or amotion of its municipal officers. * * * This power of expulsion, amotion or quasi impeachment of delinquent municipal officers has generally been considered, both at common law and in this country, as an incident of corporate existence, and is exercised by the municipality as an administrative duty springing from its political existence and as vital thereto. * * * It is, strictly speaking, this administrative power which is conferred upon the trustees of the city of Sacramento under the charter." In Craig v. Superior Court, 157 Cal. 482, 108 Pac. 310, the provisions of an express grant of power in the charter to the city of Stockton are considered. The provisions of section 16 of article 20 of the Constitution are quoted to the effect that "in the case of any officer or employé of any municipality governed under a legally adopted charter the provisions of such charter with reference to the tenure of office or the dismissal from office of any such officer or employé shall control," and it is held touching the employment, retention, and dismissal of members of the police and fire departments of the city of Stockton that the charter provisions are controlling and exclusive. In Dinan v. Superior Court, 6 Cal. App. 217, 91 Pac. 806, the same question arose touching the provisions of the charter of the city and county of San Francisco, and it was there held in conformity with the provision of the Constitution above quoted that the procedure prescribed by the charter was exclusive. In Croly v. City of Sacramento, 119 Cal. 229, 51 Pac. 323, this court considered the provisions of the charter of the city of Sacramento authorizing the board of trustees to try and remove appointees against whom charges had been preferred. Here the court refused to pass upon the question as to whether or not the city possessed the common-law power of amotion but placed its decision solely upon the charter provision.

It is inconceivable, if the power of amotion of its officers is inherent in a municipal corporation, even when its charter is silent on the subject, that this court would not long ago have so declared and thus have done away with a vast amount of the argumentative reasoning in which it has indulged, and which is and was entirely superfluous, if the contention of appellant herein is sound. Moreover, if the power here contended for was inherent in the municipality there would be little or no import to the language of section 16, art. 20, of the Constitution, which undertakes in express terms to make the provisions of a municipal charter controlling with reference to the tenure of office or the dismissal from office of officers and employés of a municipality, for, if the power exists as is here contended for, this solemn declaration of the Constitution accomplished nothing and at the most was but the recognition of a power already existent.

[2] And, finally, upon this proposition, the legislative enactments have their significance. Section 4386 of the Political Code empowers the mayor "to suspend and with the consent of the common council, to remove any nonelected officer, stating in the suspension or removal the cause thereof." Section 852 of the municipal corporation act (Gen. Laws 1910, Act 2348), which is the governing charter of the city of Roseville, empowers the board of trustees to appoint an "attorney, poundmaster, superintendent of streets, civil engineer and such police and such other and subordinate officers as in their judgment may be deemed necessary and fix their compensation and each of said officers shall hold office during the pleasure of the board." The significance of these legislative declarations is found in this: First, that they are made applicable to nonelected officers and not to elective officers; and, second, if the power contended for inherently exists, it would be stultification for the Legislature to provide with careful detail for the removal of nonelective officers when the city itself possesses the inherent power to remove nonelective as well as elective officers.

It is concluded, therefore, that as to municipal corporations within this state the general law touching the removal of its officers creates an implied restriction upon the exercise of what may be thought to be the inherent power of amotion. The necessity for the existence and exercise of that power being removed, it becomes at the best but a convenience. The power may be, notwithstanding the existence of the general laws, conferred by charter, and, when so conferred, will be construed, depending upon the nature of the language, as being either concurrent as in Coffey v. Superior Court, supra, or exclusive as in Craig v. Superior Court, supra. Const. art. 20, § 16.

The judgment appealed from is therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

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161 Cal. 209

WERNER v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 5,798.)

(Supreme Court of California. Oct. 17, 1911.)

1. Justices of the Peace (§ 159*)—Appeal—Defective Bond—Effect.

Where plaintiff in a suit before a justice of the peace appealed from an adverse judgment, a bond by which he agreed to pay all costs and damages awarded against "the defendant," instead of against "plaintiff," was defective, but was not a nullity, so as to deprive the superior court of jurisdiction of the appeal.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 567, 576; Dec. Dig. § 159.*]

2. Justices of the Peace (§ 159*)—Appeal—Bond—Justification.

Under Code Civ. Proc. § 92, providing that sureties on appeal, or on any bond or undertaking, given in any cause or proceeding before a justice court, may justify before any one of the justices, where a cause in the justice court was assigned for trial to a particular justice, as authorized by section 90, the justification of the sureties on an appeal bond before another justice of the court was proper.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 555; Dec. Dig. § 159.*]

3. Justices of the Peace (§ 159*)—Appeal—Bond—Correction.

Where a bond on appeal from a justice of the peace was defective, in that it provided for the payment of costs and damages to the wrong party, appellant was entitled to correct the error by filing a corrected bond by leave of court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 573, 577; Dec. Dig. § 159.*]

In Bank. Application by Charles Werner for a writ of prohibition against the Superior Court of the City and County of San Francisco and Frank J. Murasky, Judge thereof. Denied, and writ discharged.

F. J. Castelhun, for petitioner. L. Seidenberg, for respondents.

PER CURIAM. This is a petition for a writ of prohibition to restrain the superior court from proceeding with the hearing and determination of a case appealed to it from the justices' court, upon the ground that the superior court had never acquired jurisdiction of the cause upon appeal.

[1] In support of his application petitioner contends that the undertaking given on appeal is so radically defective as to be a nullity, wherefore the superior court never acquired jurisdiction. McCracken v. Superior Court, 86 Cal. 74, 24 Pac. 845. The defect in the undertaking, which it is contended thus completely destroys it, is this: The instrument provides that the sureties will pay all costs and damages awarded against "the defendant"; whereas, the plaintiff being the appellant, it should have read "plaintiff" or "appellant." That this palpable error is not sufficient to vitiate the undertaking and render it a nullity is decided in Swain v. Graves, 8 Cal. 549, under facts and circumstances well-nigh identical with those here presented. It follows, therefore, that the error rendered the undertaking merely defective, and not a nullity.

[2] Under section 90, Code of Civil Procedure, the case in the justices' court was assigned for trial to Justice A. B. Treadwell. Subsequently the sureties justified before Justice Isadore Golden, another justice of the same justices' court. This was after due notice to the defendant. It is contended that this justification was a nullity; but section 92 of the same Code expressly provides that "sureties on appeal or on any bond or undertaking given in any cause or

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

proceeding in said court when required to justify may justify before any one of the justices." The justification, therefore, was not a nullity.

[3] It is made to appear that a corrected undertaking, by leave of the court first had, was filed in the superior court before which the appeal was pending. This was a permissible procedure, and cured the error complained of. Coulter v. Stark, 7 Cal. 245; McCracken v. Superior Court, supra.

Wherefore the relief prayed for is denied, and the writ discharged.

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161 Cal. 208

Ex parte SMITH. (Cr. 1691.)

(Supreme Court of California. Oct. 17, 1911.)

HABEAS CORPUS (§ 92*)—ATTACK OF AFFIRMED JUDGMENT.

One, whose judgment of conviction has been affirmed on appeal, cannot on habeas corpus, claiming that his detention is unlawful for reasons affecting the judgment, urge grounds reviewable on that appeal, though not mentioned in the decision of the appellate court.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 81–87; Dec. Dig. § 92.*]

In Bank. Application of John Smith for writ of habeas corpus, prayed to be directed against W. H. Reilly, Warden. Denied.

John Smith, in pro. per.

PER CURIAM. Habeas corpus. The petitioner is detained by the warden of Folsom Prison under a commitment showing his conviction of the crime of robbery. He claims that his detention is unlawful, for reasons affecting the judgment of the superior court.

His petition, framed by himself, is very meager, but shows with sufficient certainty that he is the same John Smith who was convicted of robbery in June, 1906, in the superior court of San Francisco, and whose conviction was affirmed by the District Court of Appeal in October, 1908. 9 Cal. App. 224, 98 Pac. 546. Every ground of his present petition was reviewable on that appeal; but they were not mentioned in the decision, and they cannot now be urged in a collateral attack upon the judgment.

Writ denied.

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161 Cal. 214

PEOPLE v. BENNETT. (Cr. 1,623.)

(Supreme Court of California. Oct. 18, 1911.)

1. HOMICIDE (§ 253*)—FIRST-DEGREE MURDER—EVIDENCE.

In a prosecution for homicide, evidence *held* to warrant a finding that defendant deliberately armed himself, sought out deceased when he was unarmed, and either provoked a quarrel, or, when the quarrel arose, drew his weapon and shot him with malicious deliberation, and was therefore guilty of first-degree murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 523–532; Dec. Dig. § 253.*]

2. HOMICIDE (§ 22*)—MURDER—INTENT.

There need be no appreciable time between the formation of the deliberate intent to kill and the act of killing in order to establish first-degree murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 35–38; Dec. Dig. § 22.*]

3. HOMICIDE (§ 230*)—FIRST-DEGREE MURDER—INTENT—INFERENCE.

An intent to kill may be inferred from the circumstances of the unlawful act.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 478; Dec. Dig. § 230.*]

4. CRIMINAL LAW (§ 938*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—REPUTATION OF DECEASED.

Where decedent's first assault was mere battery, not of a deadly character, and defendant thereupon immediately shot deceased, who was unarmed, and there was evidence that defendant knew deceased was unarmed, defendant was not entitled to a new trial for newly discovered evidence that the deceased's reputation for peace and quiet in the community was bad, under the rule that such testimony is admissible only when the evidence raises the issue of self-defense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306–2317; Dec. Dig. § 938.*]

In Bank. Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Horace Bennett was convicted of murder, and he appeals. Affirmed.

A. E. Warth and W. C. Shaw, for appellant. U. S. Webb, Atty. Gen., George Beebe, Deputy Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HENSHAW, J. Defendant, informed against for the crime of murder, was adjudged guilty of murder in the first degree and the death penalty was imposed. From this judgment and from the order denying his motion for a new trial he appeals.

Upon appeal the contention is most earnestly urged that the evidence is insufficient to sustain the verdict of murder in the first degree, and that a verdict of manslaughter, at the most, is all that the evidence warrants.

[1] The prosecution showed that John D. Stirling, the deceased, was foreman on a stock ranch in Monterey county; that defendant previous to the homicide had been employed upon the same ranch; that the deceased, finding him asleep when he should have been at work, reported the fact, and defendant was discharged. From his expressions concerning the matter defendant entertained some feeling of bitterness toward deceased upon that account. Defendant obtained employment upon a neighboring ranch. The two met about 11 o'clock in the morning at the Brockman House bar in the town of Gonzales, and there spent their time until 4 or 5 o'clock in the afternoon. They drank together, played cards together, and several times the defendant borrowed small sums of money from the deceased. During this time the defendant accused Stirling of hav-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ing caused him to be discharged. Stirling replied that he had done no more than his duty, and that the defendant had no occasion to harbor ill feeling against him on that account. The defendant replied: "Well, I have no personal feelings, but I know you are the cause of it." More than once the conversation turned upon the fencing of a gap in the hills, defendant declaring that he had been instructed to fence this particular gap, the deceased objecting to it, declaring that he used the gap in the "rodeoing" of his cattle, and, if he found the fence there, he would tear it down, and would tear it down as often as it was built up. The two men continued to drink and as the day wore on their conversation, always harking back to the fencing of the gap, grew more and more acrimonious, until the proprietor feared there would be a fight. He asked the deceased to leave the place to avoid trouble. At this time both men were angry. The deceased replied that he would make no trouble, and did promptly leave the place, going to a nearby saloon. Before he left, however, the deceased had asked a friend in the saloon to lend him his pistol to carry while he was rodeoing as he had broken his own. The friend assented. His pistol, with its belt and cartridges, was behind the bar, and the barkeeper put them on the counter for the deceased to take. Deceased said that he did not want the pistol at that time, but would take it before he left town, and the barkeeper replaced it. It is in this connection urged by the defense that defendant heard the deceased ask for the pistol, and assumed that he was armed. But, if he heard this part of the conversation, it is a fair inference that he heard the rest of it, and thus knew that the deceased did not take the pistol and was not armed. About 10 minutes after deceased's departure defendant left the saloon, went to a nearby store and purchased a revolver and some cartridges, loaded it, thrust it in his pocket, and went to Scattini's saloon where deceased was. Entering, he invited the deceased and the barkeeper to drink with him, and they did. After drinking, the two men engaged in conversation, and again that conversation turned upon the fencing of the gap. The barkeeper testifies: "Bennett and Stirling were standing by the barrel I should judge 15 or 20 minutes, and chewed the rag about that gap. They were talking in an angry voice and pretty loud, but I didn't hear any profane language used or curse words of any kind. I gathered from their conversation that there was a spring of water somewhere around that gap, where cattle went to drink. Bennett said that his boss requested him to close up that gap so people or cattle couldn't pass through. Stirling said if it was closed up he would tear it down. Bennett and Stirling were not drinking at this time. They were feeling pretty good. Finally Stirling stepped up to Bennett and said, 'Since you were up there and chopped wood, you have had it in for me.' Jack Stirling slapped Bennett like that (illustrating with his open palm), and says, 'Take this for that.' Stirling did not swear at Bennett. I am positive that Stirling's hand was open at the time he slapped Bennett's face. He struck Bennett on the left side of his face, but he didn't strike him hard. Stirling's left hand at that time was hanging down empty. As soon as Stirling slapped Bennett, Bennett stepped back about a step, I think, and pulled out his gun and shot. Stirling was standing with both his hands open and extended along down the side of his body. Bennett said nothing before he pulled his gun. He pulled it very quickly. I think it was in his pocket, but I had no time to look because it was very quick. As soon as the first shot sounded, Stirling covered his face with his hands and stepped over and turned to the left, and took three steps, seven or eight feet, and then he got another shot in his back, and he fell. He fell right in front of the slot machine on his stomach, and rolled over toward the bar. Bennett stepped forward after he fired the first shot." Bennett then came forward with his pistol in his hand pointing at Stirling, and said, "Who is the best man?" Stirling was on the floor at the time, and Stirling then said to Bennett, "You are." Bennett went outside and whistled and came back a second time, still with the pistol in his hand, approached within four or five feet of Stirling, pointing his weapon in Stirling's direction, and again asked Stirling who was the best man. Bennett was urged not to go into the saloon any more, that "Jack was down," and he replied, "All right, I won't go in. I have whistled to give myself up." The powder in the pistol was black powder and the first shot, while it missed, was close enough to sting and powder-mark Stirling's face, and probably temporarily to partially blind him. This accounts for the fact that after the first shot he put his hands over his face and turned half staggering away. The bullet in the back caused the wound which was mortal. Defendant surrendered himself, with various remarks: "Come up here. I have just shot a man to show what kind of a man I am. * * * I am sorry I didn't hit him the first shot." A few hours after his arrest he stated, his remarks being voluntary and taken down in shorthand: "And, when he hit me, I shot him like a man. I started to shoot him in the face, and the second shot I shot him in the back. I am sorry I ever shot a man in the back. There is only one thing I am sorry for, and that is that I shot him in the back." Such is the evidence of the prosecution. The story of the defendant, unsupported by other evidence, is this: That he believed Stirling to be a reckless and desperate man; that he thought he was armed; that Stirling struck him, not with his open palm, but a severe blow with his fist; that he staggered from the blow, and saw Stirling, as he thought, attempt to draw a pistol; that believing his life was in danger he drew his own weapon and fired suddenly; that the black powder smoke obscured his vision; and that he fired again through the smoke without being able to see that Stirling's back was toward him. He had for some time contemplated purchasing the pistol, and bought it at this time for no other reason than that he was going that evening back to the ranch. No doubt defendant's passions were somewhat inflamed and his judgment somewhat in abeyance by reason of the whisky which he had drunk. Nevertheless the testimony is that he was not intoxicated, and, even if he were, his voluntary intoxication would afford no excuse for his crime. It is manifest that the jury rejected his account of the homicide, and believed, as the evidence would warrant their believing, that he deliberately armed himself, sought out an unarmed man and either provoked the quarrel, or, when the quarrel arose, drew his weapon and shot him with malicious deliberation.

[2, 3] It is, of course, well settled that there need be no appreciable time between the formation of the deliberate intent and the act of killing, and the intent itself may be inferred from the circumstances of the unlawful act. People v. Hunt, 59 Cal. 430; People v. Suesser, 142 Cal. 364, 75 Pac. 1093; People v. Machuca, 158 Cal. 62, 109 Pac. 886; People v. Mahatch, 148 Cal. 200, 82 Pac. 779. It is not, of course, for this court to declare that a lesser verdict would meet the ends of justice where the verdict actually rendered by a jury from the vicinage finds support in the evidence given.

[4] Defendant moved for a new trial upon the ground of newly discovered evidence, supporting his motion with affidavits of diligence. This newly discovered evidence is embraced in the affidavits of two men which are to the same effect: That they knew the reputation of the deceased for peace and quiet in the community wherein he lived, and that that reputation was bad. Upon the trial defendant had attempted to establish the same fact by two witnesses. But, when the preliminary proof of knowledge was made as to one of these witnesses, the defense refused to ask the question touching deceased's reputation, and the other witness, when asked, testified that he "never knew anything bad about the deceased." Testimony of this character is admissible only when it tends in some way, in connection with the immediate circumstances of the homicide, to show that the defendant had sufficient grounds as a reasonable man to fear that he was himself about to receive at the hands of the deceased some great bodily injury, and that he acted as a reasonable man under the influence of this fear in slaying the deceased. People v. Lombard, 17 Cal. 316; People v. Edwards, 41 Cal. 640; People v. Lamar, 148 Cal. 564, 83 Pac. 993. Usually this kind of evidence finds proper place where there is doubt as to who was the first aggressor, where the immediate circumstances of the homicide make it questionable whether the act was justifiable or not. Here all the circumstances of the homicide were proven by the testimony of eyewitnesses, and the defendant's own account of it would not be strengthened by the evidence which he sought to introduce. Admittedly the deceased was the first aggressor. But this aggression took the form of a mere battery. The defendant himself does not say that the assault was of a deadly character. The defendant then immediately drew his weapon and fired. True, he says that he saw or believed he saw the deceased make a motion as if to draw his pistol, but this is discredited by the testimony of eyewitnesses by the fact that deceased was unarmed, and by the further inference of fact that defendant knew that he was unarmed. It is therefore not at all probable that a different result would be reached by the admission of the newly discovered evidence, and the court's judgment upon the matter will not be disturbed. People v. Buckley, 143 Cal. 390, 77 Pac. 169; People v. Oppenheimer, 156 Cal. 745, 106 Pac. 74.

For these reasons, the judgment and order appealed from are affirmed.

We concur: MELVIN, J.; SLOSS, J.; ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.

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161 Cal. 210

STUART v. BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 5,471.)

(Supreme Court of California. Oct. 18, 1911. Rehearing Denied Nov. 17, 1911.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 20*)—PUBLIC SCHOOLS—TEACHERS—REGULATIONS—VALIDITY.

A resolution by the board of education of San Francisco, requiring teachers and other school employés to reside within the city and county during their employment, is a reasonable exercise of power under San Francisco Charter, art. 7, c. 3, § 1, empowering the board of education to enforce necessary regulations for the government and efficiency of the schools.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 20.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 20*)—PUBLIC SCHOOLS — TEACHERS — REGULATIONS—VALIDITY.

A resolution of a board of education, requiring teachers to reside within the city and county during their employment, is not invalid, as imposing a qualification on teachers in excess of those prescribed by Pol. Code, §§ 1791, 1793.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 20.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Department 2. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Margaret M. Stuart against the Board of Education of the City and County of San Francisco and others. Judgment for plaintiff, and defendants appeal. Reversed.

Percy V. Long, City Atty., and N. J. Manson, Asst. City Atty., for appellants. Mastick & Partridge, for respondent.

HENSHAW, J. This action was to enjoin the defendants, the board of education of the city and county of San Francisco and the superintendent of schools thereof, from enforcing a general resolution passed by the board, requiring teachers and other employés of the school department to reside within the city and county during their terms of office or employment. Upon defendants' refusal to answer after their demurrer was overruled, judgment passed for plaintiff as prayed for, and defendants appeal.

[1] A part of the argument of the appellants is directed to the provisions of the charter of the city and county (article 16, § 2), which declares that "all deputies, clerks, assistants and other employés of the city and county must be citizens of the United States and must during their respective terms of office or employment, actually reside in the city and county and must have so resided for one year preceding their appointment." In this connection, it is argued that school teachers are officers of the city within the contemplation of this provision. Respondent makes answer that the school system is a state, and not a municipal, affair; that school teachers are not officers or employés of the city and county at all, but are employés of the board of education, and that to hold that a teacher is a municipal officer would work incalculable confusion and hardship, and would immediately result in forfeiting the positions of many such teachers under the provision of section 996, subd. 5, of the Political Code, which declares "that an office becomes vacant upon the incumbent ceasing to be an inhabitant of the district, county, city or township of which he was chosen or appointed or within which the duties of his office are required to be discharged." Into these considerations, however, we think it unnecessary to enter, for, aside from them, the charter confers full power upon the board of education (if such a grant of power be needed) to pass the resolution here under review. It declares (article 7, c. 3, § 1), that "in addition to the powers conferred by the general laws of the state, the board of education shall have power: 4. To establish and enforce all necessary rules and regulations for the government and efficiency of the schools and for carrying into effect the school system." In this connection, section 1616 of the Political Code provides that "boards of education are elected in cities under the provisions of the law governing such cities and their powers and duties are as prescribed in such laws except as otherwise in this chapter provided."

In view of the fact that the charter of the city and county of San Francisco requires all of its officers, deputies, clerks, assistants, and other employés, including the members of the board of education itself, to be residents of the city and county, and in view of the further fact that the state law contemplates a like residence of officials within the territory where their duties are to be performed (Pol. Code, § 996), it will not be said that the resolution of the board of education, requiring a residence of teachers within the municipality, is unreasonable. To the contrary, in contemplation of the fact that the teacher stands in loco parentis, that it may become her duty to devote her time to the welfare of individual pupils, even outside of school hours, that the hurrying for boats or trains cannot be regarded as conducive to the highest efficiency on the part of the teacher, that tardiness may result from delays or obstructions in the transportation which a nonresident teacher must use, and, finally, as has been said, that the "benefit of pupils and resulting benefits to their parents, and to the community at large, and not the benefit of teachers, is the reason for the creation and support of the public schools" (Bates v. Board of Education, 139 Cal. 145, 72 Pac. 907), all these, and many more considerations not necessary to detail, certainly make the resolution in question a reasonable exercise of the power of the board of education. Nor can the matters pleaded, namely, that the residence of the plaintiff in the city of Berkeley "does not interfere in any manner with the performance of her duties," be given any weight in such a consideration. It is a conclusion which cannot affect the validity or invalidity of the resolution.

[2] Nor can we agree with respondent that the resolution in question is the imposition of an additional "qualification" which a teacher must possess, which qualification is not within the power of the board of education to exact. True section 1793 of the Political Code, in conjunction with 1791 thereof, does prescribe certain qualifications and give a list of causes and reasons for which teachers may be dismissed or removed, but a regulation concerning residence is not an added "qualification," within the contemplation of this law, any more than would a resolution that a teacher should be free from contagious disease; and it would scarcely be said that if the board of education passed a resolution to that effect that it would add another and an unlawful "qualification" to those prescribed by the Political Code. Nor does it matter in this

case, as respondent argues, that the board of education has no power to dismiss a teacher, except for the reasons prescribed by section 1793 of the Political Code. That section itself contemplates dismissal for insubordination, and clearly a refusal of a teacher to comply with a reasonable regulation of the board would be such insubordination.

For these reasons, the judgment appealed from is reversed, with directions to the trial court to sustain defendants' demurrer.

We concur: MELVIN, J.; LORIGAN, J.

(161 Cal. 220)

Ex parte QUONG WO. (Cr. 1,690.)

(Supreme Court of California. Oct. 19, 1911. Rehearing Denied Nov. 18, 1911.)

1. CONSTITUTIONAL LAW (§ 208*) — CLASS LEGISLATION.

An ordinance divided the business section of a city into seven "industrial districts," and declared the remainder to be a "residence district," and made it unlawful to carry on certain kinds of occupations, including laundries and washhouses, within the residence district. The ordinance was amended, so as to make it unlawful to maintain within the residence district any "stone crusher, rolling-mill, * * * soap factory, or any other works or factory where power other than animal power is used to operate or in the operation of the same, or any haybarn, woodyard, lumber yard, public laundry, or washhouse; provided, that the board of fire commissioners may grant a permit to install an electric motor in any such place in a residence district in which a permit to install a steam boiler has been granted prior to the ordinance." *Held*, that the ordinance on its face did not discriminate against Chinese, or any other race.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 649-677; Dec. Dig. § 208.*]

2. CONSTITUTIONAL LAW (§ 208*) — CLASS LEGISLATION.

The ordinance absolutely prohibits the maintenance of any "* * * public laundry or washhouse" within the residence district, regardless of the kind of power used therein, or whether they existed when the amendment was enacted; and hence there is no discrimination against hand laundries in favor of laundries run by mechanical power, by reason of the permission to substitute electricity for steam power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 649-677; Dec. Dig. § 208.*]

3. CONSTITUTIONAL LAW (§ 208*)—OPERATION AND EFFECT—PROOF OF DISCRIMINATION.

A stipulation merely that several steam laundries operate within the residence district of a city does not show unjust discrimination in the enforcement of an ordinance prohibiting the maintenance of public laundries or washhouses within such district, when petitioner was prosecuted for maintaining a hand laundry therein; it not appearing that they are operating with the city's consent, or that prosecutions have not been instituted against them.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 649-677; Dec. Dig. § 208.*]

4. MUNICIPAL CORPORATIONS (§ 603*)—FIRE LIMITS—ORDINANCES—REASONABLENESS.

An ordinance, defining the residence district of a city as such parts as are not included in the territory constituting the industrial district, as established from time to time by ordinance, does not give the city council power to arbitrarily except from the residence district parts to be added to the industrial district, but requires that the boundaries of any sections added to the industrial district be not unreasonable.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1334; Dec. Dig. § 603.*]

5. EVIDENCE (§ 47*)—JUDICIAL NOTICE.

The Supreme Court cannot take judicial notice that there has been unjust discrimination in excepting small parcels from the residence district of a city as established by ordinance, and adding them to the industrial district; the presumption being in favor of the legality of the action of a legislative body.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 69; Dec. Dig. § 47.*]

6. CONSTITUTIONAL LAW (§ 208*) — CLASS LEGISLATION.

That small parcels, consisting of only one city lot, were excepted by the city council from the "residence district" of a city as fixed by ordinance, within which district certain occupations could not be followed, and added to the "industrial district," when such parcels were surrounded on all sides by parts of the "residence district," does not of itself show unjust discrimination in excepting territory from the residence district.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 649-677; Dec. Dig. § 208.*]

7. CONSTITUTIONAL LAW (§ 295*)—DUE PROCESS OF LAW—POLICE POWER.

Since all property is held subject to the lawful exercise of the state's police power, an ordinance prohibiting laundries within a certain district of a city, denominated the "residence district," would not be invalid, as affecting petitioner, because it prohibited the continuation of his laundry business in premises in which he had an unexpired leasehold interest.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 841; Dec. Dig. § 295.*]

8. NUISANCE (§ 61*)—NUISANCE PER SE—PUBLIC LAUNDRY.

A public laundry is a lawful occupation, and not a nuisance per se, though reasonable regulations may be prescribed for its operation.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 142-151; Dec. Dig. § 61.*]

9. MUNICIPAL CORPORATIONS (§§ 613, 625*)—ORDINANCES—REASONABLENESS.

Lawful occupations, such as laundry business, may be confined to certain limits in the city wherever such restrictions may reasonably be found necessary to protect the public health, morals, and comfort; and an ordinance prohibiting the maintenance of public laundries and washhouses in the part of a city designated as the "residence district" cannot be said to be unreasonable and invalid, though large parts of such district are sparsely built up, in the absence of facts showing unjust discrimination.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1378, 1379; Dec. Dig. §§ 613, 625.*]

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10. MUNICIPAL CORPORATIONS (§ 63*)—ORDINANCES — REGULATION OF BUSINESSES — REASONABLENESS.

Whether restrictions upon the operation of a business in certain portions of a city are reasonably necessary for the protection of health, etc., is primarily for the determination of the city council, and its action will not be disturbed by the courts, unless the regulation has no relation to health, etc., but clearly invades personal or property rights under the guise of police regulation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 155, 1378, 1379; Dec. Dig. § 63.*]

In Bank. Original application for habeas corpus by Quong Wo against C. E. Sebastian, Chief of Police of the City of Los Angeles. Writ discharged, and petitioner remanded to custody.

Geo. S. Hupp, for petitioner. Guy Eddie, City Prosecutor, and Ray E. Nimmo, Deputy City Prosecutor, for respondent.

ANGELLOTTI, J. By ordinance No. 19,500 (new series), adopted by the city council on December 28, 1909, and approved by the mayor December 30, 1909, seven "industrial districts," numbered from 1 to 7, respectively, were established in the city of Los Angeles. By ordinance No. 19,563 (new series), approved January 10, 1910, all of the city of Los Angeles, except those portions of the said city included within the boundaries of such industrial districts, and such fire districts as are now or may be hereafter established and designated as such by ordinance, and also excepting that portion of the said city lying south of Manchester avenue, and also except such portions of the said city as have heretofore been or may hereafter be excepted by ordinance from the said residence district, was established and declared to be a "residence district." By this ordinance, it was declared to be unlawful to maintain or carry on certain kinds of occupation within such residence district. By ordinance No. 21,996 (new series), approved March 8, 1911, the only section of said ordinance No. 19,563 referring to public laundries and washhouses (section 2) was amended to read as follows: "It shall be unlawful for any person, firm or corporation to erect, establish, maintain or carry on within the residence district described in section 1 hereof, any stone crusher, rolling-mill, carpet-beating establishment, fireworks factory, soap factory, or any other works or factory where power other than animal power is used to operate, or in the operation of the same, or any haybarn, woodyard, lumber yard, public laundry or washhouse; provided, that the board of fire commissioners may grant a permit to install and maintain an electric motor in any such place in such residence district in which a permit to install a steam boiler has been granted prior to the adoption of this ordinance; but in no case shall a permit be granted to install an electric motor in any such place except to take the place of a steam boiler in such place, and such permit shall be granted only upon condition that such steam boiler shall be removed from such place and the use thereof discontinued and abandoned immediately upon the installation of such electric motor; and in no case shall a permit be granted to install an electric motor of greater horsepower than the steam boiler so to be removed and abandoned." The substantial change made by the amendment in the original section 2 was to take the term "public laundry or washhouse" from the occupations named prior to the clause, "or any other works or factory where power other than animal power," etc., and to place it in conjunction with the sentence, "or any haybarn, woodyard or lumber yard." By sections 3, 4, and 5 of said ordinance No. 19,563, it was made unlawful to maintain within the residence district certain specified occupations, viz., any hospital, or any asylum for the feeble-minded, or any place where wine or brandy is manufactured, or any blacksmith shop; it being provided that the prohibition should not apply to any such place being lawfully maintained at the time of the adoption of the ordinance. Since the arrest of petitioner upon the charge under which he is held in custody, which was on April 13, 1911, his alleged offense being charge to have been committed on the day of his arrest, an ordinance has been adopted, making, it may be conceded, materially different provision as to the subject-matter of ordinance No. 19,563, and all ordinances amendatory thereto or thereof, and repealing such ordinances, providing, however, that such repeal shall not affect the prosecution and punishment of any one for violation of any of said repealed ordinances, or affect any pending proceeding or action for violation of any such ordinances. Ordinance No. 22,798 (new series), approved June 17, 1911. This case, of course, must be determined upon the law as it stood at the date of petitioner's alleged offense, and without regard to the provisions of the new ordinance.

The petitioner was charged with having, on April 13, 1911, maintained and carried on "a public laundry and washhouse at number 721 South Flower street, in said city, within the residence district of said city of Los Angeles described in section 1 of ordinance No. 19,563 (new series) of said city," etc. He was convicted of this offense, and is held in custody under the judgment pronounced upon such conviction. By this proceeding, he seeks his discharge from such custody.

The petitioner, who is a native and citizen of the empire of China, has been engaged for several years in conducting such laundry and washhouse at said location, occupying the premises under a lease which has two years yet to run. He has paid the customary license required by the city to conduct such business, up to and including the month of June, 1911. As we understand the stipulated facts, no power, other than animal power, was used in the operation of this laundry; it being a hand laundry, as distinguished from a steam, electric, or other power laundry.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The city of Los Angeles contains about 94 square miles. Large portions of the established residence district are sparsely built up, while large portions are closely built up and thickly populated. The established industrial districts are in some places not thickly or closely built up, but some portions are, and where so built up there are large quantities of smoke and soot, and such district "is situate a great distance from petitioner's laundry and his customers." Petitioner's laundry is within the established residence district and in a portion thereof that is apparently closely built up, and not sparsely populated.

Since the adoption of said ordinance No. 19,563, the city council has by ordinance excepted from the residence district and included within the industrial district in excess of 40 small parcels of land. These exceptions are scattered throughout the residence district, and in many instances consist of a single lot in a tract. Ten of these exceptions are specified; one having an area of about 400 feet square, at the corner of Tenth and Main streets, upon which is now in operation an automobile factory, employing steam as the motive power, and having about 200 employés. Other exceptions specified are small parcels of land having a frontage of about 300 feet and a depth of about 125 feet, at the corner of Washington and Arlington streets, at the corner of Washington and Hoover streets, at the corner of Washington and Figueroa streets, on Pico street between Georgia and Sentous streets, etc., and some "ordinary sized city lots." There is, however, nothing to indicate that any of these exceptions was arbitrarily made, or that the situation of the land thus taken from the residence district and placed in industrial territory was not such, with reference to all the circumstances, as to reasonably warrant the action of the city authorities.

The laundry of petitioner is no more dangerous and unsafe to the residents of the locality in which it is situate than any other laundry. Seven persons residing in the vicinity thereof testify that they have not noticed any offensive odors, or loud or unusual noises from its operation, that no sickness has been caused to any of their respective families thereby, and that the operation of the laundry has not in any way affected their safety, comfort, or welfare, or, to their knowledge, that of any resident in the neighborhood. There are several steam laundries operating within said residence district. The foregoing facts are established, for all the purposes of this case, by the stipulation of the parties.

[1] There is absolutely nothing to indicate that the ordinance was intended in any of its features to operate peculiarly against the Chinese, or any other particular race. So far as any contention of unlawful discrimination between persons or classes of persons is concerned, it is certainly fair on its face, applying equally and uniformly to all engaged in the kinds of business enumerated.

[2] It is claimed that the ordinance discriminates without reason against the existing hand laundry and in favor of the existing steam laundry, in that it permits an existing steam laundry to continue upon installing an "electric motor" in lieu of the "steam boiler," while an existing hand laundry is compelled to cease operations altogether. It might be difficult to sustain any such distinction, but we do not think that section 2 of the ordinance, as amended March 8, 1911, can reasonably be construed as meaning what is claimed for it by petitioner. While the intent of the framers is perhaps not as clearly expressed as it might have been, we are of the opinion that the only reasonable construction of the section is that the kinds of places enumerated after the clause, "or any other works or factory where power other than animal power is used to operate," viz., "any haybarn, woodyard, lumber yard, public laundry or washhouse," are all absolutely prohibited within the residence district, whether existing at the time of the amendment or not, and regardless of the kind of power used therein, and that the proviso as to substitution of electric for steam power has no application to any such prohibited place.

[3] There is no foundation for any claim of discrimination in the enforcement of the ordinance. The mere fact that there are several steam laundries operating within the residence district, which is the whole of the stipulation in this regard, is not sufficient to show such discrimination. It does not appear that they are operating with the consent of the city authorities, or that criminal prosecutions have not been instituted against those carrying them on.

[4] We do not construe the ordinance as intended to confer upon the council any arbitrary power in the matter of excepting by ordinance from the residence district such portions of such district as originally established as it sees fit to except. Section 1 of the ordinance simply defines the residence district to be such portions of the city as are not included in the territory constituting the industrial district, as such territory is established or may be established from time to time by ordinance. If the city council has the power to confine an occupation within prescribed limits, it must have the power to make changes in the limits so prescribed;

the only limitation being, as in the case of the original fixing of the limits, that the boundaries fixed must not be unreasonable.

[5, 6] We cannot judicially say that there has been any unreasonable discrimination in any of the changes made by excepting from the original residence district certain comparatively small parcels of land. The presumption is always in favor of the action of the legislative body in such matters, and there is absolutely nothing to indicate that the property so excepted was not so situated, with reference to all the circumstances, as to make it reasonably proper that it should constitute a part of the industrial district, or that there was anything arbitrary in the action of the council in regard thereto. That some of the parcels so excepted were small in area, consisting of only one city lot, and were surrounded on all sides by portions of what was, under the ordinance, "residence district," does not in itself warrant a contrary conclusion.

In this connection, the case of Fischer v. St. Louis, 194 U. S. 361, 24 Sup. Ct. 673, 48 L. Ed. 1018, is in point. An ordinance of the city of St. Louis prohibited the maintenance within the city, without permission from the municipal assembly, of any dairy and cow stable, not in operation at the time of the approval of the ordinance. The Supreme Court of Missouri had upheld the ordinance against the claim that it was void, because of the power given to the municipal assembly to grant permission to maintain such a dairy as it saw fit, and because, therefore, the assembly might discriminate against one applicant and favor another. Disposing of this claim, the court said: "We cannot and shall not indulge any such presumption against the integrity of the municipal assembly, but shall * * * assume that the municipal assembly, upon granting permission, will inquire and determine whether the place and neighborhood is a proper one in which to allow a dairy to be maintained, and will act impartially." City of St. Louis v. Fischer, 167 Mo. 654, 663, 67 S. W. 872, 875 (64 L. R. A. 679, 99 Am. St. Rep. 614). The United States Supreme Court said: "We do not regard the fact that permission to keep cattle may be granted by the municipal assembly as impairing in any degree the validity of the ordinance, or as denying to the disfavored dairy keepers the equal protection of the laws. Such discrimination might well be made where one person desired to keep two cows and another fifty; where one desired to establish a stable in the heart of the city and another in the suburbs; or where one was known to keep his stable in a filthy condition, and another had established a reputation for good order and cleanliness. * * * The question in each case is whether the establishing of a dairy and cow stable is likely, in the hands of the applicant, to be a nuisance or not to the neighborhood, and to imperil or conduce to the health of its customers. As the dispensing power must be vested in some one, it is not easy to see why it may not properly be delegated to the municipal assembly which enacted the ordinance. Of course, cases may be imagined where the power to issue permits may be abused, and the permission accorded to social or political favorites and denied to others, who, for reasons totally disconnected with the merits of the case, are distasteful to the licensing power. No such complaint, however, is made to the practical application of the law in this case, and we are led to infer that none such exists. We have no criticism to make of the principle of granting a license to one and denying it to another, and are bound to assume that the discrimination is made in the interest of the public, and upon conditions applying to the health and comfort of the neighborhood. [Citing cases.] * * * We see no difficulty in vesting in some body of men, presumed to be acquainted with the business and its conditions, the power to grant permits in special cases. It has been held in some of the state courts to be contrary to the spirit of American institutions to vest this dispensing power in the hands of a single individual [citing authorities], and in others that such an authority cannot be delegated to the adjoining lot owners. [Citing authorities.] But the authority to delegate that discretion to a board appointed for that purpose is sustained by the great weight of authority [citing authorities], and by this court the delegation of such power, even to a single individual, was sustained in Wilson v. Eureka City, 173 U. S. 32 [19 Sup. Ct. 317, 43 L. Ed. 603], and Gundling v. Chicago, 177 U. S. 183 [20 Sup. Ct. 633, 44 L. Ed. 725]."

[7] Nothing is better settled than the proposition that property is held subject to the lawful exercise of the police power; and the fact that petitioner has an unexpired leasehold interest in the premises upon which he conducts his laundry is therefore of no consequence in determining the question of the validity of the ordinance. See Grumbach v. Lelande, 154 Cal. 684, 98 Pac. 1059, and cases there cited.

This brings us to what we deem the main contention in this proceeding. Is the business of operating a public laundry or washhouse of such a nature that it may be confined, in the lawful exercise of the public power, within defined limits in a city or town?

[8] It must be admitted, of course, that the business of conducting a public laundry is a lawful and necessary occupation, and that such a laundry is not necessarily a nuisance per se. But this fact alone does not prevent the enactment of such regulations regarding it as may be reasonably found necessary for the safety, health, and comfort of society at large. There are many lawful

and necessary occupations, not constituting nuisances per se, as to which such regulations by a city have been found necessary. It was said in Ex parte Lacey, 108 Cal. 326, 41 Pac. 411, 38 L. R. A. 640, 49 Am. St. Rep. 93, involving the question of the validity of an ordinance prohibiting the operation of any steam shoddy machine, or steam carpet-beating machine, within 100 feet of any church, schoolhouse, or dwelling house: "Indeed, as to nuisances per se, the general laws of the state are ample to deal with them. But the business here involved may properly be classed with livery stables, laundries, soap and glue factories, etc., a class of business undertakings in the conduct of which police and sanitary regulations are made, to a greater or less degree by every city in the country."

Cases in which municipal regulations as to the carrying on the laundry business have been upheld as constituting a reasonable exercise of the police power are numerous. While the cases usually involved simply regulations as to the manner of carrying on the business, without prohibiting it in any particular locality, it has been held in this state that an ordinance prohibiting the carrying on of the business within a prescribed portion of a town is a lawful exercise of the police power. See In re Hang Kie, 69 Cal. 149, 10 Pac. 327. The correctness of this decision has never, so far as we can ascertain, been questioned by this court or the United States Supreme Court. Nothing said in Ex parte Sing Lee, 96 Cal. 354, 31 Pac. 245, 24 L. R. A. 195, 31 Am. St. Rep. 218, can reasonably be held to disapprove it. In the latter case the ordinance held invalid prohibited the carrying on of such business in all but two blocks of Chico, without a permit from the board of trustees of the town, and it was made a prerequisite to the obtaining of such permit that the person applying should have first obtained the written consent of a majority of the real property owners within the block in which it was proposed to carry on such business, and also of the four blocks immediately surrounding such block. It was simply held that the effect of this provision was to commit the right to carry on such business at all, in all but two blocks of the town, to the unrestricted will and caprice of a majority of the real property owners of the block upon which it was proposed to establish such laundry, and of the four blocks immediately surrounding the same, and that this constituted an unauthorized interference with the right of a person to engage in a lawful occupation, and the right of the owner of property to devote it to a lawful purpose. Nor do we think that the Hang Kie Case is overruled or questioned by Ex parte Whitwell, 98 Cal. 73, 83, 32 Pac. 870, 873 (19 L. R. A. 727, 35 Am. St. Rep. 152). The rule declared in the last-mentioned case that "a law or ordinance, the effect of which is to deny to the owner of property the right to conduct thereon a lawful business, is invalid, unless the business to which it relates is of such a noxious or offensive character that the health, safety, or comfort of the surrounding community requires its exclusion from that particular locality," is not necessarily opposed to such decision. In Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, the ordinances involved were held unenforceable against the plaintiff in error, because they not only *seemed intended* to confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons; but that their practical administration had been directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they were applied with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is guaranteed.

[9, 10] There can be no question that the power to reguate the carrying on of certain lawful occupations in a city includes the power to confine the carrying on of the same to certain limits, whenever such restrictions may reasonably be found necessary to subserve the ends for which the police power exists, viz., to protect the public health, morals, safety, and comfort. It is, of course, primarily for the legislative body clothed with this power to determine when such regulations are essential, and its determination in this regard, in view of its better knowedge of all the circumstances, and the presumption that it is acting with a due regard for the rights of all parties, will not be disturbed in the courts, unless it can plainly be seen that the regulation has no relation to the ends above stated, but is a clear invasion of personal or property rights under the guise of police regulation. In the case of Grumbach v. Lelande, 154 Cal. 679, 98 Pac. 1059, in which this court declared the well-settled rule last stated, it is said: "It is well settled that it is entirely within the police power to limit the conduct of the liquor or other businesses coming within its regulatory scope or to exclude such businesses from specified districts"—citing cases. The limitation in the case last cited was in regard to the business of selling intoxicating liquors, but the power is by no means confined to occupations of that character, and, whatever be the business or occupation to which it is attempted to be applied, the question of the validity of the limitation depends on whether it has some relation to the ends for which the police power is conferred. The necessity of such regulation in the case of necessary and lawful occupations carried on in cities and towns was recognized by the Supreme Court of the United States in Crowley v. Christensen, 137 U. S. 90, 11 Sup. Ct. 15, 34 L. Ed. 620, where it is said: "Some occupations by the noise made in their pursuit, some by the odors they engender, and some by the dangers accompanying them require regulation as to the locality in which they shall be conducted." That the power to regulate includes the power to confine certain occupations within prescribed limits in a city has been held in many cases, of which the following are examples: Ex parte Byrd, 84 Ala. 17, 4 South. 397, 5 Am. St. Rep. 328; In re Wilson, 32 Minn. 145, 19 N. W. 723; Shea v. City of Muncie, 148 Ind. 14, 46 N. E. 138; Cronin v. People, 82 N. Y. 318, 37 Am. Rep. 564; City of Newton v. Joyce, 166 Mass. 83, 44 N. E. 116; State v. Beattie, 16 Mo. App. 131; Ex parte Lacey, 108 Cal. 326, 41 Pac. 411, 38 L. R. A. 640, 49 Am. St. Rep. 93. In the last-mentioned case, the limitation was, as we have seen, regarding the operation of a steam shoddy or steam carpet-beating machine; in State v. Beattie, supra, a livery stable; in City of Newton v. Joyce, supra, a livery stable for more than four horses; in Cronin v. People, supra, the slaughtering of cattle; in Ex parte Byrd, supra, the selling of fresh meat; and in the other cases the sale of intoxicating liquor. Warrant for this character of regulation in regard to all these occupations and many others that might be named is to be found in the fact that it may reasonably be determined necessary to the health, morals, safety, or comfort of the people of a city. It was said by this court, in the Matter of Yick Wo, 68 Cal. 297, 9 Pac. 141, 58 Am. Rep. 12, quoting from Chancellor Kent: "Unwholesome trades, slaughterhouses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and burial of the dead may all be interdicted by law, in the midst of dense masses of population, on the general and rational principle that every person ought to so use his property as not to injure his neighbor; and that private interests must be made subservient to the general interests of the community. 2 Kent, Com. 340."

In the San Chung Case, 11 Cal. App. 511, 105 Pac. 609, an ordinance prohibiting the carrying on of a public laundry or washhouse in the city of Sacramento, in any building that shall be occupied as a store, restaurant, or saloon, or that is frequented or occupied by many persons, or that is occupied as a stopping place by transient guests, etc., or in any annex or outhouse of such a building, was sustained as being a warrantable exercise of the police power in the matter of the protection of the health of the people. It was recognized by the court, in accord with the claim of the city, "that the conditions under which laundries are operated are favorable for the propagation of disease, that the soiled garments received and handled in such places are liable to communicate deleterious germs to the circumambient atmosphere, giving rise to danger of infection to persons coming into close proximity to these surroundings." It was said: "Formerly such legislation would have been regarded as an unwarranted encroachment upon the rights of the individual; but, in view of the progress of the medical profession, the better understanding of the nature of disease and its transmission, and the broader conception of the duty of the municipality in regard to the preservation and protection of the public health characteristic of the present age, it seems upon its face to embody a sensible and reasonable restriction, bearing a direct and efficacious relation to the accomplishment of a legitimate purpose of police and sanitary legislation. At least, in the absence of any evidence to that effect, we cannot say that the public health is not thereby promoted, or that the method adopted is unreasonable and unnecessarily oppressive." This court subsequently refused to issue a writ of habeas corpus in this matter, thus practically sustaining the ordinance as a proper exercise of the police power.

Doubtless the same considerations of public health would warrant a court in sustaining the action of a municipality in prohibiting the operation of public laundries in a densely populated neighborhood devoted to residence purposes; that is, the court, in such a case, in the absence of any evidence to that effect, could not say that the public health is not promoted by such a regulation, or that the same is "unreasonable and unnecessarily oppressive." The design of the ordinance here involved undoubtedly was to protect such portions of the city of Los Angeles as are devoted principally to residence purposes from the dangers and discomfort attendant upon the operation of certain kinds of business which, while not necessarily nuisances per se, have always been recognized as proper subjects of police regulation. We do not feel warranted in saying that, as to public laundries and washhouses, the conclusion of the city council was clearly unreasonable. As was said in Re Smith, 143 Cal. 372, 77 Pac. 182: "As has been said, there must always be left a large discretion in the legislative body, with the exercise of which the courts will not and have no desire to interfere. Nor will they in any event interfere, except where the case is plain that needless oppression is worked and constitutional rights invaded. * * * In city ordinances, as distinguished from county ordinances, the interest and requirements for protection of a thickly settled and growing community will often be widely different from those of sparsely settled and thinly inhabited rural districts. An ordinance limiting, regulating, or even prohibiting, in a certain district within the corporate limits of a city, may be perfectly reasonable, where like limitations, restrictions, and prohibitions as to some district within the county, arbitrarily carved out, would be oppressive and unreasonable in the extreme. Owing to the peculiar conditions existing in cities, courts are not keen to question the wisdom of the legislative exercise of their police power in these respects." It is enough for the courts in such cases that "there may have been reasons actuating the council, good and sufficient in themselves though not clearly appearing from a mere reading of the ordinance itself." Grumbach v. Lelande, supra, 154 Cal. 685, 98 Pac. 1059. We cannot say that the contrary so clearly appears from what is shown in this case, as to warrant us in holding the regulation void.

The mere fact that "large portions of the residence district are sparsely built up" cannot affect the determination of this proceeding. Doubtless it was assumed by the city council that such portions would not be "sparsely populated" for any great length of time, an assumption probably warranted by the growth and population of the city during the last few years. So there is nothing in the action of the council in including such portions to indicate any improper design on its part. But the answer to petitioner's claim in this behalf is that his laundry is not situated within any portion of the district that is "sparsely populated," and that it does not appear that any place prohibited by the ordinance is maintained, or is desired to be maintained, within any portion of the district that is "sparsely populated." It follows that it does not appear that the constitutional rights of any one are invaded by the inclusion of such "sparsely populated" territory.

We do not see how the facts shown by the affidavits of parties living near petitioner's laundry affect the question of the validity of the regulations.

The writ is discharged, and the petitioner remanded to the custody of the chief of police of the city of Los Angeles.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.

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161 Cal. 204

CITY OF LOS ANGELES v. WESTERN UNION OIL CO. (L. A. 2,584.)

(Supreme Court of California. Oct. 17, 1911. Rehearing Denied Nov. 16, 1911.)

1. Taxation (§ 376*)—Corporate Franchises—Method of Assessment.

A proper method of ascertaining the value of a corporate franchise is to deduct from the aggregate market value of its shares the assessed value of its tangible property, the difference being the assessable value of the franchise; such method not contravening Pol. Code, § 3650, subd. 15, requiring each franchise to be entered in the assessment book without combining it with other property or the valuation thereof.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 625, 629–631; Dec. Dig. § 376.*]

2. Taxation (§ 376*)—Corporate Sureties—Excessive Valuation—"Cash Value"—"Full Cash Value"—"Market Value"—"Value."

"Market value" is synonymous with the terms "value" and "full cash value," defined by Pol. Code, § 3617, as the amount at which the property would be taken in payment of a just debt from a solvent debtor, and the market value of stock, fairly represents its full cash value in absence of exceptional circumstances giving it an abnormal value, so that any inference of fraud by the placing of an excessive valuation on stock, taken as a basis for assessing a corporate franchise, is rebutted by a showing that the value of the franchise was ascertained by the approved method of deducting from the aggregate market value of its stock, the value of its tangible property, and taking the difference as the franchise value.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. 376.*

For other definitions, see Words and Phrases, vol. 1, pp. 998, 999; vol. 4, p. 2997; vol. 5, pp. 4383–4388; vol. 8, pp. 7717, 7597, 7826.]

3. Taxation (§ 117*)—Corporate Franchises—Assessment—Defenses.

The fact that the franchise of other corporations escaped assessment on the same basis as defendant's franchise would not excuse defendant from paying its franchise assessment properly made.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 117.*]

4. Taxation (§ 117*)—Corporate Franchises—Discrimination.

The fact that a franchise tax is not assessed against the franchise of a foreign corporation is not a discrimination making the assessment of a franchise tax on a domestic corporation invalid; the franchise being assessed at the principal place of business.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 117.*]

In Bank. Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by the City of Los Angeles against the Western Union Oil Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Gibson, Trask, Dunn & Crutcher (E. E. Bacon and Henry M. Young, of counsel), for appellant. Leslie R. Hewitt, City Atty., and John W. Shenk, Asst. City Atty., for respondent.

PER CURIAM. This action was instituted to recover from the defendant $16,654.24 taxes, with 10 per cent. penalty added thereto for nonpayment thereof and interest. This represented the tax upon defendant's "franchise to be a corporation" assessed for $1,423,555. The value of this franchise was arrived at by multiplying the amount which the shares of defendant corporation were selling for upon the stock exchange in the city of Los Angeles on the first Monday in

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

March, 1907 ($303 per share), by the total number of shares of the capital stock of the corporation and deducting therefrom the assessed value of all the other property of the corporation, namely, its leasehold interest in lands in Santa Barbara county, together with derricks, oil-boring machinery, tanks, reservoirs, and oil assessed at $82,580 and money in hand amounting to $8,865. The sum so reached as the value of the franchise of the corporation was by the assessor divided in two and 50 per cent. of it, the sum above given, fixed as the assessment value of the franchise. Upon these facts the trial court gave judgment for plaintiff, and from that judgment defendant appeals.

The trial court found as follows: "In the opinion of the court the value placed thereon, to wit, the sum of $1,323,555, was grossly excessive, but the court holds that it has no jurisdiction to review the action of the board of equalization of said city of Los Angeles in fixing the value of said franchise to be a corporation at the sum of $1,323,555, and also that the method pursued by the assessor in arriving at the value of the franchise was in accordance with the rule established by the Supreme Court."

[1] The trial court truly declares that the method adopted by the assessor in this instance is in accordance with the rule established by the decisions of this court. In Crocker v. Scott, 149 Cal. 575, 592, 87 Pac. 102, 109, it is said: "It is settled law in this state that a proper method for ascertaining the value of the franchise of a corporation is by deducting from the aggregate market value of its shares the value of its tangible property, and taking the difference as the value of the franchise. See San Jose Gas Co. v. January, 57 Cal. 614; Spring Valley Waterworks v. Barber, 99 Cal. 36, 38 [33 Pac. 735, 21 L. R. A. 416]; Bank of California v. San Francisco, 142 Cal. 276, 287 [75 Pac. 832, 64 L. R. A. 918, 100 Am. St. Rep. 130]."

[2] To the argument of the appellant that the assessment in this instance is so grossly excessive as to compel the belief that it was made without the exercise of judgment and therefore carries upon it the impress of constructive fraud (Postal T. Co. v. Dalton, 119 Cal. 604, 51 Pac. 1072; Whatcom County v. Land Co., 7 Wash. 101, 34 Pac. 563; Arosin v. Mortgage Co., 80 Minn. 277, 83 N. W. 339; Southern Oregon Co. v. Coos County, 39 Or. 185, 64 Pac. 646; Merrill v. Humphrey, 24 Mich. 170), the complete answer is that an excessive valuation by itself alone is not evidence of fraud (Templeton v. Pierce Co., 25 Wash. 377, 65 Pac. 553; East St. Louis Ry. Co. v. People, 119 Ill. 182, 10 N. E. 397; Burton Stock Car Co. v. Traeger, 187 Ill. 9, 58 N. E. 418), and any inference or presumption of fraud arising from merely excessive valuation is at once repelled in this case by proof that the method adopted of fixing that valuation was the method sanctioned and directed by the highest court of the state. The assessor took the market value of the stock on a given day, and that market value is synonymous with "value" and "full cash value" defined by section 3617 of the Political Code. It is not contended that there were exceptional or extraordinary conditions giving an abnormal value to the stock at the moment of time fixed by the assessor for the taking of its market value, and, in the absence of such abnormal or extraordinary circumstances, the market value fairly represents the full cash value. Crocker v. Scott, 149 Cal. 575, 87 Pac. 102.

[3, 4] The fact, if it be a fact, that the franchises of other corporations escaped a like assessment would not relieve appellant from the duty of paying the assessment upon its franchise properly levied, nor can the payment of the tax be avoided under appellant's last contention that the tax is discriminatory against domestic corporations, in that it is not levied against the franchises of foreign corporations. The corporate franchise is to be assessed at the principal place of business of the corporation and, as the principal place of business of a foreign corporation is without the state, its franchise cannot be assessed herein. Foreign corporations and domestic corporations alike are required to pay taxes upon all the property owned by such corporations and within the state.

We have not discussed at length the proposition urged that under the Code "each franchise must be entered in the assessment book without combining the same with other property or the valation thereof" (Pol. Code, § 3650, subd. 15), and that in this instance under the guise and name of assessing franchise there has been assessed the good will, the prospective dividends, and the speculative value of the stock, for the reason that these questions must be deemed concluded by the language of Crocker v. Scott above quoted.

The judgment appealed from is therefore affirmed.

161 Cal. 718

WESTERN UNION OIL CO. v. LOS ANGELES COUNTY. (L. A. 2,578.)

(Supreme Court of California. Oct. 17, 1911. Rehearing Denied Nov. 16, 1911.)

In Bank. Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by the Western Union Oil Company against the County of Los Angeles. From a judgment for defendant, plaintiff appeals. Affirmed.

Gibson, Trask, Dunn & Crutcher (Ward Chapman and Edward E. Bacon, of counsel), for appellant. J. D. Fredericks, Dist. Atty., and Hartley Shaw, Chief Deputy Dist. Atty., for respondent.

PER CURIAM. This action was instituted by the plaintiff to have an assessment of its franchise for the fiscal year 1907–08 declared illegal and void. The case presents precisely the questions considered and decided in City of

Los Angeles v. Western Union Oil Company, 118 Pac. 720 (L. A. No. 2,584), and for the reasons therein given the judgment appealed from is affirmed.

17 Cal. App. 58

Ex parte LEE JOHN. (Cr. 350.)

(District Court of Appeal, First District, California. Sept. 7, 1911.)

1. DEAD BODIES (§ 5*)—DISINTERMENT—COUNTY ORDINANCE—VALIDITY.

A county ordinance, prohibiting disinterment of dead bodies without permission of the county health officer, and imposing a fee of $10 for permits unless the body is to be reinterred in the county, is not invalid as conflicting with Act 1878, as amended in 1889 (Gen. Laws 1909, Act 545), regulating disinterment of remains and transportation thereof in cities, towns, and cities and counties, nor does it conflict with Act March 18, 1905 (St. 1905, p. 115), providing for registration of deaths, nor with St. 1907, p. 893, providing for preservation of the public health by regulating transportation, etc., of dead bodies.

[Ed. Note.—For other cases, see Dead Bodies, Dec. Dig. § 5.*]

2. DEAD BODIES (§ 5*)—DISINTERMENT—COUNTY ORDINANCE—VALIDITY.

Nor is the ordinance void as being designed to raise revenue.

[Ed. Note.—For other cases, see Dead Bodies, Dec. Dig. § 5.*]

Application by Lee John for writ of habeas corpus. Writ discharged, and petitioner remanded to custody.

Wm. Hoff Cook, Charles Steward, and Jas. A. Cooper, for petitioner. Franklin Sward, Dist. Atty., for respondent.

HALL, J. Petitioner was held in custody by the sheriff of the county of San Mateo, under a judgment rendered upon his conviction of having violated the provisions of an ordinance, No. 176, relating to the disinterment and removal of remains of deceased persons, interred within the limits of San Mateo County, and adopted by the board of supervisors of said county in the month of July, 1901. In this proceeding the petitioner attacks the validity of the ordinance itself, and makes no point as to the sufficiency of the complaint as stating an offense under the ordinance, if the ordinance be valid. It is substantially charged in the complaint upon which petitioner was convicted that he disinterred a dead body without first making application for, and obtaining a permit so to do, from the health officer of San Mateo county, as required by said ordinance. We also understand that the district attorney of San Mateo county, who appeared in opposition to the writ, concedes that the only offense charged against petitioner is that of violating said ordinance. The only question presented to this court for decision is thus the question as to the validity of the ordinance.

[1] The first and principal contention of petitioner is that the ordinance in question is in conflict with an act entitled "An act to protect public health from infection caused by exhumation and removal of the remains of deceased persons," adopted in 1878, and amended in 1889 (Gen. Laws 1909, Act 545). This act was certainly in force at the time of the passage of the ordinance, and if the ordinance is in conflict with the statute the ordinance never had any validity. Banaz v. Smith, 133 Cal. 102, 65 Pac. 309. The question is thus presented: Are the provisions of the ordinance in question in conflict with the provisions of the statute? For it is not denied that the board of supervisors may make and enforce within the county all such police and sanitary regulations as are not in conflict with general laws. Pol. Code, § 4041, subd. 28; Const. art. 11, § 11.

The first section of the ordinance provides that: "It shall be unlawful to disinter or exhume from any grave, vault or other burial place the body or remains of any deceased person interred within the limits of said county of san Mateo, state of California, unless the person or persons so doing shall have first complied with all the requirements of this ordinance."

The second section provides that: "Before the body or remains of any deceased person which shall have been buried or interred in any grave, vault or other burial place within the limits of said county of San Mateo, shall be disinterred, exhumed or removed, the person or persons so desiring to disinter, exhume or remove such body or remains shall make application to the health officer of said county of San Mateo." The section proceeds further to set forth the matters that must be stated in the application.

The third section provides that: "Upon the receipt of the application mentioned in section two of this ordinance, it is made the duty of the health officer of said county of San Mateo to investigate said application, and ascertain whether the disinterment or removal of the remains of the person in said application mentioned can be made without danger to the public health, and if satisfied thereof said health officer shall grant said application, and shall issue therefor a permit to be executed in triplicate." The section further provides for the form of the permit, and provides that the health officer may, if deemed necessary for the safety of the public health, require such body or remains when exhumed to be immediately placed in a zinc-lined box hermetically sealed. Further provisions are made in said section for the collection of a fee of $10 and the disposition thereof by the health officer.

Section 4 prohibits the keeper of cemeteries from allowing remains of deceased persons buried in such cemetery from being disinterred or removed without first receiving and taking up the permit of the health officer, and requires such keeper of the cemetery to file and keep the permit, and make certain records pertaining to the removal of the remains.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Section 5 provides that no fee shall be collected where the body is to be interred in another place in the county of San Mateo.

Section 6 fixes the penalty for the violation of any of the provisions of the ordinance, and section 7 provides for the taking effect of the ordinance.

The ordinance, it is thus seen, contains quite complete regulations concerning the disinterment of the remains of deceased persons, wherever buried within the limits of the county of San Mateo, and regulates and requires a permit for such disinterment in all cases, though no fee is required for such permit where the body is to be reinterred in the county of San Mateo.

On the other hand, a careful examination of the statute in force when the ordinance was passed (Act 545, p. 81, Deering's Gen. St. [Edition of 1909]) discloses that the act relates only to the disinterring of the remains of deceased persons buried within the limits of some city, town, or city and county, and the transportation of such disinterred remains through the streets of some city, town, or city and county, and has no application to the removal of remains of deceased persons from one place of interment to another place of interment within this state, except where the body has not been buried for more than one year.

The first section of the act in question provides that: "It shall be unlawful to disinter or exhume from a grave, vault, or other burial place, the body or remains of any deceased person, unless the person or persons so doing shall first obtain from the board of health, health officer, mayor, or other head of the municipal government of the city, town, or city and county where the same are deposited, a permit for said purpose." The grammatical construction of this sentence requires that the permit shall be issued by one or other of the designated officers of the *city, town, or city and county* where the remains *are deposited.* Under this sentence no permit is required unless the remains are deposited or buried in some city, town, or city and county. The remaining part of the section provides: "Nor shall such body or remains disinterred, exhumed or taken from any grave * * * be removed or transported through the streets or highways of any city, town, or city and county, unless the person or persons removing or transporting such body or remains shall first obtain from the board of health or health officer (if such board or officer there be) and from the mayor or other head of the municipal government of the city or town, or city and county, a permit in writing so to remove or transport such body or remains in and through such streets and highways." Here again the permit is issued only by an officer of the city, town, or city and county through whose streets it is desired to transport the body. No attempt in this section seems to be made to regulate the exhumation of bodies except from places of burial or deposit within municipalities, nor to require a permit for the transportation of such exhumed bodies except through the streets of such municipalities.

That this construction of the section is correct is strengthened by the wording of the next section. After providing for the conditions upon which permits may be issued and the contents thereof, it proceeds as follows: "The officer of the municipal government of the city or town or city and county, granting such permit shall require to be paid for each permit the sum of ten dollars," etc.

Section 3 provides a penalty for disinterring, exhuming, or removing from a grave, vault, or burial place the body of a deceased person without a permit therefor. While this language is more general than the language of the two preceding sections, it must be read in connection therewith, and thus read only penalizes those who have violated the preceding sections.

Section 4 fixes the penalty for transporting the disinterred remains of deceased persons through the streets or highways of any city or town, or city and county, without a permit, as described in section two.

Thus far the provisions of the act seem aimed in the main only at protecting the inhabitants of the more thickly populated portions of the state, to wit, the inhabitants of cities, towns, and cities and counties, from the dangers to be feared from the exhumation and transportation of disinterred bodies of deceased persons.

Section 5 provides a reward for informers of violations of the act.

Section 6 still further restricts the operation of the act, and sounds the keynote to the purpose and object of its enactment. It provides: "Nothing in this act contained shall be taken to apply to the removal of the remains of deceased persons from one place of interment to another cemetery or place of interment within this state; provided that no permit shall be issued for the disinterment of any body unless such body has been buried for one year or more, without the written consent of the mayor, chairman of the board of supervisors, or city council of any municipality of the state." In other words, the provisions of this act only apply where the body is to be removed to some place without the state, except where the body has been buried for not more than one year.

A comparison of the provisions of the ordinance with the provisions of the statute discloses that both deal with the same general subject, to wit, the disinterment of the remains of deceased persons. The ordinance contains requirements not contained in the statute, and is much more extensive in its scope, and operates over the entire territory of the county alike, while the statute, if we are correct in our reading of it, operates only within cities, towns, and cities and counties, at least so far as the disinterring of bodies is concerned, which is the only matter regulated by the ordinance.

These conditions as to the scope of the statute and of the ordinance bring this case within the rule approved in Ex parte Hong Shen, 98 Cal. 681, 33 Pac. 799; In re Murphy, 128 Cal. 29, 60 Pac. 465; and In re Hoffman, 155 Cal. 115, 99 Pac. 517, 132 Am. St. Rep. 75.

In the Hong Shen Case it was held that an ordinance is not in conflict with a state law simply because it makes other and different regulations for the sale of an article of commerce than those provided by a statute of the state.

In the Murphy Case it was held that it was competent for an ordinance to prohibit all games played for money, though such general language included games prohibited by the statute; that in such case the ordinance would not be void and would be given operation as to the games not prohibited by the statute. Murphy was charged under the ordinance with playing keno, which it was claimed was a banking game and thus included within the games prohibited by the statute. The court declined to take judicial notice of the fact that keno was a banking game. Under the doctrine of this case the ordinance under which petitioner was charged should be given operation as to disinterments of remains not buried in a city, town, or city and county, even though it should be held inoperative as to disinterments in such municipalities.

In the Hoffman Case it was held that an ordinance that made another, different, and more onerous regulation for the sale of milk than that prescribed by the statute was not for that reason in conflict with such statute or void. The state law prohibited the sale of milk unless it was of a certain standard. The ordinance required a different and higher standard. The court said: "Nor is it any objection to the validity of the ordinance that its regulatory provisions and the penalty for its violation differ from those of the state law."

Counsel for the petitioner attacks the soundness of the doctrine approved in the Hoffman Case, and urges that it is in conflict with other cases decided in this state. It is sufficient for us to say that it is the very latest decision of the highest court of this state upon the subject, and is of binding authority upon this court.

In re Desanta, 8 Cal. App. 295, 96 Pac. 1027, cited by petitioner, and decided by this court, cannot, since the decision in the Hoffman Case, be considered as authority.

In re Sic, 73 Cal. 142, 14 Pac. 405, simply holds "that there is a conflict where the ordinance and the general law punish precisely the same acts." The concluding sentence of the opinion is: "We do not wish to be understood as holding that the sections of the ordinance which make criminal other acts not punishable under the general law are void because the Legislature has seen fit to legislate upon the same subject."

The gist of the decision in Ex parte Keeney, 84 Cal. 304, 24 Pac. 34, also cited by petitioner, is to the effect that the general law required the health officer of the city and county of San Francisco to issue burial permits under certain conditions, and that an ordinance that attempted to punish him for doing what the general law not only authorized but required him to do was void.

In Ex parte Grey, 11 Cal. App. 125, 104 Pac. 476, this court simply held that an ordinance that attempted to require plumbers to obtain a license to carry on the plumbing business, from a special board created under the ordinance, was in direct conflict with an act entitled "An act to grant to boards of health or health officers in cities and cities and counties the power to regulate the plumbing and drainage of buildings, and provide for the registration of plumbers," and which provided that a license to carry on the plumbing business shall be issued only after a satisfactory examination by the board of health.

The case of People v. Newman, 96 Cal. 605, 31 pac. 564, also cited by petitioner, presented a case of a direct conflict between an ordinance of the board of supervisors, attempting to establish a fire department and to provide for the appointment of fire commissioners, with an act that was a constituent part of the charter and established a fire department, and provided for the appointment of the fire commissioners.

We do not think that any of the California cases cited by petitioner are in point save the Desanta Case, which can no longer be considered as authority.

The ordinance in question cannot be held void, or in conflict with the act of 1878 as amended in 1889.

It is also claimed that the ordinance is in conflict with an act approved March 18, 1905, and entitled "An act for the registration of deaths. * * *" St. 1905, p. 115.

This act consists of 19 sections, and is manifestly an act intended to promote and provide for the gathering and preservation of vital statistics. The case between the ordinance and this statute is very similar to the case between an ordinance and a statute considered in Borough of Yeadon v. White, 36 Pa. Super. Ct. 367, where the ordinance was sustained as not in conflict with the general law. No attempt is made to point out any particulars in which the act of 1905 conflicts with the ordinance, and we have found none.

Neither do we find anything in the act of 1907 relating to the preservation of the public health (St. 1907, p. 893) that is in conflict with the ordinance in question. This act consists of 22 sections dealing with a great number of sanitary matters. One subdivision of one of these sections provides that disinterred bodies shall be treated as infectious or dangerous to the public health, and requires the approval for the removal or transportation of such to be obtained from the state board of health. The subdivision in question, however, concludes with a proviso to the effect that "the consent of the local health authorities shall be first obtained, and all local health regulations strictly observed." It is thus perfectly clear that the Legislature, in enacting the statute of 1907, did not intend to repeal or interfere with local ordinances concerning the disinterment of the remains of deceased persons, and we find no such conflict as would work an abrogation of the ordinance. The mere fact that a license or permit is required from two different authorities does not create a conflict. Brazier v. Philadelphia, 215 Pa. 297, 64 Atl. 508.

We are of the opinion that the ordinance in question cannot be held void as in conflict with the general law of the state.

[2] It is also claimed that the ordinance in question is one for the purpose of raising revenue, and for that reason void.

Little need be said, we apprehend, upon this subject. The matter of the disinterring and removal of dead bodies is clearly one calling for sanitary regulations. The ordinance in question requires the health officer, in every case where application is made for a permit to disinter or remove the remains of a buried body, to investigate said application, and ascertain whether the disinterment or removal can be made without danger to the public health, and if so satisfied to grant the application. While the fee of $10 exacted for such permit is somewhat large, we cannot say that it is so disproportionate to the services necessary to be performed in the faithful safeguarding of the public health as to warrant us in holding that the purpose of the ordinance is revenue and not sanitary regulation.

No other point is urged for the discharge of the petitioner.

The writ is therefore discharged, and the petitioner is remanded to the custody of the sheriff of San Mateo county.

We concur: LENNON, P. J.; KERRIGAN, J.

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17 Cal. App. 74

NIELSON v. GROSS et al. (Civ. 867.)

(District Court of Appeal, Third District, California. Sept. 8, 1911. Rehearing Denied by Supreme Court Nov. 6, 1911.)

1. MINES AND MINERALS (§ 99*)—OPERATION OF MINES—MINING PARTNERSHIP—ACTIONS—PLEADING.

The complaint, in an action for services rendered, alleged that defendants were a mining partnership, working and operating as such quartz mines, mining claims, and other property. Civ. Code, § 2511, provides that a mining partnership exists when two or more persons, owning a mining claim for the purpose of working it, actually engage in work. *Held*, that the complaint was not defective in failing to allege that the mine was being operated for the purpose of extracting minerals.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 99.*]

2. MINES AND MINERALS (§ 100*)—OPERATION —MINING PARTNERSHIP—DISSOLUTION.

Where the members of a statutory mining partnership suspend the operation of the mine, intending to permanently abandon it, the partnership itself is dissolved.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 100.*]

3. MINES AND MINERALS (§ 100*)—OPERATION —MINING PARTNERSHIP—ACTIONS—DISSOLUTION—BURDEN OF PROOF.

One claiming the dissolution of a statutory mining partnership has the burden of rebutting the presumption of continuance arising from the original existence of the partnership.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 100.*]

4. MINES AND MINERALS (§ 100*)—OPERATION —MINING PARTNERSHIP—DISSOLUTION.

Proof that the members of a statutory mining partnership ceased operation with the intention of resuming work may be made either by direct or indirect evidence.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 100.*]

5. MINES AND MINERALS (§ 99*)—OPERATION — MINING PARTNERSHIP — DISSOLUTION — EVIDENCE.

In an action where it was sought to charge defendant as a member of a mining partnership, evidence *held* to support a finding that the partnership had not been dissolved by abandoning the operation of the mine.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 99.*]

6. APPEAL AND ERROR (§ 171*)—REVIEW—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW.

In an action against a mining partnership, there could be no complaint on appeal because of the admission of certain evidence, even though not admissible under the complaint, where the case was tried upon the theory that such evidence was within the issues.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053–1069, 1161–1165; Dec. Dig. § 171.*]

Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Action by Chris Nielson against L. A. Gross, E. W. McGraw, and L. D. Butt. From a judgment for plaintiff, defendant McGraw appeals. Affirmed.

Fred Searls and E. W. McGraw, for appellant. J. M. Fulweiler, for respondent.

BURNETT, J. The complaint is in two counts, and it is made the basis for the recovery from defendants Gross and McGraw, as mining partners, for work and labor performed as a miner by plaintiff for the partnership, for a period extending from the 10th day of February, 1908, to the 28th day of September 1909. It was also sought to foreclose a laborer's lien on the property, alleged to belong to L. D. Butt, but the court held that no lien existed, and the correctness of that decision is not questioned on the present appeal. A demurrer was interposed to the amended complaint, but it was overruled.

E. W. McGraw is the only defendant that answered. He admitted that the services were performed, and were of the value alleged, and that by virtue of the statutes of the state Gross and he were mining partners, prior to October 26, 1908, and he offered to pay plaintiff for the amount due for his work to that date, but he denied that at any time subsequent to said October 26th defendant Gross and he were mining or other partners. He averred that on October 26, 1908, all work on the mines was definitely abandoned, and the mining partnership ended; that thereafter no mining work was done on the property by Gross and McGraw, and that from and after October 26, 1908, plaintiff did no work as a miner, but was employed by defendant Gross as a caretaker, except that from June 29, 1909, to and including July 30, 1909, defendant McGraw employed men, and among them the plaintiff in prospecting the mine in question, and that defendant McGraw paid plaintiff in full for said labor, and that Gross had nothing whatever to do with that work. The court found in favor of plaintiff, and the appeal is from the judgment on a bill of exceptions.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] The objection to the complaint is that the facts are insufficient to show the existence of a mining partnership. The following is the allegation in that respect: "That during all the times hereinafter mentioned the defendants L. A. Gross and E. W. McGraw were a mining partnership, working and operating as such certain quartz mines, mining claims, and properties hereinafter more particularly described as one mine, near Carlisle, in Meadow Lake mining district, in the county of Nevada state of California." The statute defines a mining partnership as follows: "A mining partnership exists when two or more persons, who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom, actually engage in working the same." Civ. Code, § 2511. The point is that a mining partnership is the "creation of the statute"; that when reliance is had upon "a right or status created by the statute" "the pleader must state all the facts necessary to bring the case within the statute" (Dye v. Dye, 11 Cal. 163); and that this requirement has not been observed, by reason of the failure to allege that the defendants were working the mine for the purpose of "extracting the mineral therefrom." We feel confident, however, that appellant had no difficulty in understanding, from the allegations of the complaint that the foregoing was the identical purpose for which the mine was being operated. The complaint might have been more specific in this respect, but the pleader could safely indulge the presumption that the defendants would use common sense in the construction of the complaint, and would therefore easily reach the conclusion that the mine was being operated for the ordinary and general purpose for which such mines are developed.

[2] There is another objection of appellant that is entitled to more serious consideration. It relates to the finding that the plaintiff was employed by the partnership. It is contended that, "on October 26 or 28, 1908, the mining operations ceased, and there was no agreement to resume them in the future. By such cessation of work without any agreement for resumption, the mining partnership between Gross and McGraw was ipso facto dissolved, and thereafter they were merely tenants in common, and as such had no power to bind each other by contract. Wagoner v. Silva, 139 Cal. 562 [73 Pac. 433]." Many authorities are cited in support of the principle. Among these, the following quotations are made from Chancellor Kent, and note 7, p. 228, vol. 22, Am. & Eng. Ency. of Law: "If a partnership is formed for a single purpose or transaction it ceases as soon as the business is completed, and nothing can be more natural or reasonable than the rule of the civil law that the partnership in any business should cease when there was an end put to the business itself." 3 Kent's Com. (14th Ed.) p. 71. Said note is as follows: "Where the actual working of the mine has ceased, the relation of the co-owners is that of tenants in common, and not that of partners, and there is no longer any confidential relation between them. Harris v. Lloyd, 11 Mont. 390 [28 Pac. 736] 28 Am. St. Rep. 475."

[3] But, granting that appellant has stated the rule with substantial accuracy, it does not apply, as we view it, to a temporary suspension of the operation of the mine. There must be an abandonment of the work, before it can be said that the partnership is at an end. If there was an understanding, express or implied, to resume at a later date, the mere cessation of labor would not result as a dissolution. This, as we understand it, is conceded by appellant. While he speaks of an agreement as necessary to continue the partnership, he does not contend that it may not be implied, as well as executed. And, whatever may be required to prevent dissolution on the cessation of labor, the burden of proof, it would seem, must be borne by appellant to show that the partnership was terminated. This follows from the presumption arising from the admitted fact that the partnership existed prior to October 26, 1908. It would be presumed to continue, unless the contrary were shown. While it may be said that there was some evidence that the work of joint operation of the mine was at an end, the court was not bound to hold that this evidence overcame the said presumption.

[4, 5] But, conceding that plaintiff was required to prove that the parties intend-

ed to resume operations, then, of course, this could be proven by direct or indirect evidence, or both, and it cannot be said that such inference finds no valid support in the record. Indeed, some of the circumstances detailed by the witnesses are inconsistent with the view that the work of development had been abandoned by the partnership. It is at least a fair inference that for a long time subsequent to October 28, 1908, appellant and Gross intended to go on with the work as before. We shall not undertake a recital of all the evidence tending to show a continuance of the partnership, but will refer to some of the circumstances seemingly justifying the court's conclusion. In the first place, it is perfectly clear that they had not abandoned the mine. Appellant admits that in the spring and summer of 1909 he spent $1,000 for work and prospecting in the mine. This is entirely inconsistent with the theory of a previous abandonment of the property. There is no direct evidence why they discontinued operations on October 26 or 28, 1908, but it is fair to infer that it was on account of the approach of winter. There is nothing to show that the partnership operation was not profitable and agreeable to both parties. It was therefor a reasonable conclusion that they intended to continue the work as they had begun it.

Again, no notice was given of any dissolution of partnership. This is a circumstance of some importance, especially in view of the probability of such claims as the one before us. The evidence shows that appellant had notice of the work being done by plaintiff, and, upon the theory that the partnership had been dissolved, appellant's silence is hardly consistent with fair dealing and ordinary business prudence. The fact of the employment of plaintiff to take care of the mine, also as already indicated, signified a purpose to resume operations. What was done may have been for the purpose, it is true, of effecting a sale of the property; but these circumstances undoubtedly lend support to the view of the trial court that the cessation of operations by the partnership was not intended to be final.

Some additional evidence that the parties intended to resume is also found in the testimony of plaintiff and of Mr. Gross. The former testified that "when Mr. Gross left [October 28, 1908] he wanted me to take care of the property. He told me I would get my money inside of 10 days; they will settle everything up, and he will come back next spring; he left me to take care of the mine. I thought all the time Gross would be back in 1909 to resume work." Prior to said October 28th, it may be said, the mine was in charge of said Gross. Furthermore, he testified that Mahon, when he shut down on the 1st of August, said to him: "Chris, you are on Mr. McGraw's pay roll now." Gross testified that at the time he employed plaintiff, after they had suspended operations, "McGraw was still concerned with me in the operation and control of the properties," and that there was no dissolution of the partnership arrangement. Without further consideration, we think it must be held that there is substantial evidence to support the said finding.

[6] It is true that the work done by plaintiff for which he seeks recovery was not directly for the purpose of extracting mineral from the mine, but it seems so closely connected therewith as to bring it within "the scope of the objects" of the partnership. Gross testified: "When I left Nielson in charge, my instruction to him was to take charge of the property and protect it, see to the shoveling off of the roofs and preserving of the buildings in winter, and protect the general personal property around camp, and keep people from carrying them off; that was absolutely necessary." He states that these buildings were necessary for the development of the property, and he explained how important it was that this work should be done. The plaintiff's testimony shows that he carried out his instructions fully, and also cut a large quantity of wood for the camp. Strictly speaking, this work was probably not that of a miner, and in this respect there was a variance between the proof and the allegations of the complaint; but no objection was made on that ground in the court below, and it must be held that the case was tried upon the theory that the evidence was within the issues, and it is now too late to question it.

The foregoing seem to be the only points requiring specific attention. We think the judgment should be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

17 Cal. App. 54

RHODES v. SARGENT, Superior Judge.

(Cr. 1,050.)

(District Court of Appeal, First District, California. Sept. 7, 1911. Rehearing Denied by Supreme Court Nov. 6, 1911.)

1. CRIMINAL LAW (§ 1069*)—APPEAL—RECORD —STATUTES.

Pen. Code, § 1247, as amended by Act April 6, 1911 (St. 1911, p. 692), which took effect on June 5th, the day on which petitioner appealed from a judgment convicting him of murder in the second degree, provides that, on appeal by accused, he must, within five days, file with the clerk and present an application for appeal to the trial court, and that, if such application is not filed within the time, the appeal shall be deemed dismissed. *Held*, that such section was mandatory, so that, though accused had no knowledge thereof, and the transcript had been made, the court properly refused to certify the same, on its appearing that no application for appeal as required had been filed within the time specified.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2691-2699; Dec. Dig. § 1069.*]

2. CRIMINAL LAW (§ 313*)—APPLICATION OF STATUTE—NOTICE.

When a statute takes effect, it is operative, even in localities so remote as to render any knowledge of its existence impossible.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 313.*]

Petition for mandamus by Carl Rhodes against B. V. Sargent, as Judge of the Superior Court of Monterey County. Petition dismissed.

B. A. Herrington, for petitioner. Attorney General Webb, for respondent.

KERRIGAN, J. This is a proceeding in mandamus. The petitioner herein, charged with murder, was tried and found guilty of murder in the second degree. On June 5, 1911, a motion for a new trial was denied, and a judgment of conviction was entered, from which judgment and order petitioner, in open court, on said 5th day of June, announced and took an appeal. At the same time the court, upon petitioner's motion, directed the phonographic reporter to transcribe all the testimony and proceedings had and taken at the trial, for the purpose of said appeal. In compliance with that order, the proceedings were transcribed and filed with the clerk, and presented to the judge within the time prescribed by law; but the judge, on July 5th, refused to certify thereto, canceled the certificate of probable cause, and ordered and decreed that the judgment be forthwith enforced, upon the ground that petitioner's appeal was ineffectual for any purpose, for the reason that he had not filed and presented a proper application within five days after the entry of the judgment, stating the ground of the appeal, the points upon which he relied, and designating what portions of the reporter's notes it would be necessary to have transcribed to fairly present the points of the appeal. Whereupon this proceeding was instituted to compel the court to certify to the reporter's transcript, in order that petitioner might perfect his appeal.

The action of the court in this regard was based upon section 1247 of the Penal Code, as amended in 1911, which amendment was passed April 6th of that year, and went into operation 60 days thereafter, to wit, June 5th (Santa Cruz Water Co. v. Kron, 74 Cal. 222, 15 Pac. 772), the day the appeal herein was taken. That section as amended reads as follows: "Upon an appeal being taken from any judgment or order of the superior court to the Supreme Court, or to a district court of appeal, in any criminal action or proceeding, where such an appeal is allowed by law, the defendant, or the district attorney when the people appeal, must within five days file with the clerk and present an application to the trial court stating in general terms the grounds of the appeal and the points upon which the appellant relies, and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon. If such application is not filed within said time the appeal is wholly ineffectual and shall be deemed dismissed, and the judgment or order may be enforced as if no appeal had been taken. * * *" St. 1911, p. 692.

[1] There is no escape from the order of the court questioned in this proceeding. The section is plainly mandatory. Prior to its amendment, it directed, as it does now, that the appellant should file with the clerk an application to the court, stating generally "the ground of the appeal, and the points upon which the appellant relies, and designate what portion of the phonographic reporter's notes it would be necessary to have transcribed" to fairly present the appeal; but it did not, as it does now, prescribe that "if such application is not filed within said time the appeal is wholly ineffectual and shall be deemed dismissed, and the judgment or order may be enforced as if no appeal had been taken." As this section stood originally, it was deemed directory only; and, as is too often the case where a law is thus regarded, it was "more honored in the breach than the observance," and invariably, whether necessary or not, the entire record was written up, resulting in a great and needless waste of public funds. One of the purposes of this amendment, if not the only purpose, was to remedy that evil. The history of the section, therefore, as well as its language, clearly indicates that it was intended to be mandatory. Another reason for so holding is that, where a statute imposes a penalty for noncompliance with its directions, as does this one, it is as a rule to be regarded as imperative. Lewis' Sutherland, Stat. Const. (2d Ed.) § 610; Maxwell's Interpretation of Statutes (4th Ed.) 554; Corbett v. Bradley, 7 Nev. 106; Endlich on Interpretation of Statutes, 607, 608, 616; Cran's Statute Law, 236; Black on Interpretation of Laws, 334; McCrea v. Haraszthy, 51 Cal. 150; Perine v. Forbush, 97 Cal. 308, 32 Pac. 226.

In the last case it is pertinently said: "Where the statute attaches a consequence to the failure to perform the act within the time limited, the consequence can be avoided only by a compliance with the statute." Here the defendant was ignorant of the amendment, which went into effect on the day he took his appeal, the testimony was transcribed, and any expense to the county which an observance of the law would have saved has been already incurred; therefore, counsel for petitioner argues, the appeal should be allowed. If the defendant had done the things to perfect his appeal required by the law as it stood for two years prior to the amendment, he would not now be here complaining of the action of the trial court. He omitted to do those things; and, as the amendment peremptorily requires them to be done, we cannot, whatever the hardship of the case may be, afford him any relief. To place upon this statute a construction which would extricate the defendant from his difficulty would establish a precedent, and encourage further infringements of the law, and the mandatory effect thereof would be impaired, if not wholly destroyed. Summarized, the defendant's position amounts to a request to be excused on account of his ignorance of the law, which is, of course, no excuse. In neither a criminal nor civil cause, in any circumstances, can one justify his act by the naked showing that he did not know of the existence of the law. "Ignorantia juris non excusat" is therefore a rule in our jurisprudence, as in the Roman, whence it is derived. 1 Bishop, New Crim. Law, § 294.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[2] And when a statute takes effect it is operative, even in localities so remote as to render any knowledge of its existence impossible. Id., § 1296. The reason of the rule was well stated in Matthews v. Zane, 7 Wheat. 179, 5 L. Ed. 425, where it is said: "It being practically impossible actually to notify every person in the community of the passage of a law, whatever day might be appointed for its taking effect, no general rule could be adopted less exceptionable. The general rule may, in some instances, produce hardship; but, if ignorance of the law was admitted as an excuse, too wide a door would be left open for the breach of it."

For the foregoing reasons, it is ordered that the petition be dismissed.

We concur: LENNON, P. J.; HALL, J.

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17 Cal. App. 68

PEOPLE v. ARNOLD. (Cr. 315.)

(District Court of Appeal, First District, California. Sept. 8, 1911.)

1. Grand Jury (§ 38*)—Presence of Stenographers—Oath.

Under Pen. Code, § 925, providing that whenever criminal causes are being investigated before them the grand jury, on demand of the district attorney, must appoint a competent stenographic reporter to be sworn and to report the testimony, such reporter need not be especially sworn in each case under investigation, but having once been sworn may continue in that capacity.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. § 81; Dec. Dig. § 38.*]

2. Grand Jury (§ 38*)—Presence of Reporters—Oath.

Under Pen. Code, § 925, providing for the appointment of a stenographic reporter for the grand jury, who shall be sworn, and in view of Code Civ. Proc. § 2093, providing that every officer or person authorized to take testimony has the power to administer oaths, the foreman of the grand jury may administer the oath to the reporter.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. § 81; Dec. Dig. § 38.*]

3. Criminal Law (§ 1166*)—Appeal—Harmless Error.

Where the stenographer appointed as reporter for the grand jury testified before that body and reported his own testimony, the testimony having been correctly reported, the accused was not prejudiced, even though it would have been better practice to have appointed another reporter to take the testimony.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1166.*]

4. Indictment and Information (§ 137*)—Motion to Quash—Grounds.

An irregularity in the preparation of an indictment, not made a statutory ground for motion to set it aside, should be ignored.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 480-487; Dec. Dig. § 137.*]

5. Larceny (§ 14*)—Offenses—Distinguished from False Pretenses.

Where accused, who claimed to be a spiritualist and clairvoyant, induced one of her patrons to give her a sum of money with which to purchase certain mining stock, with the intention to appropriate the money to her own use, accused, having so appropriated the money and failed to deliver the mining stock, was guilty of the crime of larceny, and not of obtaining money under false pretenses.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 34-38; Dec. Dig. § 14.*]

6. Criminal Law (§ 371*)—Evidence—Evidence of Other Crimes.

In a prosecution for larceny, where it appeared that accused, who posed as a clairvoyant, had induced one of her patrons to intrust her with a sum of money for the purchase of mining stock, and that accused had appropriated the money to her own use, evidence that accused had on other occasions obtained money by similar expedients, and had appropriated the same to her own use, was admissible to show accused's intent, even though it tended to show the commission of other crimes not then charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.*]

7. Criminal Law (§ 1137*)—Appeal—Persons Entitled to Allege Error.

An accused cannot complain of an instruction given upon his request.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3010; Dec. Dig. § 1137.*]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Dessie Arnold was convicted of grand larceny, and appeals from the judgment and an order denying a motion for a new trial. Affirmed.

Wm. Hoff Cook and Carroll Cook, for appellant. Attorney General Webb, for the People.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

LENNON, P. J. The defendant was convicted, after indictment, of the crime of grand larceny, and appeals from the judgment and the order denying her motion for a new trial.

[1] In support of her claim that the defendant's motion to set aside the indictment was improperly denied, the point is presented that no oath was especially administered to the person who acted as stenographic reporter for the grand jury, before he entered upon the duty of reporting the testimony taken in the particular case of this defendant. The record of the proceedings had in the lower court upon the hearing of the motion to set aside the indictment discloses that when the grand jury was first impaneled and organized Howard Vernon was appointed as the official reporter, and that, before entering upon his duties, there was administered to him by the foreman a general oath to correctly take in shorthand and transcribe all of the testimony given by any witness testifying before the grand jury. It is the contention of the defendant that the statute does not authorize such a general oath, and that, where the services of a reporter are required by the grand jury, he should be repeatedly sworn to report each particular case under investigation. It is further claimed that the foreman of the grand jury was authorized by statute to swear only the witnesses who might be called to testify, and that nowhere in the law is there to be found any authority for the foreman administering an oath to the reporter who may be called upon to serve the grand jury. From this it is argued that, unless an oath be administered in each particular case, and by some one with power to administer oaths, other than the foreman of the grand jury, the reporter is not qualified to act; and that if, under such circumstances, he is permitted to be present at the session of the grand jury at which a defendant is indicted he must be considered as a person other than those permitted to be present by the provisions of section 925 of the Penal Code. This section, as we read and understand it, does not require that the reporter of the grand jury must be especially sworn in each and every case that may be under investigation. The language of the section is broad enough to warrant the interpretation that the reporter who is appointed and, in the first instance, sworn to serve the grand jury is to continue in that capacity at the pleasure of the grand jury until its labors are completed. We are of the opinion that when the reporter is once sworn to faithfully perform the duties of his office this is a substantial and sufficient compliance with the statute, and it is not necessary that he be repeatedly and specifically sworn to act in each individual case that may be called to the attention of the grand jury.

[2] It is true that section 925 of the Penal Code does not authorize the foreman of the grand jury to administer the oath to the person appointed to act as its reporter, and that the Legislature has omitted to designate in express terms who shall administer such oath. However, section 2093 of the Code of Civil Procedure provides: "* * * Every officer or person authorized to take testimony in any action or proceeding, or to decide upon evidence, has power to administer oaths." The foreman of the grand jury is an officer of the court, and he, in conjunction with his fellow grand jurors, is certainly empowered to take testimony and to decide upon evidence. It would seem, therefore, that under the general provisions of the section last quoted the foreman of the grand jury was authorized to administer the oath in question.

[3, 4] Defendant makes the further point in support of her motion to set aside the indictment that Howard Vernon, the official reporter of the grand jury, was called as a witness for the people upon the investigation of the crime charged against her, and that he was permitted and required to report and transcribe his own testimony. In this behalf the record shows that Vernon, who was also the official reporter of the police court of the city and county of San Francisco, was called as a witness to identify and certify to the correctness of the deposition of one E. C. Miles, who, as a witness for the people, had given testimony in a proceeding previously instituted against the defendant in the police court, which was relevant and material to the charge then being investigated by the grand jury. Ordinarily it would have been the safer and better method to have appointed another reporter, if one was available, to take the testimony of the witness. It was conceded, however, in the lower court that Vernon correctly reported and transcribed his own testimony, and no suggestion was then or is now made that the defendant was in any manner prejudiced by the procedure adopted in this instance. Moreover, the supposed irregularity is not one of the statutory grounds of a motion to set aside an indictment, and it was therefore properly ignored by the trial court upon the hearing of the motion to set aside the indictment in the case at bar.

The record does not sustain the assertion of counsel for the defendant that a deputy district attorney was called as a witness before the grand jury, and gave testimony against the defendant without being sworn. The record shows that during the course of the examination of the witness Vernon a deputy district attorney read the deposition hereinbefore referred to. This apparently was done in aid of an intelligent development of the testimony sought to be introduced upon the hearing, and it was a necessary incident to the right of the district attorney, conferred by section 925 of the Penal Code, to be present at the sessions of the grand jury for the purpose of interrogating witnesses.

[5] Counsel for the defendant claims that the evidence adduced at the trial does not support the verdict of the jury, finding the defendant guilty of the crime of grand larceny. It is insisted that the crime, if any, committed by the defendant was that of obtaining money by false pretenses. This claim is based upon the assumption that the evidence affirmatively shows that the complaining witness parted with the title to, as well as the possession of, the money charged to have been feloniously taken by the defendant. We cannot agree with this interpretation of the testimony. The undisputed facts upon which the defendant was indicted and convicted are in substance and effect these:

The defendant claimed to be a spiritualist, and posed as clairvoyant. The complaining witness, Mrs. Francis Shaw, attended a number of séances given by the defendant, and eventually became a pupil of the defendant in the study of spiritualism. At one of these séances Mrs. Shaw was induced, by false and fraudulent pretenses and the deceit and artifice commonly employed in cases of larceny by trick and device, to give the defendant the sum of $150, with which to purchase for the complaining witness certain mining stock. When the defendant received this money, she said to the complaining witness: "Now, don't be uneasy about your money; you will get it back again, I guarantee, with good interest. * * * I will get a certificate in a couple of weeks." The certificate of stock did not materialize at the end of two weeks, and upon several occasions thereafter the complaining witness demanded of the defendant the promised certificate of stock, or the return of the money. For several months the defendant evaded doing either, upon the pretext, made from time to time, that she was unable to purchase the stock. Finally, and without any explanation of her conduct, the defendant flatly refused to return the money or produce the certificate of stock. However, after a civil suit to recover the money had been instituted, the defendant tendered a paper writing, which she said was a certificate of stock. This the complaining witness refused to accept, saying: "I don't want the certificate. I want my money."

From all the facts in the case, the jury was justified in finding, as implied by the verdict, that the complaining witness never intended to vest in the defendant the title to the money in question, and that it was at all times the defendant's intent and purpose, by trick and device, to get possession of the money, and then appropriate it to her own use. It is undisputed that the money was intrusted to the defendant for the sole purpose of purchasing mining stock, and until this purpose was executed the title to the money, in the eyes of the law, remained in the complaining witness. It was therefore the subject of larceny, and its misappropriation by the defendant, coupled with a preexisting design to defraud the complaining witness, constituted the crime of larceny. People v. Delbos, 146 Cal. 737, 81 Pac. 131.

[6] The trial court did not err in its ruling permitting the district attorney, over the objection of the defendant, to show that, prior to the crime here charged against her, the defendant had systematically tricked and defrauded several other persons under like circumstances, and by methods and means similar to those employed by the defendant upon the complaining witness in this case. This evidence was admitted for the single purpose of showing the felonious intent of the defendant prior to and at the time she obtained possession of the money of the complaining witness, and for that limited purpose it was clearly admissible. The intent of the defendant at the time she obtained possession of the money determined the character of her offense; and, while it is true generally that the intent with which a person does an act may be inferred from all of the surrounding circumstances, the prosecution, nevertheless, is not limited in its efforts to establish that intent to mere proof of the bald facts of the transaction. It was therefore the right and duty of the district attorney to show affirmatively, if he could, a felonious intent, or failing in that, to negative an innocent intent on the part of the defendant. The doing of the acts charged agaist the defendant was not disputed. Her intent, which was a material ingredient of the crime charged, was the only controverted point in the case; and it is clear that evidence of previous similar and systematic frauds would have a legitimate tendency to show that the defendant, in her dealings with the complaining witness, was prompted by a specific intent to deceive and defraud. For this purpose the evidence complained of was competent, relevant, and material, and therefore it was clearly admissible, notwithstanding it may have also tended to show the commission of other crimes, not charged in the indictment against the defendant. People v. Gray, 66 Cal. 271, 5 Pac. 240; People v. Whalen, 154 Cal. 473, 98 Pac. 194; Makin et ux. v. Atty. Gen., 63 Law Journal Rep. (N. S.) 41; Reg. v. Heesom, 14 Cox's Crim. Law Cases, 40.

[7] Complaint is made of one instruction given by the trial court in its charge to the jury. This particular instruction does not appear to be in conflict with the balance of the court's charge, and as it was given at the request of the defendant the error, if any, in the giving of it cannot now be considered or reviewed. People v. Rodley, 131 Cal. 240, 63 Pac. 351.

The judgment and order are affirmed.

We concur: HALL, J.; KERRIGAN, J.

17 Cal. App. 81

LINDER HARDWARE CO. v. PACIFIC SUGAR CORPORATION. (Civ. 806.)

(District Court of Appeal, Third District, California. Sept. 8, 1911. Rehearing Denied by Supreme Court, Nov. 7, 1911.)

1. NOVATION (§ 4*)—REQUISITES.

A novation presupposes a previous obligation for which the new one is substituted.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 4; Dec. § 4.*

For other definitions, see Words and Phrases, vol. 5, pp. 4848–4851; vol. 8, p. 7733.]

2. NOVATION (§ 12*)—BURDEN OF PROOF.

The burden is on defendant to establish a novation pleaded in defense of suit on a debt.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 12; Dec. Dig. § 12.*]

3. NOVATION (§ 12*)—EVIDENCE—SUFFICIENCY.

Evidence, in an action on debts, *held* insufficient to show a novation pleaded by defendant.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 12; Dec. Dig. § 12.*]

4. ASSIGNMENTS (§ 135*)—ACTION ON ACCOUNT —EVIDENCE.

In an action on an account for labor, brought by the assignee thereof, evidence as to the order under which the assignment was made and the order itself were admissible.

[Ed. Note.—For other cases, see Assignments, Dec. Dig. § 135.*]

5. BILLS AND NOTES (§ 523*)—EVIDENCE.

In a suit on a note, assignment thereof to plaintiff was sufficiently shown to make the note admissible in evidence, where it appeared that it was given by defendant in adjustment of defendant's account with the payee and delivered by defendant to plaintiff, that it was sent to the payee and returned thereafter with the assignment indorsed upon it, signed by the payee corporation by its treasurer, and that it was in plaintiff's possession at the trial.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1822–1825; Dec. Dig. § 523.*]

6. BILLS AND NOTES (§ 524*)—INDORSEMENT—EVIDENCE.

Possession of commercial paper with indorsement makes a prima facie case of delivery by the indorser to the holder, and of ownership of the latter.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1826–1831; Dec. Dig. § 524.*]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by the Linder Hardware Company against the Pacific Sugar Corporation. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Rehearing denied, 118 Pac. 789.

Bradley & Bradley and Gray, Barker, Bowen, Allen, Van Dyke & Jutten, for appellant. G. W. Zartman and Power & McFadzean, for respondent.

CHIPMAN, P. J. Plaintiff seeks to recover from defendant on three separate counts: For goods sold and delivered, $3,407.47; on an account for labor, alleged to have been assigned to plaintiff, $2,000; on a promissory note, alleged to have been executed by defendant to Studebaker Bros. Company, and assigned to plaintiff, $2,370.15. A fourth, based on a promissory note, was dismissed as not then due.

The defendant did not deny the purchase of the goods, the performance of the labor, or the execution of the note, but, by amended answer, set up certain separate defenses: (1) That a new contract of novation was entered into between plaintiff and defendant, whereby payment of the obligation sued upon was postponed, and payment was to be made in sugar, thereafter, to be manufactured by defendant, instead of in cash, and that performance under the new contract was not due when the action was commenced. (2) That plaintiff acquired ownership of the claim for labor only as a result of the contract of novation; that said claim was part of a larger claim owing at the time to one Hibama, and, as matter of law, this demand could not be split up without defendant's consent, to which it did not consent, except by novation. (3) The assignment of the Studebaker promissory note is denied.

The findings of the trial court were in favor of plaintiff, and judgment was entered for the several items, aggregating, with attorney's fees and interest, $8,179.29. Defendant appeals from the order denying its motion for a new trial, and from the judgment.

[1, 2] The principal proposition discussed in appellant's brief is thus stated: "The evidence established a contract of novation which entirely changed the rights and relations of the parties as to all the items embraced in the action." In short, the claim is that plaintiff agreed that defendant might pay its obligations in sugar, instead of in money. Novation presupposes a previous obligation for which the new one is substituted. It is made by contract, and is subject to all the rules concerning contracts in general. Civ. Code, §§ 1530, 1532. In the present case, it is pleaded in defense, and the burden of establishing it was on the defendant. The soundness of appellant's contention can only be tested by an examination of the evidence adduced at the trial, and this involves the necessity of stating it with some fullness.

[3] It appears that plaintiff is a mercantile house, doing business at the city of Tulare, and defendant was one of its customers. Defendant is engaged in growing sugar beets and manufacturing them into sugar, having one factory at Visalia, Tulare county, and another at Corcoran, in Kern county. At the time the action was commenced, defendant was indebted to plaintiff on an open account for merchandise, amounting to $3,407.47. Defendant was also indebted to one Hibama for work and labor done in the field, in the year 1908, in the sum of over $2,000. Hibama was also indebted to plaintiff for an amount in excess of this sum. He gave plaintiff an or-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

der on defendant for $2,000, which plaintiff credited to Hibama's account and charged it to defendant's account. On March 29, 1909, defendant executed its promissory note to the Studebaker Bros. Company for the sum of $2,370.16, which it is alleged was assigned to plaintiff prior to the commencement of the action. These three demands constituted the basis of the action.

There were but three witnesses called in the case: Mr. Linder, of plaintiff company; Mr. Cole, of defendant company, each concededly authorized to speak and act for his respective corporation; and Mr. Hibama, witness for plaintiff, with whom defendant contracted for certain labor. Mr. Cole's testimony was taken by deposition.

Witness Linder testified to the amount of the open account of his company against defendant for the year 1909 up to the commencement of the action, which was July 26, 1909, and that the statement as shown was presented to defendant and was correct, amounting to $3,407.47, no part of which has been paid. We do not understand that the amount of this indebtedness is questioned by defendant, nor, for that matter, either of the other demands. The witness next testified that he received the following order from Mr. Hibama on the sugar company:

"$2,000.00. Tulare, Cal., April 30, 1909.

"At three days' sight pay to the order of Linder Hardware Co. two thousand and no/100 dollars and exchange value received and charge the same to account of

"Henry Hibama.

"To Pacific Sugar Corporation, Corcoran, Cal."

The instrument was received in evidence over defendant's objection that no proper foundation had been laid, and that it was irrelevant and immaterial. The witness testified that the order was afterwards presented to defendant—"sent through the bank"—the response being, "No funds." He testified: "I had a conversation with Mr. Cole with reference to this order. At that time, or shortly afterwards, Mr. Cole expected to make arrangements with the Crocker National Bank to pay all outstanding indebtedness, and that was one of the first things to be taken care of after they had made the arrangement. That was what Mr. Cole said. At the time plaintiff received this order from Henry Hibama, he was indebted to the plaintiff in a sum considerably over $2,000." Over defendant's objection, witness testified that "plaintiff gave Mr. Hibama credit for that, and charged it up to the sugar company," and that no part of it has been paid. A promissory note, dated March 29, 1909, for $2,370.16, payable to the Studebaker Bros. Company, signed: "Pacific Sugar Corporation, by Jacob Adloff, President. Attest: W. C. Petchner, Secretary," to which the corporate seal was affixed, "indorsed on the back thereof as follows: 'Studebaker Brothers Company of California, by Chester W. Weaver, Treasurer' "—was shown the witness, being the note set out in the complaint. Witness testified: That prior to this the indebtedness between the Studebaker Bros. Company and defendant was an open account, and the matter was turned over to witness for adjustment. He "took the note from the Pacific Sugar Corporation for the Studebaker people." He testified: "The note was first taken from the sugar people and sent to San Francisco, and they made the indorsement on it and mailed it to me, and returned it to me, perhaps within two or three days. Just made the assignment and returned it to me. Q. Was the indorsement on the back of the note at the time it was turned over to you? A. Yes, sir." The note was admitted in evidence, over defendant's objection that it was "irrelevant, immaterial, and incompetent, no proper foundation laid, no proof of assignment." Witness testified further: "I afterwards notified the Pacific Sugar Corporation that plaintiff was the holder of that note by verbal notice to Mr. Cole, and I think to Mr. Petchner, too, at one time prior to filing the suit. Mr. Petchner, I think, was secretary of the defendant company. No part of that indebtedness has been paid." On cross-examination, the witness testified: "The officer of the defendant with whom I conducted these negotiations leading up to the first transaction about which I testified—the Hibama transaction—was Mr. Cole. I did not have any talk with Mr. Cole at that time about the payment of the $2,000 obligation of Hibama in sugar. The first real conversation had about sugar was after we brought suit. There was no discussion, except in a casual way, before we brought suit; nothing definite; no agreement at all."

Witness Hibama testified: That he did certain work for defendant in 1908, for which he presented a statement, given in the record and admitted by defendant to be correct. It showed an indebtedness of defendant to witness, on October 15, 1908, of $6,678.14. To this was added a further indebtedness, subsequently incurred in that year, of $751.09 for chopping wood, making in all $7,429.23, all of which he testified was owing to him shortly after October 15, 1908. A payment of $500 was made December 28, 1908, and another of $250 on January 15, 1909; that, on April 30, 1909, he gave the order in question to plaintiff, and credited it to defendant's account, and plaintiff credited it on the account of witness. He testified further that, on April 30, 1909, defendant gave him a draft for $500, and that the balance of $2,179.23, due for 1908, was paid in July, 1909. The statement of account also included an unpaid balance for labor in 1907. Upon cross-examination, he testified: "In my testimony I said I had given credit to the Pacific Sugar Corporation for $2,000 on the

Linder Hardware Company. I got nothing in writing from the defendant to show that credit. I simply gave that credit on my own books. I asked Mr. Cole for payment at that time. He told me he made some arrangement with the Linder Hardware Company, so he wanted me to make $2,000 order on the Linder Hardware Company; so I did. Mr. Cole was the vice president of the sugar company. * * * Mr. Cole told me at the time the subject of this $2,000 order was discussed between him and me that he had arranged with the Linder Hardware Company to pay the amount in sugar. He told me that he made arrangement with the plaintiff to sell the sugar, so he wanted me to make something, do something, an order. I did not talk about that transaction with Mr. Linder. I just made out an order. Mr. Cole was the one who first asked me to make out the order. I then took it to Mr. Linder, and he accepted the order. I told Mr. Linder Mr. Cole wanted me to do that way. Q. Did you tell him that Mr. Cole said that arrangements were made, so that payment would be made in sugar? A. Well, I didn't say; just didn't say it. Q. You didn't say it? A. No, sir. Q. What did you say about the sugar? A. Mr. Cole told me, he told me he made arrangement to sell his sugar to the Linder Hardware Company." On redirect, he testified: That he had previously asked Mr. Cole for money, and was told he had no money, and that the statement of the account he had presented referred to the year 1908. "Q. And this order that you gave to Mr. Linder was for part of the money that was due you for 1908?" To which objection was made as immaterial, and that the order is the best evidence. The witness answered: "Yes, sir; 1908, on the old account."

Witness Linder was recalled for cross-examination, and testified: As to the item of $203.50 each for Studebaker wagons, in plaintiff's bill of particulars, that the wagons were ordered from the San Francisco house of Studebaker Bros. Company, and were received by them May 17, 1909; that the wagons were shipped from the factory on May 29th, and arrived at Tulare June 14th; that they were not shipped from the East, but came from San Francisco; that they have a factory in South Bend, Ind., and a house in San Francisco. "It was from the San Francisco house the wagons were ordered." He further testified that the wagons were delivered to defendant, and went into use.

Witness Cole testified at considerable length; much of his testimony being upon matters not necessary to be stated. In substance his testimony was: That he had a conference with Mr. Linder in April, 1909, about the purchase of Studebaker wagons, which resulted in the purchase, after about a month, during which interval he and Mr. Linder had several interviews. At these meetings Mr. Linder explained to him that he owned an account held by the Studebakers against defendant, and the account of plaintiff against defendant was also spoken of, as also was the Hibama account against defendant; that witness proposed that all these claims be paid in sugar, including the Studebaker and Hibama indebtedness, of which latter $2,000 was to be assigned to plaintiff and paid in sugar. "The sugar was to be purchased in the regular way through some jobber; Mr. Linder fully understood the reason for that. We manufacturers could not sell direct to retailers without disturbing trade conditions, but we could deliver this sugar to him through any wholesale dealer whom he might select. I explained this fully to Mr. Linder. The sugar was to be sold at the San Francisco wholesale prices, plus the freight to Tulare, * * * and enough sugar was to be delivered in this way to the plaintiff to pay these accounts; that is, the Linder Hardware Company and the Hibama account, and also the account for the purchase of the new wagons. * * * Delivery of the sugar was to be made during the manufacturing season, at the convenience of both parties." He testified that he explained to Mr. Linder that certain creditors had prior claims on the sugar to be produced that season (naming them), in amounts aggregating about $280,000; that at that time they "were very hopeful of having a large crop"; that there was no other discussion between witness and Mr. Linder "with reference to the purchase of these wagons, or any arrangement, other than the payment in sugar in that way. I think I told Mr. Linder we had no money, and would have to pay those bills out of our crop," and that the agreement was not reduced to writing during these negotiations. He testified: "I considered that the agreement was made orally and Mr. Linder sent for me one day and wanted me to enter into a written contract. I am not able to say definitely when that took place, but it was subsequent to the arrangement;" that the transaction was fully understood and fully completed before the contract was drawn up; that Mr. Linder was to prepare the contract, "and if his draft was not satisfactory he would amend it, or change it. This was either after the factory had started, or about the time it started." It elsewhere appeared that the factory at Corcoran started up about July 15, 1909. He testified further that Mr. Linder's attorney prepared a draft of the contract, which was presented to defendant. A copy of this contract was introduced, and, as originally drawn, bore date July 19, 1909, but there was a clause "seeking to bind Mr. Poindexter, the trustee, to the delivery of the sugar, which defendant informed Mr. Linder would prevent the ratification by defendant." (Mr. Poindexter, apparently, was in charge of the factories for creditors.)

Certain changes were made by interlineation by Mr. Petchner. It appears that the directors of defendant did not sign this contract until after the present suit was brought, and also that the defendant never communicated to plaintiff its willingness to sign it. (The action was commenced July 26, 1909.) Witness testified further: That after the suit was begun he offered to return the wagons. "Q. On the assumption that a mistake might have been made as to the terms of this agreement, was it, or what was the purpose of making such tender? A. My idea was that if we disagreed, the best thing to do was to try and straighten the matter out, and that seemed to be the way to do it—to give him back his property."

On cross-examination, he testified: That this offer was after the wagons had been in use, and after suit brought on these claims; that "the only offer of sugar was made after the suit was begun," and that Mr. Linder was not satisfied with the samples; that "they were not up to standard"; that other samples were offered, and Mr. Linder went to his bins and brought out a sample of such sugar as he was selling, and pointed out the difference between the two samples "as to color." Mr. Linder also stated that if defendant "would give him such sugar as the customers would take he was ready to take the sugar. Q. Did you ever offer him any sugar before or after the trial that he would accept as being merchantable? A. I never presented any further samples, because the conclusion was the matter was in the courts, and the bond had been given for the attachment, and the members of our board were not willing for me to do anything further in the matter." It appeared that defendant did not produce enough sugar during the season to meet the preferred claims; that defendant had some sugar of the 1908 run which was not subject to the lien of preferred creditors, and the samples offered to plaintiff were of this sugar, which Mr. Linder said was not merchantable. "The sample of sugar that defendant expected to be able to deliver was not acceptable to him by reason of the color. That is the only time defendant ever offered him sugar, and that was after the suit was brought."

On redirect, Mr. Linder testified: "I think I recollect the circumstance of a conversation between myself and Mr. Cole and Mr. Zartman [defendant's attorney], as detailed, as taking place some time along during the middle of the month of July. The conversation, as far as I remember now, was this: They were to pay up last year's account, and all current business was to be paid out of the money coming from the Crocker National Bank. After the mortgage went on record, and we didn't get anything, of course I was willing to take anything else. That led up to the sugar proposition. Then it was that defendant proposed to give plaintiff sugar. I instructed Mr. Zartman to draw up a memorandum of agreement as to furnishing plaintiff sugar from that time on. I never heard anything more of that agreement. Nobody ever offered any sugar to me, or gave me any sugar. I requested sugar a number of times. Q. And never received any? There never was any compliance with those requests? A. Not in merchantable goods."

It is urged that the testimony of Mr. Cole shows beyond controversy the establishment of a novation, and that there is no substantial conflict between his testimony and that of Mr. Linder; that "Mr. Linder does not *directly* contradict any statement made by Mr. Cole, and there is not necessarily any indirect contradiction, as the testimony of Mr. Linder may all be true in its material features, and yet not necessarily inconsistent with the material statements of Mr. Cole."

After all is said of this testimony, the one dominant question of fact is, Did the parties mutually agree that all the items of indebtedness should be paid for in sugar and not in money? As to this vital fact, did the minds of the parties meet in May, as testified to by Mr. Cole, and was that mutually conceded to be the fact governing the parties in their subsequent dealings with each other? Is there, indeed, no substantial conflict in the testimony given by these witnesses, and must we conclude that "the testimony of Mr. Linder may all be true in its material features, and yet not necessarily inconsistent with the material statements of Mr. Cole?"

Mr. Cole testified that he had several interviews with Mr. Linder "stretching over nearly a month * * * before the arrangement was fully completed. I think it was some time in May when I gave the orders for the wagons." It is shown that the order was given May 17th, but the wagons were not delivered until June 14, 1909. The Hibama order was given April 30, 1909, and when returned, "no funds," Mr. Linder testified that he had a conversation with Mr. Cole with reference to it, and that at that time "Mr. Cole expected to make arrangements with the Crocker National Bank to pay all outstanding indebtedness, and that was one of the things to be taken care of after they had made the arrangement. That was what Mr. Cole said." This was after the date Mr. Cole says he explained fully to Mr. Linder that the defendant had no money, and could only pay in sugar. This was also after the date fixed by Mr. Cole when he commenced negotiations with plaintiff for the purchase of the wagons, which he said was in April. With reference to the Hibama transaction, as to which Mr. Cole testified that it was included in the contract to pay in sugar, Mr. Linder testified: "I did not have any talk with Mr. Cole at that time about the payment of the $2,000 obligation of Hibama in sugar. The first real conversation we had about sugar was after we brought suit. There was no discussion, except in a casual way, before we brought suit, nothing definite, no agreement at all." This was brought out on cross-examination, and it seems to us to be in sharp conflict with the testimony of Mr. Cole on a very substantial issue in the case—indeed, the vital issue.

As late as the middle of July, a conversation took place between Mr. Linder and Mr. Cole. Of this Mr. Linder testified: "They were to pay up last year's account, and all current business was to be paid out of the money coming from the Crocker National Bank. After the mortgage went on record [the Crocker mortgage], and we didn't get anything, of course, I was willing to take anything else. That led up to the sugar proposition. Then it was that defendant proposed to give plaintiff sugar. I instructed Mr. Zartman, I believe, to draw up a memorandum of agreement as to furnishing plaintiff sugar from that time on. I never heard anything more of that agreement. Nobody ever offered any sugar to me, or gave me any sugar."

It is true that Mr. Linder was not called upon, while on the witness stand, to admit or deny specifically and definitely the various facts testified to by Mr. Cole; but we find it impossible to say, as defendant says we may, that Mr. Linder's testimony "may all be true in its material features, and yet not necessarily inconsistent with the material statements of Mr. Cole." A legitimate inference may be drawn from Mr. Linder's testimony that there was no agreement that these claims should be paid in sugar up to the middle of July, and that the agreement then reached was to be put in writing, which was, by Mr. Linder's direction, so done; but it was not ratified by defendant as submitted, but was changed in some material respects, and, after this suit was brought, was signed by defendant as thus changed, but plaintiff was not notified, nor was a copy sent plaintiff, though submitted in duplicate. In fact, as Mr. Cole testified, the bringing of the suit terminated the negotiations. We do not feel called upon to analyze the testimony further or examine into other features which might lend support to the findings. Suffice it to say, that a substantial conflict is shown as to facts material to the issues, and that it cannot be said that defendant has sustained the issues presented in its special defense without substantial conflict.

[4] 2. As to the Hibama order, the evidence is that it was made by Mr. Cole's direction and with his consent, and, as defendant failed to establish its point that this indebtedness was the subject of the novation claimed, the discussion as to the law governing the splitting of demands need not be noticed. The evidence as to this order and the order itself were admissible.

[5, 6] 3. We de not think defendant can escape its liability on the Studebaker note on the only ground urged, that there was no proof of its assignment. The evidence is that this note was given in adjustment of defendant's account with the San Francisco house, and it was by defendant delivered to plaintiff; it was sent to San Francisco, and came back in two or three days with the assignment indorsed on it. This assignment was by the corporation named as payee, by its treasurer; it was in plaintiff's possession at the trial, and put in evidence. Defendant knew that plaintiff held this obligation, and it was part of the indebtedness made the subject of negotiations between plaintiff and defendant, as testified by Mr. Cole. We think it was rightly admitted in evidence. Possession of commercial paper with indorsement makes a prima facie case of delivery by the indorser to the holder, and of ownership of the latter. In Pastene v. Pardini, 135 Cal. 431, 67 Pac. 681, the court said: "The delivery was prima facie established by plaintiff's production and proffer of the note." See note to Bedell v. Herring, 77 Cal. 572, 20 Pac. 129, 11 Am. St. Rep. 323, where the cases are collected. The proposition there laid down and supported by numerous cases is thus stated: "It is well established that the mere possession of a negotiable instrument by the indorsee, or by the transferee, where no indorsement is necessary, imports prima facie that he is the lawful owner, and that he has acquired it before maturity, bona fide, for value, in the usual course of business, and without any circumstances impeaching its validity."

No other questions call for notice.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

17 Cal. App. 81

LINDER HARDWARE CO. v. PACIFIC SUGAR CORPORATION.

(Sac. 1,865.)

(Supreme Court of California. Nov. 8, 1911.)

In Bank. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by the Linder Hardware Company against the Pacific Sugar Corporation. Judgment for plaintiff, and, an order denying a new trial having been affirmed (118 Pac. 785), defendant moves for rehearing. Rehearing denied.

Bradley & Bradley and Gray, Barker, Bowen, Allen, Van Dyke & Jutten, for appellant. G. W. Zartman and Power & McFadzean, for respondent.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing. There was a plain and direct issue as to the assignment of the note given by defendant to Studebaker Bros. Company, and the plaintiff was bound to make proof of that fact. In my opinion, the proof was wholly insufficient. According to the weight of authority, the treasurer of a trading corporation has no power as such to indorse the negotiable paper of the corporation for sale or discount, and here was no evidence of a special authority—no evidence even that Weaver was treasurer—no evidence of the genuineness of his signature. To hold that the assignment was proved in this case is, in my opinion, to establish a dangerous precedent.

161 Cal. 260

RICHTER v. LIGHTSTON, City Treasurer.

(S. F. 5,599.)

(Supreme Court of California. Oct. 26, 1911. Rehearing Denied Nov. 20, 1911.)

1. Intoxicating Liquors (§ 71*)—Licenses—Issuance—Discretion.

San Jose city ordinance July 7, 1908, established the limits within which retail and wholesale liquor licenses would be granted, and forbade the issuance of licenses without the territory, and provided that it should not prevent the renewal of any license to conduct a bar in any bona fide hotel then existing within the limits fixed. *Held*, that the issuance of a license by the board of health, permitting petitioner to conduct a hotel, merely amounted to a declaration that the premises were sufficiently sanitary to justify the issuance of a hotel license, and was not a conclusive finding against the municipal authorities that the place was or would be conducted as a hotel, and did not prevent the city treasurer, in his discretion, from finding that the building was not a bona fide hotel existing at the date of the adoption of the ordinance, or at all, and from refusing for that reason to issue a license for sale of liquors therein.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 71.*]

2. Intoxicating Liquors (§ 59*)—Licenses—Nature of Place—"Hotel."

Where a building consisted of a barroom, grocery store, six bedrooms, two dining rooms, and a kitchen, and was occupied continuously by a family consisting of a husband and wife and five children, and two others, guests being accommodated at night only occasionally, it was not a bona fide hotel within San Jose city ordinance July 1, 1908, regulating the issuance of liquor licenses.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 59; Dec. Dig. § 59.*

For other definitions, see Words and Phrases, vol. 4, pp. 3349, 3350; vol. 8, p. 7680.]

3. Intoxicating Liquors (§ 130*)—Regulations—Prohibition District.

Where a city ordinance restricting the location of saloons embraced within its boundaries the center or business part of the city, the fact that the district was irregular in shape, and that there were certain streets radiating from and extending beyond the district, in which the saloons were permitted, did not show that the boundaries of the district were unreasonably established.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 130.*]

4. Intoxicating Liquors (§ 130*)—Regulation — Ordinances — "Bar" — "Barroom" —"Saloon."

San Jose city ordinance July 1, 1908, is entitled "An ordinance establishing the limits within which retail and wholesale licenses and transfers thereof will be granted," and provides that no license for any bar, barroom or saloon, or other public drinking place should be granted, etc. *Held*, that the words "bar," "barroom," and "saloon" were used, according to their commonly accepted definition, to mean rooms or places where intoxicating liquors were sold, and that the ordinance was therefore not objectionable because the body thereof did not in terms mention intoxicating liquors.

[Ed. Notes.—For other cases, see Intoxicating Liquors, Dec. Dig. § 130.*

For other definitions, see Words and Phrases, vol. 1, pp. 704, 705; vol. 7, pp. 6310, 6311; vol. 8, p. 7794.]

5. Intoxicating Liquors (§ 130*)—Prohibition District—Regulatory Ordinance.

San Jose city ordinance July 1, 1908, establishing a district within which sales of liquor should be limited, and providing against the issuance of licenses for the sale thereof outside such district, was not objectionable as an attempted police regulation fixing no penalty for its violation.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 130.*]

6. Constitutional Law (§ 240*) — Fourteenth Amendment — Intoxicating Liquors.

San Jose city charter July 1, 1908, establishing a limited district within which licenses for the sale of liquor might be granted, is not in conflict with Const. U. S. Amend. 14.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 240.*]

In Bank. Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Application by Kate Richter for a writ of mandamus against James Louis Lightston, as Treasurer of the City of San Jose, to compel the granting of a license to maintain a saloon on plaintiff's premises. Judgment for defendant, and plaintiff appeals. Affirmed.

John B. Kerwin, for appellant. H. L. Partridge, for respondent.

HENSHAW, J. This action is for mandate against the treasurer of the city of San Jose to compel him to issue a quarterly license to maintain a saloon for the sale of intoxicating liquors on plaintiff's premises. Judgment passed for defendant, and plaintiff appeals.

Plaintiff had been conducting the business of a saloon keeper under a quarterly license issued by the city of San Jose. In December, 1907, the city passed an ordinance "establishing the limits within which retail and wholesale liquor licenses and transfers thereof will be granted." This license ordinance fixed the district and streets within which and upon which such licenses could be issued and forbade the issuance of licenses without this territory and provided "that nothing herein contained shall prevent the renewal of any license to conduct a bar in any bona fide hotel at present existing within said limits." This license ordinance by its terms was to take effect after the 1st day of July, 1908.

Plaintiff pleaded and the court found that on the 14th day of July, 1908, plaintiff procured from the treasurer of the city of San Jose a license to conduct a hotel upon the premises of plaintiff for the six months beginning July 1, 1908, and ending on December 31, 1908; that also on the 14th day of July, 1908, the board of health of the city of San Jose granted plaintiff a permit to conduct and maintain a hotel upon said premises; and that this permit has not been revoked—all in conformity with the ordinances of the city. Plaintiff thereupon made demand upon the treasurer of the city to issue the license for the conducting of a liquor saloon in connection with the hotel, and upon the treasurer's refusal to do so this action in mandate was brought.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] It is first contended that mandate should issue against the treasurer as of right, since the treasurer is vested with no discretionary power to issue or to refuse to issue such a license, and that the question of petitioner's right thereto is settled by the issuance by the board of health of the permit to conduct the hotel and by the issuance following thereon of the license to conduct the hotel. The issuance of a license permitting one to conduct a hotel is in no sense a binding finding against municipal authorities that the place is, or is to be conducted as, a hotel. Still less does it estop them from declaring, if the facts shall warrant, that a hotel is not actually being conducted. For the same reasons no more force attaches to the permit of the board of health to conduct a hotel, which amounts to nothing other than a declaration that the premises are sufficiently sanitary to justify the issuance of a license for the indicated purposes. Municipalities may well provide for a method by which such disputed questions of fact may be determined. If such a method is not provided, it does not become the imperative duty of the license officer to issue a license on demand. He must as the agent of the city be vested with certain discretionary powers, and upon his refusal to issue a license appeal may be made to the council itself, or, as here, to a court.

[2] The court found that "the building wherein such bar and saloon were kept is not and was not a bona fide hotel existing at the date of the adoption of such ordinance or existing at any other time or at all." It is contended that this is but a misplaced conclusion and is at variance with a specific finding, No. 16, which declares: "(16) That plaintiff has invested large sums of money in her business conducted at No. 575 Keyes street, which consists of a picnic park or pleasure ground, a saloon or barroom, a grocery store, a house having six bedrooms, one small and one large dining room, and a kitchen which is kept as a boarding house and eating house, at which the daily boarders varied from 4 to 40; that said boarding house and eating house was on and before December 18, 1907, and ever since has been, open to the public as a place where meals and lodgings could be had; and that occasionally persons were accommodated over night. All of said property is of a total value of $14,000." But, unless it can be said that finding 16 conclusively establishes that plaintiff was conducting a hotel business, it is not in conflict with the ultimate finding above quoted; and this cannot be said when the sole circumstance pointing to a hotel business is that "occasionally persons were accommodated over night." This is far from establishing that the business of conducting a hotel was there carried on. A consideration of the evidence confirms this conclusion and justifies the finding of the court. There are in this "hotel" six bedrooms; three bedrooms upstairs which are in reality but two rooms, the third being made by dividing one by portières. In the house there are three double beds, three three-quarter beds, and one single bed. There are five children in the family, and the husband and the wife and the five children occupy the upstairs bedrooms. The bedrooms of the lower floor alone would be available as guest chambers of this hotel; but one of these is occupied by John Cavanaugh and has been so occupied for a year. The remaining two rooms have a concrete floor, and one had been used as a kitchen and a kitchen cookstove left therein. One of them is occupied by Meyer, and the other small bedroom downstairs is occupied by another person whose name is not disclosed by the record. It may be by the barkeeper, as it is in evidence that the barkeeper sleeps in the house. Thus, there are 10 persons in all who continuously occupy the limited accommodations afforded by these six rooms. We think it requires no further elaboration of the evidence to support the finding that this is not a hotel.

[3] Against the validity of the ordinance it is contended that it does not describe a district. But by the stipulation of the parties it appears that the territory "embraced within the exterior boundaries set forth describes the center or business part of the city of San Jose." If, as appellant contends, the district is irregular in shape, and there are certain streets radiating from and extending beyond this district upon which saloons are permitted, these facts do not of themselves establish the unreasonableness of the district, and appellant does not show any additional fact to support his contention.

[4] The fact that the body of the ordinance does not in terms mention intoxicating liquors is immaterial. The title of the ordinance is above given and the body of the ordinance declares that "no licenses for any bar, barroom, saloon or other public drinking place * * * shall be granted," etc. In connection with the title no doubt can be entertained but that the ordinance was designed to prohibit the granting of licenses for the sale of intoxicating liquors at retail. The words "bar," "barroom," and "saloon," whatever their primary significance, have come to have accepted definitions even by the lexicog-

raphers as being rooms or places where intoxicants are sold.

[5] There is no force to the argument that the ordinance as an attempted police regulation is futile in that it fixes no penalty for a violation of its terms. Its terms, it will be noted, are prohibitory. It forbids the issuance of a license within the inhibited district. It is the province of other ordinances to impose fines and penalties for the conduct of the prohibited business without a license, and in the case of the city of San Jose the charter itself makes such provision. Article 3, c. 2, § 1, subd. 16.

[6] It is finally urged that the ordinance is in conflict with the fourteenth amendment to the Constitution of the United States and Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923, is cited in support of this proposition. We fail to perceive its applicability, and counsel does not enlighten us upon the point. Recognition is made of the matter, however, in conformity with the practice of this court that where a federal question is advanced notice will be taken of it in the opinion to serve as the foundation for an application for a writ of error to the Supreme Court of the United States.

The judgment appealed from is therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.; ANGELLOTTI, J.; SHAW, J.; SLOSS, J.

(161 Cal. 238)

Ex parte WOODS. (Cr. 1,710.)

(Supreme Court of California. Oct. 20, 1911.)

COURTS (§ 41*)—JUSTICES OF THE PEACE (§ 2*)—JUSTICES' COURTS—ABOLITION.

Const. art. 6, § 1, as amended in 1911 (Laws 1911, p. 2161), provides that the judicial power of the state shall be vested in the Supreme Court, District Courts of Appeal, superior courts, and such inferior courts as the Legislature may establish, etc. Section 11, as so amended, provides that the Legislature shall determine the number of inferior courts in incorporated cities or towns, and in townships, counties, etc., according to population, and shall fix the powers of such courts and of the judges or justices thereof; and section 15, as amended by such amendment, provides that no judicial officer, except court commissioners, shall receive any fees of office, provided that justices of the peace now holding office shall receive for their own use such fees as are now allowed by law during the terms for which they have been elected. *Held*, that the amendments did not abolish the justices' courts and other inferior courts which had been previously established by statute.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 41;* Justices of the Peace, Dec. Dig. § 2.*]

In Bank. In the matter of the application of J. A. Woods for a writ of habeas corpus. Application denied.

Robert J. Adcock and French & Burnham, for petitioner.

PER CURIAM. The application for a writ of habeas corpus is denied. The recent amendment of sections 1, 11, and 15 of article 6 of the Constitution does not abolish the justices' courts and other inferior courts which had been previously established by acts of the Legislature. They remain in existence with the jurisdiction vested in them by the acts creating them, until the Legislature shall, in the exercise of the power given by the section as amended, otherwise provide.

(161 Cal. 257)

GOFF v. LADD. (S. F. 5,304.)

(Supreme Court of California. Oct. 26, 1911.)

1. CONTRACTS (§ 187*)—PARTIES—AGREEMENT FOR BENEFIT OF THIRD PERSONS—PAYMENT OF ANOTHER'S OBLIGATION.

Civ. Code, § 1559, permits a contract, made expressly for the benefit of a third person, to be enforced by him before rescission; and section 2854 entitles a creditor to the benefit of everything which his surety has received from the debtor by way of security for the performance of the obligation, and, upon maturity of the obligation, to compel application of such security to its satisfaction. Plaintiff procured a judgment against T., from which T. appealed, giving an undertaking to stay execution with a surety company, to induce it to execute which, T. and defendant's testator executed a several agreement with the surety company to "pay such judgment as the court on appeal may award to said plaintiff," and the judgment was affirmed on appeal. The surety company became insolvent, and T. died, leaving no estate. *Held* that, construing the statutes in view of the analogous rule entitling a creditor in equity to the benefit of all security received by the surety from the debtor, undertaking to pay the original debt, and not merely to indemnify the surety for any sum paid by him because of his obligation, the undertaking between testator and the surety company was for plaintiff's benefit, within section 1559, being in effect a promise to pay plaintiff the amount of the judgment upon affirmance, so that he could enforce it thereunder, as well as under section 2854; it being security for the performance of the surety company's obligation.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 798–807; Dec. Dig. § 187.*]

2. PARTIES (§ 30*)—JOINT AND SEVERAL OBLIGATIONS.

Where a contract is joint and several, one of the promisors could be sued alone thereon.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 42–45; Dec. Dig. § 30;* Contracts, Cent. Dig. § 1605.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Almon B. Goff, Jr., against W. Ladd, executor of Benjamin Healey, deceased. From a judgment for defendant, plaintiff appeals. Reversed.

F. W. Sawyer, for appellant. W. A. S. Nicholson and D. I. Mahoney, for respondent.

PER CURIAM. When this case was in department, it was decided upon the record then before this court that this action upon a rejected claim presented against the estate of Benjamin Healey, deceased, was not commenced within three months after its rejection, and was therefore barred by the provisions of section 1498 of the Code of Civil Procedure. Upon petition for a rehearing and the presentation of a supplemental record, it was shown that the action upon the claim was in fact commenced within the time limited by the Code provision. The rehearing was therefore granted that the appeal might be considered on the merits.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

In the court below, judgment was given for the defendant after sustaining a demurrer to the second amended complaint. The material facts alleged are as follows: In an action against William Tardiff, this plaintiff obtained a judgment for $462.55. Tardiff appealed from the judgment, giving an undertaking to stay execution with the Union Surety & Guaranty Company as surety thereon. To induce the surety company to execute the undertaking, Tardiff and Benjamin Healey, defendant's testator, entered into a written contract with the surety company, whereby they severally agreed to "pay such judgment as the court on appeal might award to the said plaintiff." On the appeal, the judgment was affirmed. The Union Surety & Guaranty Company became and is insolvent. The judgment has not been paid. Tardiff died, and Healey became the executor of his estate. Tardiff left no property. Healey died, and Ladd (defendant herein) became the executor of his estate. Plaintiff in due time presented to Ladd, as such executor, his duly verified claim against the estate of Healey, as set forth in the complaint, and the same was rejected. The contention is that plaintiff is entitled to avail himself of the benefit of the undertaking taken by the surety company for its indemnity.

[1] The right of a creditor in such cases is determined by the rules stated in sections 1559 and 2854 of the Civil Code, which are as follows: "Sec. 1559. A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." "Sec. 2854. A creditor is entitled to the benefit of everything which a surety has received from the debtor by way of security for the performance of the obligation, and may, upon the maturity of the obligation, compel the application of such security to its satisfaction." The principle is thus stated in Van Orden v. Durham, 35 Cal. 145: "If a surety has a counterbond, or security from the principal, the creditor will be entitled to the benefit of it, and may, in equity, subject such security to the satisfaction of his debt." To the same effect are Hopkins v. Warner, 109 Cal. 136, 41 Pac. 868; Williams v. Naftzger, 103 Cal. 440, 37 Pac. 411; Keller v. Ashford, 133 U. S. 622, 10 Sup. Ct. 494, 33 L. Ed. 667; Crowell v. Currier, 27 N. J. Eq. 154; King v. Harman's Heirs, 6 La. 607, 26 Am. Dec. 485; 1 Brandt on Suretyship, § 357; 1 Jones on Mortg. § 755; 3 Pom. Eq. Jur. § 1206.

A distinction is made in the decisions between the case where the indemnity bond to the surety consists of an undertaking to pay the original debt, or is "for the performance of the obligation," as section 2854 of the Civil Code expresses it, and the case where it is simply an undertaking to repay to the surety such sum as he may be compelled to pay of the debt by reason of his obligation as surety therefor. In the latter class of cases, it is said there can be no breach of the counterbond until the surety has paid something on the debt, and as it runs to the surety alone, and is solely for his benefit, the creditor is not entitled to sue on it, or to subject it to the payment of his debt, in equity. The following decisions so hold: Osborn v. Noble, 46 Miss. 449; Taylor v. Farmers' Bank, 87 Ky. 398, 9 S. W. 240; Macklin v. Northern Bank, 83 Ky. 314; Hampton v. Phipps, 108 U. S. 260, 2 Sup. Ct. 622, 27 L. Ed. 719; Ohio Life Ins. Co. v. Reeder, 18 Ohio, 46; Leggett v. McClelland, 39 Ohio St. 624; Henderson v. Shillito, 64 Ohio St. 252, 60 N. E. 295, 83 Am. St. Rep. 745; Michigan Bank v. Hastings, 1 Doug. (Mich.) 258, 41 Am. Dec. 549; 1 Brandt, Suretyship, §§ 360, 361.

According to the allegation of the complaint, the undertaking of Healey to the surety company was not simply to indemnify it against loss from such sum as it might be compelled to pay on the judgment, but was a direct undertaking to pay the judgment. The judgment could not be paid, except to some person authorized to receive payment; that is, to the plaintiff alone. Hence it was, in effect, a promise to pay the judgment to the plaintiff, if it was affirmed, and, although made to a third person, it was expressly for plaintiff's benefit and, under section 1559 aforesaid, it may be enforced by him. Also, as it was security "for the performance of the obligation" on which the surety company was bound (the judgment), it comes within the terms of section 2854, and the plaintiff may compel its application to the satisfaction of the judgment.

[2] There does not seem to be any misjoinder or nonjoinder of parties. The alleged obligation of Healey and Tardiff was joint and several in form. Healey alone could be sued separately upon it. Tardiff's personal representative is not a party defendant. It appears from what we have said that the demurrer was improperly sustained.

The judgment is reversed.

161 Cal. 234

JONES et al. v. ALLERT et al. (Sac. 1,828.)

(Supreme Court of California. Oct. 20, 1911.)

1. MINES AND MINERALS (§ 55*)—VENDOR'S LIEN—WAIVER—SECURITY.

Plaintiffs agreed to sell mining claims to E. and his assigns; it being understood that he would forthwith organize a corporation to develop the mines. Plaintiffs executed a deed to E. and placed it in escrow. A corporation having been organized, plaintiffs surrendered possession to the corporation, which thereafter continued in possession and made all the payments on the purchase price, except the last. Prior to the accrual of this payment, the corporation's officers induced plaintiffs to make another deed directly to the corporation, and had instructed the escrow holder to deliver the first deed to E., which was done; plaintiffs receiving the note of the individual defendants for the balance of the purchase price under the contract. *Held*, that the reception of the note was the taking of security, which worked an absolute waiver of plaintiffs' vendor's lien on the property, as prescribed by Civ. Code, § 3046.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 55.*]

2. CORPORATIONS (§ 448*)—OBLIGATIONS—PERSONAL LIABILITY.

Where, a contract was made to convey mining claims to E. and his assigns, it was contemplated that he should organize defendant corporation to take over and operate the claims, as he subsequently did, and the corporation entered under a deed from the vendors directly to it, and later secured other deeds from the vendors of amended locations, E. was a mere intermediary, and the corporation, having knowledge of his agreement in taking over the property, assumed his obligations for the price.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1709, 1789–1792; Dec. Dig. § 448.*]

Department 2. Appeal from Superior Court, Plumas County; John E. Raker and John L. Childs, Judges.

Action by B. L. Jones and another against H. D. Allert and others. From a decree for plaintiff Annie E. Jones against the Continental Mining Company, and from an order denying a new trial, defendants appeal. Reversed in part.

L. N. Peter (H. W. Ballantine, of counsel), for appellants. U. S. Webb and J. A. Boyle, for respondents.

HENSHAW, J. This is an appeal by the defendants from a decree in favor of plaintiff Annie E. Jones, wife of plaintiff B. L. Jones, against one of the defendants the Continental Mining Company, awarding a personal judgment against the corporation for the balance of the purchase price of certain mining claims, and declaring the amount of the judgment to be a vendor's lien upon the property. There is also an appeal from the order denying defendants' motion for a new trial.

[1] The complaint alleged that the plaintiff Annie E. Jones was the owner, and that she and her husband, plaintiff B. L. Jones, were in the possession and operation of certain mining claims and ditch and water locations; that the plaintiffs entered into an agreement in writing with defendant Engle (who made default) to sell and convey this property to Engle or his assigns. It was understood and agreed that Engle would forthwith incorporate a mining company to develop and work the properties. Pursuant to their agreement, the plaintiffs executed a deed to the property, conveying it to defendant Engle, and placed it in escrow, with directions to the escrowee to deliver the deed to Engle or his assigns upon performance of the agreement. Defendant Engle was at that time associated with defendants Allert and McLean and others, and they incorporated and organized the Continental Mining Company in accordance with the terms of the agreement. The plaintiffs then surrendered possession to the defendants, including the defendant Continental Mining Company, who entered, took possession, and have continued in possession of the property ever since. By the terms of the agreement, payments of the money were to be made on account of the purchase price from time to time, and these payments were made. In addition thereto, plaintiffs were to receive and did receive a certain amount of the stock of the defendant corporation. Defendants' agreement was in all respects complied with, saving that they failed to make the last payment of $4,500. Prior to the time when this payment became due, the defendants, officers of the defendant corporation, induced plaintiffs, upon the representation of the convenience to the defendant corporation in promoting sales of its stock and in the management of the property, to make another deed directly to said corporation, and to instruct the escrowee to deliver their first deed to the defendant Engle, all of which was done. Subsequently, at the request of Engle and of the corporation, the plaintiffs made amended locations to the lands, and for a further assurance of the title of the corporation made new deeds to the corporation under these amended locations. After these subsequent acquisitions of title by the corporation, defendants Allert and McLean, who had always been stockholders, officers, and managers of the mining business of the corporation, at the instance of the corporation, "and for and on its behalf, and for and in consideration of the purchase money for said property still unpaid as aforesaid, at the town of Langdon, North Dakota, did make" their promissory note to the plaintiff B. L. Jones for $4,500, the amount of the last payment on the purchase price of the property; "that plaintiffs received said promissory note, and have since and do now hold said promissory note, and the defendants have promised plaintiffs that the said corporation defendant would pay said sum of money to these plaintiffs, but the said sum of money, or any part thereof,

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

has not been paid, and the whole thereof is now long past due and wholly unpaid." It is upon this pleading that the plaintiff sought a personal judgment against the corporation defendant and a vendor's lien upon the property for the amount of the judgment. This was awarded by the court. The answer of the defendant corporation set up that the plaintiffs "received and accepted the note from the defendants Allert and McLean in consideration of and as security for the unpaid portion of the purchase price of said property, and do now hold said promissory note as security for the unpaid portion of the purchase price for said properties, and that said plaintiffs have thereby waived and abandoned any lien they might claim upon said property, or any part thereof, as security for said purchase price thereof." The finding upon this is "that said note was not accepted by said plaintiffs, nor by either of them, as payment of the balance due on the purchase price of said mine, or any part thereof, or at all." This by respondent is construed as a finding that neither of the plaintiffs received the note for any purpose or at all, and that it thus negatives the averment of the defendants' answer. If such be the purport of the finding, then it is in absolute conflict with the testimony of the plaintiff Mrs. Jones, the owner of the property. Interrogated as to the note, she makes answer as follows: "Q. Haven't you kept it now for a little over four years? A. Yes, sir. Q. Haven't you been to town a great many times since the note was received by you? A. Yes, sir. Q. Didn't you and your husband place it in the hand of Judge Goodwin for collection in July, 1904? A. Yes, sir. Q. Did you not, you and your husband, authorize Judge Goodwin to take action for the collection of the note, if necessary? A. Yes, sir. Q. You and Mr. Jones have considered all the time since you received that note, considered it belongs to you, and have a right to retain it, do you not? A. Yes, sir."

The finding is also at variance with the allegations of the complaint itself, which are to the effect that the makers of the note gave it to the plaintiffs at the instance of the corporation "for and on its behalf, and for and in consideration of the purchase money of said property still unpaid," and that "plaintiffs received said promissory note, and have since and do now hold said promissory note, and the defendants have promised plaintiffs that the said corporation defendant would pay the said sum of money to these plaintiffs." That the reception of this note under these circumstances was the taking of security, working an absolute waiver of the vendor's lien, there can be no doubt. Section 3046 of the Civil Code so provides, and leaves no room for the consideration of cases arising in the absence of such statutory provision, where the question turns upon the intent of the vendor to waive his lien. Upon the taking of security, the law of this state fixes the intent as an absolute waiver. Baum v. Grigsby, 21 Cal. 175; Avery v. Clark, 87 Cal. 619, 25 Pac. 919; Finnell v. Finnell, 156 Cal. 589, 105 Pac. 740, 134 Am. St. Rep. 143; Royal Consolidated Mining Co. v. Royal Consolidated Mines, 157 Cal. 737, 110 Pac. 123, 137 Am. St. Rep. 165. It follows herefrom that such part of the judgment as decrees a vendor's lien cannot be sustained.

[2] Appellants further urge that there is no evidence justifying a personal judgment against the corporation defendant; their contention in this respect being that they merely took from Engle and did not assume the obligations of his contract. Lisenby v. Newton, 120 Cal. 571, 52 Pac. 813, 65 Am. St. Rep. 203. But, without elaborating upon the facts which justified the court's judgment in this regard, suffice it to say that the agreement and course of conduct of the parties give evidence that Engle was a mere intermediary, and that the real party in interest was the corporation; that the officers of this corporation solicited and obtained from plaintiffs a deed to the property directly to it; that they entered into possession of the property under the deed, and secured later deeds from the plaintiffs of amended locations; that they proposed to the plaintiffs to accept for the last payment the note of the corporation; that they delivered to plaintiffs, on behalf of the corporation, the security note above discussed; that the corporation had knowledge throughout of the Engle agreement; that it did not consider it necessary to secure or record a deed from Engle, but rested upon the title obtained from plaintiffs, and in many ways, through its officers, made recognition of its personal obligation to make the money payments in accordance with the terms of the Engle contract. The findings and the judgment in this respect are therefore sufficiently sustained.

It follows from the foregoing that so much of the judgment as awards a vendor's lien to the plaintiffs must be reversed, and that in all other respects the judgment should be affirmed, and it is ordered accordingly.

We concur: MELVIN, J.; LORIGAN, J.

161 Cal. 265

SUNSET TELEPHONE & TELEGRAPH CO. et al. v. CITY OF PASADENA et al. (L. A. 2,557.)

(Supreme Court of California. Oct. 27, 1911. Rehearing Denied Nov. 25, 1911.)

1. Telegraphs and Telephones (§ 10*)—Franchises—Use of Streets—Federal Act.

Act Cong. July 24, 1866, c. 230, 14 Stat. 221, empowering telegraph companies to construct their lines over military or post roads of the United States, does not permit a telegraph company to appropriate to its exclusive use portions of streets of a city without being subject to charges imposed by the city therefor.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 6; Dec. Dig. § 10.*]

2. Commerce (§ 28*)—Telephone Companies—Interstate Business—Rights in Streets.

That a telephone company was engaged in interstate commerce did not give it the right to permanently occupy portions of the public streets of a city to the exclusion of the public without permission to do so from the proper authority.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 22; Dec. Dig. § 28.*]

3. Telegraphs and Telephones (§ 10*)—Rights in Streets—Statutes.

Act March 22, 1905 (St. 1905, p. 777) § 1, provides that every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate street or suburban railways on any street or highway, or to exercise any privilege hereafter proposed to be granted by any boards of supervisors, boards of trustees, common councils, or other governing or legislative bodies, or any county, city and county, city, or town within the state, except steam railroads and except telegraph or telephone lines doing an interstate business, shall be granted on the conditions provided by the act and not otherwise. *Held*, that such act did not grant any rights in public highways to a telephone company doing an interstate business; the whole purpose of the act being to prescribe the method and conditions under which franchises included within its terms might be granted by the legislative body authorized by law to make the grant.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 6; Dec. Dig. § 10.*]

4. Telegraphs and Telephones (§ 10*)—Construction of Lines—Rights in City—Statutes—"Telegraph Corporations."

The words "telegraph corporations," as used in Civ. Code, § 536, prior to its repeal and re-enactment by St. 1905, p. 492, authorizing telegraph corporations to construct lines along or on any public road or highway, etc., could not be construed to include telephone companies, under the rule that grants contained in public statutes must be strictly construed in favor of the public.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 6; Dec. Dig. § 10.*

For other definitions, see Words and Phrases, vol. 8, p. 6897.]

5. Statutes (§ 209*)—Construction—Words.

There is no rule that requires the same meaning to be given to the same word used in different places in the same statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 286; Dec. Dig. § 209.*]

6. Telegraphs and Telephones (§ 10*)—Construction—Rights in Streets—"Municipal Affair."

The construction and maintenance of telephone wires along the streets of a city, and the terms and conditions under which they shall be constructed and maintained, is a municipal affair within Const. art. 11, § 6, as amended in 1896, making the provisions of a freeholders' charter, adopted by a city, paramount to general laws enacted by the State Legislature in municipal affairs.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 10.*

For other definitions, see Words and Phrases, vol. 5, p. 4619; vol. 8, p. 7726.]

7. Municipal Corporations (§ 661*)—Rights in Streets—State Jurisdiction—Surrender.

The state may surrender to any municipality full control of its streets and highways, as regards the appropriation and use thereof for telephone lines.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1432; Dec. Dig. § 661.*]

8. Municipal Corporations (§ 661*)—Streets—Control—City Charter—Constitutional Provisions.

That the provisions of a freeholders' charter, purporting to give to a city full control as to the use of its streets for pipes and conduits for furnishing water, light, etc., were ineffective because of a subsequent direct grant of power with reference to such uses made by Const. art. 11, § 19, did not indicate an intention not to vest such control in the city; such provisions not being limited to authorization to prescribe regulations only within the domain of the police power.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1432, 1434–1437; Dec. Dig. § 661.*]

9. Telegraphs and Telephones (§ 10*)—Rights in Streets—Statutes.

Since the rights of a telephone company to maintain and operate a telephone line on the streets of a city is a municipal affair within Const. art. 11, § 6, making the provisions of a freeholders' charter paramount to general statutes in municipal affairs, the rights of a telephone company, using the streets of a city governed by a freeholders' charter, were not extended by Civ. Code, § 536, as re-enacted by St. 1905, p. 492, authorizing telegraph or telephone corporations to construct lines along and on any public road or highway, etc.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 6; Dec. Dig. § 10.*]

10. Constitutional Law (§ 230*)—Use of Streets—Ordinances—Discrimination.

Pasadena city ordinance No. 841 makes it unlawful to erect or maintain on any of the streets of the city any telephone poles or wires for use in doing local or intrastate business, without a franchise or privilege therefor from the city, and declares that any person, maintaining or operating on the streets any telephone line or poles doing an interstate business, shall pay to the city, semiannually in advance, for the use of the streets the sum of 75 cents for each pole so maintained, unless the person shall have secured a franchise or privilege therefor. *Held*, that such ordinance was not discriminatory against telephone companies doing an interstate business, they being entitled to use the streets on paying the fee prescribed without a franchise, while local companies were not entitled to use the streets at all without a franchise.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 230.*]

11. Telegraphs and Telephones (§ 30*)—Use of Streets—License—Fee—Reasonableness.

Where a city had power to withhold from telephone companies the right to exclusively occupy portions of the streets for poles and wires, or to permit such occupation on terms satisfactory to it, a telephone company could not be heard to claim that a license fee per pole, required to be paid by companies using the streets, was unreasonable.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 30.*]

In Bank. Appeals from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Suit by the Sunset Telephone & Telegraph Company and the Pacific Telephone & Telegraph Company against the City of Pasadena and others. From an order dissolving a temporary injunction, from a judgment denying an injunction, and from an order denying a new trial, complainants appeal. Affirmed.

Pillsbury, Madison & Sutro (E. S. Pillsbury and Alfred Sutro, of counsel), for appellants. J. P. Wood, City Atty., and Wm. J. Carr, Asst. City Atty. (John W. Shenk, City Atty. for City of Los Angeles, on the brief, by permission of court, and Percy V. Long, City Atty., and Jesse H. Steinhart, Asst. City Atty., for City and County of San Francisco, by permission of court), for respondents.

ANGELLOTTI, J. These are appeals from an order dissolving a temporary injunction, and from a judgment denying an injunction and an order denying a motion for a new trial in an action brought by plaintiffs against the city of Pasadena and certain officers of said city to obtain a decree restraining the defendants from in any manner interfering with the maintenance or operation of plaintiffs' telephone and telegraph system so far as the same is located on public streets in said city.

There is no conflict in the evidence as to what we consider the material facts in this case. Some of our statements in regard thereto are taken from the opinion of the trial court. The city of Pasadena was organized in the year 1886 under the general laws of the state as a city of the sixth class, and in the year 1901 reorganized under a freeholders' charter, pursuant to the provisions of the Constitution. Prior to its organization as a city in 1886, viz., in the year 1883, the Sunset Telephone-Telegraph Company established a telephone system therein, using the roads and streets thereof for its poles and wires. Plaintiff Sunset Telephone & Telegraph Company was incorporated in April, 1889, and immediately acquired by assignment all of the property of the Sunset Telephone-Telegraph Company, including its lines in Pasadena, and whatever rights it had acquired in that city. The other plaintiff, the Pacific, etc., Company, was incorporated in 1906, and is the lessee of its coplaintiff of its entire telephone and telegraph system. The interests of the two plaintiffs in the matters involved are so close that they may be here treated as one person, and for convenience will be so treated and referred to in the singular number. As originally installed there were a local exchange and long distance connections. "The system has been extended, and has now about 4,000 regular subscribers. Throughout the state of California, and in its various cities and towns, the said plaintiff has installed a similar system for both local and long distance use, serving its subscribers with about 195,000 telephones. It has likewise installed in the states of Oregon, Washington, Montana, Idaho, and Nevada, a system for local and long distance service, having in those states an aggregate of about 135,000 telephones for its subscribers. The entire system in California and the other states is connected, forming a homogeneous whole." It may be assumed for the purposes of this case that plaintiff's lines in Pasadena have always been used in the conduct of an interstate telephone business. Although plaintiff's charter describes it as a telephone and telegraph company, it is clear that it has always been primarily and principally engaged in purely a "telephone" as distinguished from a "telegraph" business, and that, while it has occasionally telegraphed some messages over its main telephone wires, such transmission of messages, to use the language of the finding of the trial court, "is not usual or customary, and the number of them transmitted is insignificant, and too insignificant to characterize the lines of plaintiffs or any of the lines of either of plaintiffs, situated in the city of Pasadena, as telegraph lines." Of course, its lines connecting its offices or exchanges with the houses and places of business of its subscribers, constituting the great bulk of its system in the city of Pasadena, have never been used at all for the transmission of telegraphic messages. The trial court found that, until the year 1901, neither of plaintiffs transmitted any telegraph messages at all, over or by the aid or use of lines situated in the city of Pasadena, and that their lines situated in said city were not used at all for telegraphic purposes, and that the only lines or wires of plaintiff over which any telegraph messages have been or are at any time transmitted are telephone wires, used usually for telephone purposes, placed upon poles running on Fair Oaks avenue south of

Colorado street to the south limits of said city. The findings of the trial court in this connection are sufficiently sustained by the evidence. It is manifest from the record that what plaintiff is seeking is to restrain action on the part of the local authorities in regard to a "telephone" as distinguished from a "telegraph" system.

On August 6, 1887, an ordinance was adopted by the board of trustees of the city on the application of the Sunset Telephone-Telegraph Company, being ordinance No. 75, entitled "An ordinance granting to the Sunset Telephone-Telegraph Company the right to erect poles and run telephone wires along the public streets." This ordinance purported to grant to the applicant the privilege for the period of 20 years from its date to erect and maintain telephone poles upon, and to run wires over and along, the public highways and thoroughfares of the city of Pasadena, subject to certain conditions. These conditions reserved to the board of trustees of the city certain supervision and control in the matter of the location, construction, and maintenance of the poles and wires for the purpose of preventing undue interference with the use of the streets by the public. After the expiration of the term prescribed by this ordinance, viz., on February 4, 1908, there was duly enacted an ordinance, known as ordinance No. 841, providing that it shall be unlawful to erect or maintain on any of the streets of the city any telegraph or telephone poles or wires for use in "doing local or intrastate business without a franchise or privilege therefor from the city of Pasadena," and that any person, etc., maintaining or operating upon the streets any telegraph or telephone lines or poles "doing an interstate business," shall pay to the city, semiannually in advance, "for the use of the streets, alleys, and public places by the poles, wires and appliances of such lines," the sum of 75 cents for each and every pole so maintained and operated, unless such person, etc., shall "have or secure a franchise or privilege" therefor. Poles and wires maintained in violation of the provisions of this ordinance are declared thereby to be public nuisances, and it is made the duty of certain officers of the city to summarily abate and remove any poles, wires, or appliances so maintained. Plaintiff having failed to apply for or secure from the city any franchise for the use of the streets for its poles and wires, and having refused to pay any of the charges imposed by the ordinance for the use of the streets for its poles and wires, the city authorities were proceeding with the work of summarily removing such poles and wires from the streets, with the result that this action was commenced to obtain an injunction restraining any such action by the city authorities; the claim of plaintiff being that as to it ordinance 841 is void and without force.

It is to be borne in mind that the only interference with plaintiff threatened by the city authorities is that of preventing the exclusive occupation by it with poles and wires of portions of the public streets of the city except upon compliance with the terms of the ordinance. To warrant such exclusive use of any portion of a public highway by any person or corporation, there must be, as was said by the trial judge, a "grant of right from a competent authority."

[1] It was claimed by plaintiff in the lower court that such a grant was to be found in the provisions of the act of Congress of July 24, 1866, entitled "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal and military purposes"; the plaintiff being a telegraph as well as a telephone company and having accepted the provisions of said act in the year 1897. For all the purposes of this appeal, this claim has been expressly abandoned by plaintiff. It may properly be noted, in passing, that such a claim is without force under the views expressed in the recent case of Western Union Telegraph Co. v. Hopkins, 116 Pac. 557.

[2] Plaintiff relies upon the claim that all its lines in Pasadena are interstate telephone and telegraph lines doing an interstate telephone and telegraph business, as giving it the right to occupy the public streets thereof without permission of the city. We may assume purely for the purposes of this decision that the claim of the plaintiff as to the interstate character of its business in Pasadena is sustained by the evidence, although the trial court found otherwise. It is, of course, not claimed, and could not well be claimed, that the mere fact that one is engaged in interstate commerce gives him the right to permanently occupy, to the exclusion of the public, portions of public highways of a state, either within or without cities, in the absence of permission to do so from proper state authority.

[3] But it is urged that the right has been granted to plaintiff by the state by section 1 of the act of the Legislature of the state of California, approved March 22, 1905, entitled "An act providing for the sale of street railroad and other franchises in counties and municipalities," etc. Stat. 1905, p. 777. That section, so far as material, simply provides that "every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate street or suburban railroads upon any public street or highway, * * * or to exercise any other privilege whatever hereafter proposed to be granted by boards of supervisors, boards of trustees, or common councils, or other governing or legislative bodies or any county, city and county, city or town within this state, *except steam railroads and except telegraph or telephone lines, doing an interstate business,* * * * shall be granted upon the conditions

in this act provided, and not otherwise." The remaining sections prescribe the method of procedure to be followed and the conditions upon which the franchises specified shall be granted; such conditions including among others one to the effect that the holder must, after the first five years of the life of the franchise, pay to the county or municipality 2 per cent. of the gross annual receipts, arising from the use, operation, or possession of the franchise. It appears very clear to us that this act cannot reasonably be construed as granting any right in public highways. Its whole purpose was to prescribe the method and conditions upon which the franchises included within its terms might be granted by the legislative body authorized by law to make the grant, or, as said in McGinnis v. Mayor, etc., 153 Cal. 711, 96 Pac. 367, "to prevent the granting thereof in any other manner than that prescribed," and the only effect of the exception was to exempt the excepted franchises from the operation of the act. So that, assuming that plaintiffs' claim as to the interstate character of its business in Pasadena is correct, that fact alone gives it no right to exclusive possession of portions of the public highways in the city. And it may be said in passing that we cannot see that the question whether this claim be well founded or not is at all material in the determination of this case, unless it be also true that ordinance No. 841 discriminates against those engaged in interstate telephone or telegraph business —a matter to which we shall hereafter refer.

[4] Plaintiffs' claim of right to use the streets of Pasadena for its poles and wires without permission from the city is based principally upon section 536 of the Civil Code, providing ever since its re-enactment in 1905 (St. 1905, p. 492), that "telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this state, and may erect poles, posts, piers, or abutments for supporting the insulators, wires and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters." Prior to its re-enactment in 1905 this section did not in express terms include telephone corporations or telephone lines, and it is very earnestly argued by defendants and was held by the learned trial judge that until such re-enactment the section was not applicable to telephone corporations or lines.

Section 536, Civil Code, was a part of the original Civil Code, adopted in 1872, and was never changed or amended in any respect until its repeal and re-enactment in the year 1905. As we have already stated, until the year 1905, it contained no reference in terms to telephone corporations, reading: "Telegraph corporations may construct lines of telegraph along and upon," etc. In the recent case of Western Union Telegraph Co. v. Hopkins, 116 Pac. 557, we considered the effect of this section, so far as telegraph corporations are concerned. It was there concluded that the section is operative to effect a grant to all telegraph corporations so far as acceptance of its provisions by construction and maintenance of its lines in public highways is had, in the absence of later enactment having the effect of repealing the same or suspending its operation as to particular portions of the state, and that in so far as such acceptance is had prior to any such repeal or suspension, and to the extent of the actual occupation by any corporation of public streets constituting such acceptance, a vested right accrues to the corporation, subject only to the lawful exercise of the police power, of which it cannot be deprived at the instance of the state without compensation. This, as his opinion indicates, was the view of the learned judge of the trial court in this case.

This construction makes the section a pure grant by the state of a franchise in its highways, one, as suggested by defendants, "of incalculable value and importance." It is a well-settled principle that grants contained in public statutes or made by public officers or public bodies are to be strictly construed in favor of the public; the rule being clearly stated in Knoxville Water Co. v. Knoxville, 200 U. S. 22, 33, 26 Sup. Ct. 224, 227 (50 L. Ed. 353), as follows: "Only that which is granted in clear and explicit terms passes by a grant of property, franchises, or privileges in which the government has an interest. Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld. Nothing passes by implication." This rule of construction of public grants has been incorporated in our Civil Code; section 1069 of the Civil Code providing: "A grant is to be interpreted in favor of the grantee, except that a reservation in any *grant. and every grant by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor.*" The italics are, of course, ours. See opinion of Chief Justice Beatty in Oakland v. Oakland Water Front Co., 118 Cal. 174, 175, 50 Pac. 277, and Clark v. City of Los Angeles (decided May 31, 1911) 116 Pac. 722. It is urged by learned counsel that this rule has no application to the question in dispute here, going only to the question of the *extent* of a valid grant and in no way to the *identity* of the grantee, and the language, "but this rule presupposes the existence of an effective grant, and relates only to the extent of its operation," used by this court in Cullen v. Sprigg, 83 Cal. 56, 23 Pac. 222, is quoted in support of this claim. This was said in disposing of a claim that section 1069, Civil Code, was applicable in determining the question whether a grant to a private party was void for uncertainty, and was immediately followed by the statement: "In all cases, it must be presumed that a grantor intended to make a valid grant of some property unless the contrary appears." Assuming, in favor of plaintiff, that the rules goes only to the question of the extent of a valid grant, it appears to us that such a question is necessarily presented here. The thing granted, as described in the statute, was the right to "construct lines of telegraph along and upon any public road or highway," etc., and in such places to "erect poles," etc., "for supporting the insulators, wires, and other necessary fixtures of their lines," i. e., the lines of a telegraph system. Whether or not this description included the poles and wires of a telephone system is a question very materially affecting the extent of the grant made by the state and the consequent burden imposed on public streets and highways. We can see no good reason why the rule of strict construction in favor of the public is not applicable to this section, which is purely a grant by the state of valuable rights.

In view of this rule, we are satisfied that the decision in Davis v. Pacific Tel. & Tel. Co., 127 Cal. 312, 57 Pac. 764, 59 Pac. 698, cannot be taken as definitely settling the meaning of the word "telegraph," as the same is used in section 536 of the Civil Code. The question there was whether the words "any line of telegraph," as used in section 591, Penal Code, as it existed prior to the year 1905, included a telephone line. The section made it a misdemeanor for any one to maliciously take down, remove, injure, or obstruct "any line of telegraph," or to sever any wire thereof. After showing that in numerous cases in other jurisdictions the courts had held that "telephone" is included within the meaning of "telegraph," the court said that, "if the consideration could be limited to a strict etymological point of view, it would have to be conceded at once that there is a difference in the meaning of the two words; the one conveying the idea of transmission of writing to a distance, the other the transmission of sound to a distance." But it was declared that in their "present sense and acceptation" the term "telegraph" means "any apparatus for transmitting messages by means of electric currents and signals, and embraces within its meaning the narrower word 'telephone.'" It was held that in contemplation of section 4 of the Penal Code, which provides that the rule of the common law that penal statutes are to be strictly construed has no application to the Code, and that "all its provisions are to be construed according to the fair import of their terms with a view to effect its object and to promote justice," and in recognition of the fact that a substantial identity exists between the two words, no hesitation need be expressed in declaring that under section 591 of the Penal Code a criminal prosecution will lie for the illegal destruction of a telephone wire.

When we consider the rules applicable in the construction of public grants, it seems at once apparent, in view of the fact that the telephone was absolutely unknown at the time of the enactment of section 536, Civil Code, that the decision in Davis v. Pacific Tel. & Tel. Co., supra, is not controlling here.

[5] There is no rule of law that necessarily requires the same meaning to be given to the same word used in different places in the same statute. It is plain that section 4480 of the Political Code, as was said by Judge Gilbert in his dissenting opinion in Sunset Tel. & Tel. Co. v. Pomona, 172 Fed. 840, 97 C. C. A. 262, "does not purport to say that a word used in the statutes shall have the same meaning wherever used." And while, for certain purposes, the provisions of the four Codes must be construed as though they had all been passed at the same moment of time, and were parts of the same statute (section 4480, Pol. Code), it is manifest that, dealing as they do with all the subjects of our statutory law, the prima facie presumption that a word used more than once in the same statute is always used in the same sense, if it be conceded to apply at all, is necessarily of the slightest weight when considering sections in different Codes relating to essentially different matters and subject to different rules of construction. The case of Bruner v. Superior Court, 92 Cal. 239, 28 Pac. 341, cannot be taken as holding otherwise, for, as was said by Judge Gilbert in the Pomona Case, supra, "the word 'telegraph' has not been defined in either of the Codes, as was the word 'elisor,'" the word there under consideration, which was clearly defined in section 4192, Political Code. The difference between the telegraph and telephone in respect to matters affecting the question at bar is very pronounced. The telephone being a device by which the human voice is directly transmitted, all that is essential to the sending of a message thereby is the speaking of the same into a comparatively simple appliance connected with the wire along which the current is to go. Trained and skilled operators are necessary only at the central offices for the purpose of answering calls and making the necessary connections of wires. Skilled experts, only, can operate the telegraph, manipulate its instruments, and understand its signals. See Telegraph Co. v. Nashville, 118 Tenn. 19, 101 S. W. 770. This difference is accountable for the greatest conceivable difference in the extent of the burden on public streets and highways by the use of a telegraph company and a telephone company respectively of such streets and highways for the poles and wires of the system, especially in villages, towns, and cities. A telegraph line does no purely local business, but simply runs through a town or city, having therein one or more offices where

messages are received and transmitted by trained operators. The result is that its use of public streets for the purposes of its poles and wires is limited to its main through line, and such branches as are essential to connect with its various offices, which are necessarily very few in number. While the telephone is also used for long distance communication, its most common use is for communication among the people of a particular city or town. Any person being able to use the same in his home, office, or place of business, through a simple and inexpensive instrument placed therein and connected by wire with a central agency, the subscribers therefor in a city or town constitute a large proportion of the inhabitants, numbering in a city like Pasadena several thousand. The result is well expressed by the Supreme Court of Tennessee in Telegraph Co. v. Nashville, supra, as follows: "A telephone system, however, to be effective, requires, not only rights of way to enter and leave the city, but also to occupy *all* its streets and alleys, and to enter its business houses, residences, and other places, thus making it necessary to use many poles and wires and other fixtures, in order to do the business expected of it. It must therefore, necessarily, make use of the *streets and alleys generally* of the city, and incumber them with a network of wires and poles and fixtures, to a much greater extent than a telegraph system would do." The italics are ours.

As we have said, the telephone was unknown at the time of the enactment of section 536 of the Civil Code in the year 1872. While the possibility of transmitting speech along wires had previously been suggested by scientists, no one had ever succeeded in devising a practical instrument therefor until Bell made his discovery in the year 1875. To show that the idea of such transmission of the human voice was up to that time but a dream of scientists, reference need only be made to the Telephone Cases, 126 U. S. 1, 8 Sup. Ct. 778, 31 L. Ed. 863. Under these circumstances, our Legislature granted the right to construct lines of telegraph, with the necessary poles, etc., along and upon the public highways of the state. We have seen that this court has expressly recognized that, from a strict etymological point of view, telephone lines would not be included in the words "lines of telegraph," or telephone corporations, within the words "telegraph corporations." We have seen further that the circumstances at that time were such that in its common acceptation the word "telegraph" must have meant only the kind of communication then known and in practical use under that name, entirely excluding all idea of any such thing as the direct transmission of the human voice, and that by the simple method of speaking into an instrument of such slight cost that it could be placed in every dwelling house and place of business, with the necessary result that the use of practically all of the streets would be required. It is to be remembered that the question in determining the meaning of the word "telegraph" contained in this statutory grant is: What was in the minds of the legislators as to its meaning when they used it? No rule of construction applicable to public grants warrants the inclusion therein of privileges not embraced within the common acceptation of the language used. Practically the same question as is here involved was presented to the Supreme Court of the United States in Richmond v. Southern Bell Tel. & Tel. Co., 174 U. S. 761, 19 Sup. Ct. 778, 43 L. Ed. 1162. It was there claimed that the act of Congress of July 24, 1866, granting to any "telegraph company" accepting the provisions of the act the right to construct, maintain and operate "lines of telegraph" over and along military and post roads, etc., applied to telephone companies. After reviewing the decisions that had been rendered by other courts up to that time (1889), the court held that the act was not applicable to such companies. Among other things, the court said: "It may be that the public policy intended to be promoted by the act of Congress of 1866 would suggest the granting to telephone companies of the rights and privileges accorded to telegraph companies. And it may be that, if the telephone had been known and in use when that act was passed, Congress would have embraced in its provisions companies employing instruments for electrically transmitting articulate speech. But the question is, not what Congress might have done in 1866, nor what it may or ought now to do, but what was in its mind when enacting the statute in question. Nothing was then distinctly known of any device by which articulate speech could be electrically transmitted or received between different points, more or less distant from each other, nor of companies organized for transmitting messages in that mode. Bell's invention was not made public until 1876. Of the different modes now employed to electrically transmit messages between distant points, Congress in 1866 knew only of the invention then and now popularly called the 'telegraph.' When therefore the act of 1866 speaks of telegraph companies, it could have meant only such companies as employed the means then used or embraced by existing inventions for the purpose of transmitting messages merely by sounds of instruments and by signs or writings." The court further said that the conclusion that the act conferred upon telephone companies the valuable rights and privileges therein specified is not authorized by any explicit language used by Congress. While it is true, as said by learned counsel for plaintiff, that this court is the ultimate tribunal in the matter of the construction of a statute of this state, we are satisfied that the court in that case correctly construed the act of Congress, and that what is said in the opinion is equally applicable to our section 536 of the Civil Code. A similar question was presented to the Supreme Court of Tennessee in Telegraph Co. v. Nashville, supra, a state statute very much like ours being there involved, and a similar conclusion reached. Any other construction would, it appears to us, make this statutory grant include rights and impose burdens on the public that were never within the contemplation of the Legislature, and this case is a striking illustration of the wisdom of the rule that requires a grant by the public to be strictly construed in favor of the grantor.

We have examined the many cases cited by plaintiff, wherein it is held that the word "telegraph" in a statute includes "telephone." Comparatively few of these cases involve any question of the right of a telephone company to use public streets and highways under a statutory grant to telegraph companies being generally, as our own Davis Case, cases in which the meaning of the word as used in some other statute was involved. For instance, the question whether a telephone company could incorporate under a statute authorizing the incorporation of telegraph companies, the question whether such a company had the right of eminent domain under a statute giving telegraph companies such right, the question whether telephone companies were under the burdens and obligations imposed on telegraph companies, the question whether a statute providing for the assessment of telegraph companies applied to telephone companies, were questions presented in many of the cases. But there are some cases cited in which statutes giving telegraph companies rights and privileges in public highways were held to include telephone companies. In none of these cases, however, does the question of the effect of the rule requiring grants by the public to be strictly construed in favor of the grantor appear to have been discussed. In so far as these decisions may appear, upon a close examination of the condition of the statutory law upon which they are based, to be opposed to the conclusion we have reached, we are of the opinion that they should not be followed in this state.

We are thus brought to the conclusion that, prior to its repeal and re-enactment in the year 1905, section 536 of the Civil Code was not applicable to telephone companies.

[6] In the year 1901 the city of Pasadena became organized under a freeholders' charter, adopted under the provisions of section 8 of article 11 of the Constitution of the state, and has ever since continued as a city under such charter. Stats. 1901, p. 884 et seq. In the year 1896, section 6 of article 11 of the Constitution was so amended as to make the provisions of a freeholders' charter so adopted paramount to general laws enacted by the state Legislature "in municipal affairs." The charter above referred to purports to confer upon the city of Pasadena full control of its streets, with power to determine whether and upon what terms portions thereof may be exclusively used and occupied by telegraph or telephone companies. By subdivision 13 of section 3 of article 1, the city is declared to have the power to lay out, open, extend, widen, change, vacate, and improve streets. By subdivision 7 of section 10 of article 8, the city council is declared to have not only the power to require the placing underground of all telephone, telegraph, and other wires, but also the power to "prohibit the placing of poles and the suspending of wires along or across any of the streets, alleys and public places of the city." By subdivision 31 of the same section the city council is declared to have the power "to *grant* the right to *erect or lay telegraph or telephone wires*, to construct and operate street railroads, to lay gas or water pipes, to erect poles and wires, or lay conduits for transmitting electric energy for lighting or power purposes *along or upon the public streets and highways of the city;* provided, however, that all such rights and franchises shall be granted subject to all the restrictions and limitations in this charter contained relating to the granting of franchises." The italics are ours. By section 3 of article 13, as amended in February, 1905 (St. 1905, p. 1022), the terms for which any franchise may be granted was limited to 20 years, and the city council was authorized to impose such lawful conditions, restrictions, and limitations as may best subserve the public interest and welfare. We are satisfied that these provisions can reasonably be read in no other way than as evidencing an intention to give to the city of Pasadena full control of its streets and highways, with the power to determine for itself whether any portion thereof shall be exclusively used and occupied by the poles and wires of telegraph, telephone or power companies.

[7] It cannot be disputed in the light of the decisions that the state may surrender to any municipality full control of its streets and highways in regard to such matters, and, of course, an appropriate place for an enactment of this character on the part of the state is, under our constitutional provisions, the freeholders' charter provided for by section 8, art. 11. See Platt v. City and County of San Francisco, 158 Cal. 74, 82, et seq., 110 Pac. 304.

[8] That the provisions of the charter purporting to give such full control as to the use of streets for pipes and conduits for the furnishing of water and light are not effective, in view of the direct grant for those purposes made by section 19 of article 11 of the Constitution (see In re Johnston, 137 Cal. 115, 69 Pac. 973), is not a sufficient warrant for holding that it was not intended to vest such control in the city. We think it impossible to reasonably construe these provisions as purporting to authorize on the part

of the city only such regulations as come within the domain of the police power.

Are the matters referred to "municipal affairs" within the meaning of those words as they are used in section 6 of article 11 of the Constitution? There has been much discussion in our decisions as to what matters are embraced in this term, and it has been said that it is very difficult, if not impossible, to give a general definition clearly defining the term "municipal affairs" and its scope. But we can see very little reason in the argument that the question whether and to what extent the streets of a municipality shall be subjected to such secondary uses as the maintenance therein of telegraph and telephone poles and wires, the primary purpose for which highways are established being the convenience of public travel, and such secondary uses permanently excluding the public from using for such purpose the portions occupied for such uses, is not a municipal affair. If the provisions of not only the many freeholders' charters of this state, but also those of the general municipal corporation act and other statutes, are to be given any effect in the consideration of this question, they demonstrate the existence of practically a universal idea that such matters are principally of local concern, and should be within the exclusive control of the municipality. Even in the case of the ordinary commercial railroad, we find legislative recognition of the fact that the question whether such a railroad should be allowed to occupy for its tracks any street, alley, or highway within a municipality is one of such concern to the municipality that its consent should be a prerequisite; it being provided in section 470 of the Civil Code, as enacted in 1872, that "no railroad corporation must use any street, alley, or highway * * * within any incorporated city or town, unless the right to so use the same is granted by a two-thirds vote of the town or city authority from which the right must emanate." As said by learned counsel for defendants, "the Legislature has consistently recognized and treated the control of municipal streets by municipalities as a local or municipal affair as distinguished from a state affair." It is unquestioned that the matter of opening, widening, and vacating the streets of a municipality is purely a municipal affair. See Byrne v. Drain, 127 Cal. 663, 667, 60 Pac. 433. It would seem to be equally true that the question to what extent and upon what terms the primary use of these streets, which are constructed and maintained by the people of the city for use in common by the public for purposes of travel, shall be subjected to secondary uses completely excluding any use at all by the traveling public of the portions devoted to such secondary uses, is also a municipal affair, within the meaning of our constitutional provision. It is simply a question of the extent to which streets constructed and maintained by the city primarily for purposes of travel by the public shall be diverted to other uses excluding such primary use as to the portions so diverted, an absolute taking away from the city and its inhabitants of so much of the streets as is exclusively used for poles and wires.

In holding that a statute of the state of Washington made the consent of the city council of a municipality prerequisite to such use of the streets for telegraph and telephone lines, the Supreme Court of that state said: "In addition to the reasons suggested heretofore for imposing the powers and duties upon municipalities to control the streets, it is pertinent to refer to the long usage in this country for vesting such authority in municipalities. Such usage is historical, and is expressed in many statutes in the different states and in the mother country. The people of a municipality, who incur and pay the expenses for the construction and maintenance of their streets, and who largely use them, are usually most capable of exercising discretion in the secondary and subordinate purposes for which their streets shall be used." State ex rel. Telephone & Telegraph Co. v. City of Spokane, 24 Wash. 53, 63 Pac. 1116. In the face of the long usage in such matters, by virtue of which this power has so frequently been regarded as one appropriate for a municipality to possess, it would be difficult to find warrant for the conclusion that, although such power is in terms conferred by a charter, it is nevertheless not a municipal affair within the meaning of our Constitution. That any citizen in the state may be interested in the maintenance and operation of a telephone system in the city of Pasadena, to the extent that he may desire "the quick and ready communication afforded by the telephone" with some resident thereof, is doubtless true; but we do not see that this affects the question whether the extent to which portions of the streets of Pasadena may be exclusively occupied by telegraph and telephone companies is a municipal affair. It may, however, be suggested that no persons can be more interested in having the quickest and most efficient method of communication available between Pasadena and the rest of the state than the people of Pasadena themselves, and it is not likely that any municipality will insist upon such arbitrary and unreasonable conditions in the matter of the use of its streets, as will result in cutting it off from such method of communication.

[9] The matters referred to being "municipal affairs" within the meaning of our constitutional provision, the charter provisions vesting control in the city of Pasadena are not subject to general laws, and the re-enactment of section 536 of the Civil Code in 1905, by which certain rights in public highways were granted to telephone companies, conferred no right upon plaintiff so far as the streets of Pasadena are concerned.

It follows that plaintiff has no effectual "grant of right from a competent authority" for the use of the streets of the city of Pasadena for its poles and wires.

[10] The ordinance is not open to the objection that it discriminates against lines doing an interstate business, in that it imposes a semiannual charge of 75 cents for each pole of a line used in interstate business, and imposes no such charge for the poles of lines used in local or intrastate business. The discrimination, if any, is one entirely in favor of the interstate line. As to lines doing a local or intrastate business the requirement of the ordinance is absolute that such use of the streets cannot be had without a franchise therefor from the city of Pasadena. As to lines doing an interstate business, it is recognized that a franchise may also be obtained from the city, and it is expressly provided that, if such person or corporation have or secure such franchise, it shall not be required to pay the amounts required by the ordinance during the life of the franchise. The requirement as to such lines is simply that either a franchise must be obtained for the use of the streets, as required for intrastate and local lines, or the charge imposed by the ordinance must be paid. In other words, no franchise need be procured for such use for interstate lines, but the streets may be used for such lines without any grant by the city, provided the required charge be paid. At the same time, the owners of an interstate line, if they elect, may obtain such a franchise therefor just as and presumably on as favorable terms as the owners of intrastate and local lines may obtain their franchise, and thus exempt themselves from the payment of any such charge as is imposed by the ordinance. It is obvious, therefore, that there is no discrimination against interstate lines.

There is no question in this case of any actual discrimination against interstate companies in the enforcement of the ordinance, and the ordinance, so far as any attempt at discrimination is concerned, is fair on its face. It is of course needless to say that such a discrimination would not be allowable.

[11] We are satisfied, in view of what has been said as to the power of the municipality in such matters, that no question is here involved as to the reasonableness of the amount of the semiannual charge made by the ordinance. The city of Pasadena having the power to withhold from telephone companies the right to exclusively occupy portions of its streets for poles and wires, or to permit such occupation on such terms as are satisfactory to it, we have, as suggested by the trial judge, no question whether or not the amount charged is a reasonable charge. As said by him, "If it be competent for the city to exclude the poles and wires of a telephone company from its streets (and for reasons here given it must be so held), then, clearly, it is competent for the city to name such terms and require the payment of such compensation as seems proper."

Our conclusions upon the matters we have discussed require an affirmance of the action of the trial court.

The judgment and orders appealed from are affirmed.

We concur: SHAW, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.

161 Cal. 239

HULBERT v. CALIFORNIA PORTLAND CEMENT CO.

GILBERT v. SAME. (L. A. 3,003.)

(Supreme Court of California. Oct. 20, 1911.)

APPEAL AND ERROR (§ 458*)—INJUNCTION—STAY PENDING APPEAL.

Where adjoining landowners instituted suit against a cement company to restrain the operation of its works so as to throw clouds of cement dust over complainant's lands, to the irreparable injury thereof, and the trial court granted an injunction restraining defendants from operating its plant so as to produce an excess of a certain number of barrels of cement per annum, defendant on appeal from such judgment was not entitled to a stay of the injunction pending the appeal as an exercise of appellate jurisdiction, since such stay could only be granted at the risk of destroying rights belonging to complainants if the judgment should be sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2223, 2224; Dec. Dig. § 458.*]

In Bank. Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Suits by Lillie A. Hulbert, as administratrix of the estate of A. Hulbert, deceased, and by Spencer E. Gilbert against the California Portland Cement Company. The decree was rendered for complainant in each case, from which defendant appealed, and applied to the Supreme Court for a stay of the operation of injunction pending appeal. Denied.

Wesley H. Beach and Waters & Goodcell, for plaintiffs. Shankland & Chandler, for defendant.

MELVIN, J. Petitioner has made an original application to this court to suspend the operation of a certain injunction until the decision of the appeals in two cases, in each of which the California Portland Cement Company, a corporation, is the defendant, on the ground that the property of the corporation would be so greatly damaged by the operation of the injunction pending the appeals that a judgment in defendant's favor would be almost fruitless; while it is contended the damage to plaintiffs is easily susceptible of satisfaction by a payment of money. Petitioner offers to furnish any bond this court may require, if the order which is prayed for shall be granted. As this was the first case in America, so far as this court knew, in which the operation of a cement plant had been enjoined because of the dust produced in the processes of manufacture, and as the showing which was made indicated that petitioner's loss would be very great if the injunction were enforced at once, an order was entered, temporarily staying its operation until both sides to the controversy could be heard. The court was moved somewhat to such action also because the trial court had made an order staying the operation of the injunction for 60 days, so that this court might have the opportunity of passing upon this application. Two principal questions are presented: (1) Has the Supreme Court the authority in aid of its appellate jurisdiction, under section 4 of article 6 of the Constitution, to suspend the operation of an injunction pending appeal? (2) If it have such power, is this a proper case for the exercise thereof? Owing to the conclusion which we have reached, it is unnecessary to answer the first question authoritatively, because, assuming a reply to it in the affirmative, we cannot say that the facts of this case warrant any other response to the second inquiry than a negative one.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The salient facts shown by the petitioner are that the California Portland Cement Company is engaged in the manufacture of cement on property situated nearly two miles from the center of the city of Colton, in the county of San Bernardino, but not within the limits of said city; that said manufactory is located at Slover mountain, where the substances necessary to the production of Portland cement are quarried; that long before the surrounding country had been generally devoted to the production of citrus fruits Slover mountain had been known as a place where limestone was produced; that quarries of marble and limestone had been established there; that lime kilns had been operated upon said mountain for many years; that in 1891 the petitioner obtained title to said premises, and commenced thereon the manufacture of Portland cement; that the said corporation has expended upon said property more than $800,000; that at the time when petitioner began the erection of the cement plant the land surrounding the plant was vacant and unimproved, except some land lying to the north, which had been planted to young citrus trees; that these trees were first planted about a year before the erection of the cement plant was commenced (but long after the lime kilns and the marble quarries had been operated); that subsequently other orange groves have been planted in the neighborhood; that the petitioner's plant on Slover mountain has a capacity of 3,000 barrels of cement per day; but that by the judgment of the superior court in two certain actions against petitioner, entitled Lillie A. Hulbert, Administratrix, etc., v. California Portland Cement Company, a Corporation, and Spencer E. Gilbert, plaintiff, v. Same Defendant, the corporation aforesaid was enjoined from operating its plant in such manner as to produce an excess of 88,706 barrels of finished cement per annum; that the regular pay roll of the company includes the names of about 500 men, who are paid about $35,000 a month; that the fixed, constant monthly expenses for supplies and materials amount to $35,000; that the California Portland Cement Company employs the best, most modern methods in its processes of manufacture, but that nevertheless there is an unavoidable escape into the air of certain dust and smoke; that petitioner has no other location for the conduct of its business at a profit; that the land of the Hulbert estate is located from 1,500 to 2,500 feet from petitioner's cement works, and that Spencer E. Gilbert's land is all within 1,000 feet therefrom; that petitioner has diligently sought some means of preventing the escape of dust from its factories; that it has consulted the best experts and sought the best information obtainable, and that it is now and has been for a long time conducting experiments along the lines suggested by the most eminent engineering authorities upon this subject, and that, as soon as any process can be evolved for preventing the escape of the dust, the petitioner will adopt such process in its works, and it is believed that a process now constructing with all diligence by petitioner will effectually prevent the escape of dust. Petitioner also alleges that it is easily possible to estimate the damages of the plaintiffs in money, while it is utterly impracticable to estimate the damage in money which will be caused to the petitioner by the closing of the plant, and that stopping the plant pending the appeals will cause financial ruin to the chief stockholders of the petitioner, and that the elements of loss averred are irreparable on account of the disorganization of petitioner's working force, loss of market, and deterioration of machinery.

The learned judge of the superior court, in deciding the cases in which petitioner here was defendant, described the method of manufacturing cement and the injury to the trees. He said, in part: "The output from these two mills at the present time is about 2,500 barrels of cement every 24 hours, and to produce this there is fed into the various kilns of the defendant, during the time mentioned, about 1,500,000 pounds of raw mix, composed of limestone and clay, ground as fine as flour and thoroughly mixed. This raw mix is fed into the tops of kilns, wherein the temperature varies from 1,800 to 3,000 degrees Fahrenheit, and through which kilns the heated air and combustion gases pass at the rate of many thousands of feet per minute. The result of this almost inconceivable draft is to carry out, in addition to the usual products of combustion, particles of the raw mix, to the extent of probably 20 tons per day or more, the greater part of which, without question, is carried up into the air by the rising gases, and thereafter, through the action of the winds and force of gravity, distributed over the surrounding territory." Speaking of the premises of the plaintiffs, he said that, because of prevailing westerly winds and on account of the proximity of the mills, said lands were almost continually subject to the deposit of dust. In this regard he said: "It is the fact incontrovertibly established by both the testimony of witnesses and personal inspections made by the court that a well-nigh continuous shower of cement dust, emanating from defendant's cement mills and caused by their operation, is, and for some years past has been, falling upon the properties of the plaintiffs, covering and coating the ground, filtering through their homes, into all parts thereof, forming an opaque semi-cemented incrustation upon the upper sides of all exposed flowers and foliage, particularly leaves of citrus trees, and leaving ineradicable, yet withal plainly discernable, marks and evidence of dust, dusty deposits, and grayish colorings resulting therefrom, upon the citrus fruits. The incrustations above mentioned, unlike the deposits occasionally occurring on leaves because of the presence of undue amounts of road dust or field dust, are not dissipated by the strongest winds, nor washed off through the action of the most protracted rains. Their presence, from repeated observations, seems to be as continuous as their hold upon the leaves seems tenacious." The court further found that the deposit of dust on the fruit decreased its value; that the constant presence of dust on the limbs and leaves of the trees rendered the cultivation of the ground and the harvesting of the crop more costly than it would have been under ordinary conditions; and that said dust added to the usual and ordinary discomforts of life by its presence in the homes of the plaintiffs. The court also found that the operation of the old mill of the defendant corporation had occurred with the acquiescence of the plaintiffs, and that the defendant had acquired a prescriptive right to manufacture the maximum quantity of cement produced annually by that factory.

In view of such facts solemnly found by the court after trial, we cannot say that there is reason for a suspension by this court of the injunction, even conceding that we have power under proper circumstances thus to prevent a disturbance of existing conditions, pending an appeal. We are not insensible to the fact that petitioner's business is a very important enterprise; that its location is peculiarly adapted for the manufacture of cement; and that great loss may result to the corporation by the enforcement of the injunction. Even if the officers of the corporation are willing to furnish a bond in a sum equal to the value of the properties of Gilbert and of the Hulbert estate here involved, we cannot, under plain principles of equity, compel these plaintiffs to have recourse to their action at law only, and take from them the benefit of the injunctive relief accorded them by the chancellor below. To permit the cement company to continue its operations, even to the extent of destroying the property of the two plaintiffs and requiring payment of the full value thereof, would be, in effect, allowing the seizure of private property for a use other than a public one—something unheard of and totally unauthorized in the law. Hennessy v. Carmony, 50 N. J. Eq. 616, 25 Atl. 374; Sullivan v. Jones & Laughlin Steel Co., 208 Pa. 540, 57 Atl. 1065, 66 L. R. A. 712. Nor may we say, as petitioner urges us to declare, that cement dust is not a nuisance, and therefore that the restraint imposed is illegal, even though this is one of the first cases, if not the very first, of its kind, in which the emission of cement dust from a factory has been enjoined, for we are bound by the findings of the court in this proceeding, and may not consider their sufficiency or lack of it until we take up the appeals on their merits. The court has found that the plaintiffs in the actions tried were specially damaged by a nuisance maintained by the cement company. This entitles the plaintiffs, not only to damages, but to such relief as the facts warrant, and the chancellor has determined that limiting the production in the manner selected is a proper form of protection to their rights. It is well settled in California that a nuisance which consists in pouring soot or the like upon the property of a neighbor in such manner as to interfere with the comfortable enjoyment of the premises is a private nuisance, which may be enjoined or abated, and for which, likewise, the persons specially injured may recover pecuniary damages. Code Civ. Proc. § 731; Fisher v. Zumwalt, 128 Cal. 493, 61 Pac. 82; Melvin v. E. B. & A. L. Stone Co., 7 Cal. App. 328, 94 Pac. 390; Judson v. Los Angeles Sub. Gas Co., 157 Cal. 172, 106 Pac. 583, 26 L. R. A. (N. S.) 183. The last-named case was one in which the operation of a gas factory had been enjoined, and the following language was used: "A gas factory does not constitute a nuisance per se. The manufacture in or near a great city of gas for illuminating and heating is not only legitimate, but is very necessary to the comfort of the people. But in this, as in any other sort of lawful business, the person conducting it is subject to the rule, "Sic utere tuo ut alienum non lædas," even when operating under municipal permission, or under public obligation to furnish a commodity. Terre Haute Gas Co. v. Teel, 20 Ind. 131; Attorney General v. Gaslight & Coke Co., L. R. 7 Chan. Div. 217; Sullivan v. Royer, 72 Cal. 248 [13 Pac. 655]. Nor will the adoption of the most approved appliances and methods of production justify the continuance of that which, in spite of them, remains a nuisance. Evans v. Fertilizing Co., 160 Pa. 223 [28 Atl. 702]; Susquehanna Fer. Co. v. Malone, 73 Md. 276 [20 Atl. 900, 9 L. R. A. 737, 25 Am. St. Rep. 595]; Susquehanna Fer. Co. v. Spangler, 86 Md. 562 [39 Atl. 270, 63 Am. St. Rep. 533]."

Petitioner contends for the rule that the resulting injuries must be balanced by the court, and that, where the hardship inflicted upon one party by the granting of an injunction would be very much greater than that which would be suffered by the other party if the nuisance were permitted to continue, injunctive relief should be denied. This doctrine of "the balance of hardship" and the associated rule that "an injunction is not of right but of grace" are the bases of petitioner's argument, and many authorities in support of them have been called to our attention. In petitioner's behalf are cited such cases as Richards' Appeal, 57 Pa. 105, 98 Am. Dec. 202, where an injunction which had been sought to restrain defendant from using large quantities of bituminous coal to plaintiff's damage was refused, and the plaintiff was remitted to his action at law; the court saying, among other things: "Whatever of injury may have or shall result to his (the plaintiff's) property from the defendant's works, by reason of a nuisance complained of, is only such as is incident to a lawful business conducted in the ordinary way, and by no unusual means. Still, there may be injury to the plaintiff, but this of itself may not entitle him to the remedy he seeks. It may not, if ever so clearly established, be a cause in which equity ought to enjoin the defendant in the use of a material necessary to the successful production of an article of such prime necessity as good iron, especially if it be very certain that a greater injury would ensue by enjoining than would result by refusal to enjoin." The same rule was announced in Dilworth's Appeal, 91 Pa. 248, a case involving the building of a powder house near plaintiff, and in Huckenstine's Appeal, 70 Pa. 102, 10 Am. Rep. 669. Petitioner admits that in the later case of Sullivan v. Jones & Laughlin Steel Co., supra, the Supreme Court of Pennsylvania reached a different conclusion, but contends that the opinion in that case merely defines the word "grace" as used in Huckenstine's Appeal; the real meaning of the expression "an injunction is a matter of grace" being that a high degree of discretion is exercised by a chancellor in awarding or denying an injunction. An examination of the case, however, shows that the court went very much further than a mere definition of the phrase "of grace." In that case the defendant had erected a large factory for the manufacture of steel on land purchased from one of the plaintiffs, but after many years defendant had commenced the use of "Mesaba" ore, which caused the emission of great quantities of fine dust upon the property of plaintiffs. The Supreme Court of Pennsylvania, in reversing the decree of the lower court, dismissing the bill, went into the matter of "balancing injuries" and "injunctions of grace" very thoroughly, and we may with propriety, I think, quote and adopt some of its language upon these subjects as follows:

"It is urged that, as an injunction is a matter of grace, and not of right, and more injury would result in awarding than refusing it, it ought not to go out in this case. A chancellor does act as of grace, but that grace sometimes becomes a matter of right to the suitor in its court, and, when it is clear that the law cannot give protection and relief—to which the complainant in equity is admittedly entitled—the chancellor can no more withhold his grace than the law can deny protection and relief, if able to give them. This is too often overlooked when it is said that in equity a decree is of grace, and not of right, as a judgment at law. In Walters v. McElroy et al. [151 Pa. 549] 25 Atl. 125, the defendants gave as one of the reasons why the plaintiff's bill should be dismissed that his land was worth but little, while they were engaged in a great mining industry, which would be paralyzed if they should be enjoined from a continuance of the acts complained of; and the principle was invoked that, as a decree in equity is of grace, a chancellor will never enjoin an act where, by so doing, greater injury will result than from a refusal to enjoin. To this we said: 'The phrase "of grace," predicated of a decree in equity, had its origin in an age when kings dispensed their royal favors by the hands of their chancellors; but, although it continues to be repeated occasionally, it has no rightful place in the jurisprudence of a free commonwealth, and ought to be relegated to the age in which it was appropriate. It has been somewhere said that equity has its laws, as law has its equity. This is but another form of saying that equitable remedies are administered in accordance with rules as certain as human wisdom can devise, leaving their application only in doubtful cases to the discretion, not the unmerited favor or grace, of the chancellor. Certainly no chancellor in any English-speaking country will at this day admit that he dispenses favors or refuses rightful demands, or deny that, when a suitor has brought his cause clearly within the rules of equity jurisprudence the relief he asks is demandable ex debito justitiæ, and needs not to be implored ex gratia. And as to the principle invoked, that a chancellor will refuse to enjoin when greater injury will result from granting than from refusing an injunction, it is enough to observe that it has no application where the act complained of is in itself, as well as in its incidents, tortious. In such case it cannot be said that injury would result from an injunction, for no man can complain that he is injured by being prevented from doing to the hurt of another that which he has no right to do. Nor can it make the slightest difference that the plaintiff's property is of insignificant value to him, as compared with the advantages that would accrue to the defendants from its occupation.' There can be no balancing of conveniences when such balancing involves the preservation of an established right, though possessed by a peasant only to a cottage as his home, and which will be extinguished if relief is not granted against one who would destroy it in artificially using his own land. Though it is said a chancellor will consider whether he would not do a greater injury by enjoining than would result from refusal, and leaving the party to his redress at the hands of a court and jury, and if, in conscience, the former should appear, he will refuse to enjoin (Richards' Appeal, supra), that 'it often becomes a grave question whether so great an injury would not be done to the community by enjoining the business that the complaining party should be left to his remedy at law' (Dilworth's Appeal, supra), and similar expressions are to be found in other cases, 'none of them, nor all of them, can be authority for the proposition that equity, a case for its cognizance being otherwise made out, will refuse to protect a man in the possession and enjoyment of his property, because that right is less valuable to him than the power to destroy it may be to his neighbor or to the public' (Evans v. Reading Chem. Fer. Co., 160 Pa. 209 [28 Atl. 702]). The right of a man to use and enjoy his property is as supreme as his neighbor's, and no artificial use of it by either can be permitted to destroy that of the other."

Petitioner lays great stress upon North Fork Water Co. v. Medland (C. C.) 187 Fed. 169, in which, in the opinion by Judge Ross, formerly a member of this court, the following appears: "Now, in the first place, it is to be remembered that no one is entitled to an injunction as a matter of absolute right. When a contract is broken and any party thereto sustains an injury by reason of such breach, the injured party has an absolute right to maintain an action at law for the recovery of such damages as can be shown to have been sustained by him. But a suit in equity, either to enjoin the continuance of such a breach or to enforce the specific performance of the contract, appeals to the sound discretion of the chancellor—to his conscience—and the relief so sought will be granted or withheld according to the real equity of the case, in view of all its facts and circumstances." Petitioner also cites Mountain Copper Co. v. U. S., 142 Fed. 625, 73 C. C. A. 621, in which the opinion was also by Judge Ross. In that case the court refused to enjoin the operation of defendant's smelter, relying largely upon the early cases from Pennsylvania, which declare the "balance of hardship" doctrine, and that an injunction is ex gratia, and not ex debito justitiæ, and citing other cases, including the well-known Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 83 S. W. 658. While we have the utmost respect for the learned author of these opinions and for the decisions of the United States Circuit Court of Appeals for the Ninth Circuit, we cannot agree with the principles announced in the two cases decided by that court, cited above. In connection with the case of Mountain Copper Co. v. U. S., supra, it is interesting to note that in his dissenting opinion therein Judge Hawley quotes from Fisher v. Zumwalt, supra, and two other California cases (Daubenspeck v. Grear, 18 Cal. 443, 447, and Natoma Water & Min. Co. v. Clarkin, 14 Cal. 544, 551), and after an analysis of them concludes with this brief but excellent statement of the rule which he deduced from them: "The pith, point, and substance of this whole matter is that, where the acts of a party, whether individuals or corporations, wealthy or poor, destroy the substance of complainant's estate, whether it be of great or of but little value, an injunction should be issued. This is the underlying principle, the essence, and effect of all the decisions upon the subject which distinguish this character of cases from those where the injury is slight and trivial, and the damage not irreparable, and not absolutely destructive of complainant's estate."

The Mountain Copper Company Case has also been criticized by the Supreme Court of Arizona, as well as the later case of McCarthy v. Bunker Hill & Sullivan Mining & Con. Co., 164 Fed. 927, 92 C. C. A. 259. In Arizona Copper Co. v. Gillespie, 12 Ariz. 203, 100 Pac. 470, this language was used: "Counsel press upon us the proposition that we should consider the comparative damage that will be done by granting or withholding an injunction in this case, alleging that the effect of an injunction will be to stop the operation of extensive works, deprive thousands of persons of employment, and cause loss and distress to other thousands. It is undoubtedly true that a court should exercise great care and caution in acting where such results would follow. It should very clearly appear that the acts of the defendant are wrongful, and that the complainant is suffering substantial and irreparable injury, for which he cannot secure adequate compensation at law. A number of eminent courts support the contention of appellant that the comparative injury to the parties in granting or withholding relief must also be considered. Among the cases so holding is the case of McCarthy v. Bunker Hill & Sullivan Min. & Con. Co., 164 Fed. 927 [92 C. C. A. 259], decided by the Circuit Court of Appeals for this circuit, a court for which we entertain the highest respect (which exercises an appellate jurisdiction over this court in certain cases); and, if this case were reviewable there, we should not feel at liberty to express views in conflict with those of that court. But this case is reviewable only by the Supreme Court of the United States, and we cannot find, as suggested by the Circuit Court of Appeals, that that court has given adherence to the doctrine. It seems to us that to withold relief where irreparable injury is, and will continue to be, suffered by persons whose financial interests are small in comparison to those who wrong them is inconsistent with the spirit of our jurisprudence. It is in effect saying to the wrongdoer, 'If your financial interests are large enough so that to stop you will cause great loss, you are at liberty to invade the rights of your smaller and less fortunate neighbors.' We prefer the doctrine adhered to by Judge Hawley, in his dissenting opinion in Mt. Copper Co. v. U. S., 142 Fed. 625 [73 C. C. A. 621], and by Judge Sawyer in Woodruff v. North Bloomfield Gravel Min. Co. [C. C.] 18 Fed. 753. In the latter case it is said: 'Of course, great interests should not be overthrown on trifling or frivolous grounds, as where the maxim, "De minimis non curat lex," is applicable; but every substantial, material right of person or property is entitled to protection against all the world. It is by protecting the most humble in his small estate against the encroachments of large capital and large interests that the poor man is ultimately enabled to become a capitalist himself. If the smaller interest must yield to the larger, all small property rights, and all small and less important enterprises, industries, and pursuits would sooner or later be absorbed by the large, more powerful few; and their development to a condition of great value and importance, both to the individual and the public, would be arrested in its incipiency.' To the same effect are the remarks of Judge Marshall, in McCleery v. Highland Boy Gold Min. Co. [C. C.] 140 Fed. 951."

Petitioner cites, among others, the following cases, which, although tending for the most part to support the rule for which he contends, are not, we think, in accord with the best modern ideas upon this subject and with the current of Californian authorities: McBryde v. Sayre, 86 Ala. 458, 5 South. 791, 3 L. R. A. 861; Chambers v. Iron Co., 67 Ala. 358; Clifton Iron Co. v. Dye, 87 Ala. 468, 6 South. 192; Riedeman v. Mt. Morris Elec. Co., 56 App. Div. 23, 67 N. Y. Supp. 391; Barnard v. Sherley, 135 Ind. 547, 34 N. E. 600, 35 N. E. 117, 24 L. R. A. 568, 41 Am. St. Rep. 454; Gilbert v. Showerman, 23 Mich. 449; Lloyd v. Catlin Coal Co., 210 Ill. 460, 71 N. E. 335; Amelia Mill Co. v. Tenn. Coal & Iron Co. (C. C.) 123 Fed. 811; Edwards v. Allouez Min. Co., 38 Mich. 46, 31 Am. Rep. 301; Atchison v. Peterson, 20 Wall. 507, 22 L. Ed. 414; and Stewart Wire Co. v. Lehigh C. & N. Co., 203 Pa. 474, 53 Atl. 352. The last-named case was really decided upon the doctrine of laches, and not that of "balance of detriment." Many of the cases to which our attention is called by petitioner are not strictly in point. For example, in New York City v. Pine, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820, the Supreme Court of the United States recognized the principle that, where the defendant in an injunction suit has "the ultimate right"—that is to say, where it is entitled to continue with its work by eminent domain proceedings—a permanent injunction will be denied, but a temporary injunction may be granted to compel the defendant to make compensation.

In Georgia v. Tenn. Copper Co., 206 U. S. 230, 27 Sup. Ct. 618, 51 L. Ed. 1038, there is a dictum to the effect that if the plaintiff were a private individual the court might consider the balance of hardship, but from this Harlan, J., dissented. One of the most instructive cases upon this subject is American Smelting & Ref. Co. v. Godfrey, 158 Fed. 225, 89 C. C. A. 139. In that case Judge Riner says: "The fact, urged by counsel, that these smelters are located at a place where, by reason of its relation to the railroads and mines, it is most convenient for smelting purposes does not, in our judgment, constitute any defense to a bill to abate a nuisance; neither can a court take into consideration the fact that the business is conducted in a proper and reasonable manner, employing the latest and best devices and instrumentalities, where the evidence shows, as in this case, that when so operated and conducted it still results in very great damage to, if not the total destruction of, complainant's property and is a menace to health. 'The rights of habitation are superior to the rights of trade, and whenever they conflict the rights of trade must yield to the primary or natural right.' 1 Wood on Nuisances, §§ 514–517, and 523. It is also insisted that the injury to the appellants and to the public, if an injunction issues, so greatly exceeds the injury to the appellees, if denied, that an injunction should not have been granted. We think it may well be doubted whether this statement is supported by the record. The parties to this suit, upon both sides, have important and very valuable interests affected by the decree, and it would indeed be difficult to say upon the facts disclosed by the record which side would suffer the greater injury. However that may be, we do not think the fact that an actual injury resulting from the violation of a right is small, and the interest to be affected by an injunction is large, should weigh against the interposition of preventative power in equity, when it is clear that, on one hand, a right is violated and, on the other, a wrong is committed." He then discusses the leading cases. This, and the appended opinion of Marshall, District Judge, rendered in the Circuit Court, are very illuminating.

Our attention has been directed to certain Californian cases which, according to petitioner's belief, support the rule with reference to the "balancing of injury." These are Peterson v. City of Santa Rosa, 119 Cal. 387, 51 Pac. 557, and Williams v. Los Angeles Railway Co., 150 Cal. 593, 89 Pac. 330. In the latter case the court was considering the refusal by the superior court of an injunction pendente lite. While it contains some language perhaps susceptible of the meaning for which petitioner contends, the court was really considering the principle announced in Hicks v. Michael, 15 Cal. 116, that an injunction should not be issued before a hearing on the merits, except in cases of urgent necessity. In Peterson v. Santa Rosa, supra, the following language is found: "In Attorney General v. Council of Birmingham, 4 Kay & J. 528, the court indicated that in such cases only the right of plaintiff to relief, rather than the question of inconvenience to defendants, was to be considered, although the latter represented a large population. We regard the foregoing as an extreme statement, and deem it more proper to adopt the language of Swayne, J., in Parker v. Winnipiseogee, etc., Co., 2 Black, 545 [17 L. Ed. 333]: 'After the right has been established at law, a court of chancery will not, as of course, interpose by injunction. It will consider all the circumstances, the consequences of such action, and the real equity of the case.' In Curtis v. Winslow, 38 Vt. 690, it was said: 'In determining the right of a party to an injunction after a verdict in his favor by a court of law, the court will consider the relative loss to either party, the character of the property for which protection is sought, the character of the locality in which the nuisance exists, and whether the injury is properly compensable in damages.' If the injury is only occasional, and the damages small, accidental, rather than a probable and necessary consequence, an injunction will be denied. Wood v. Sutaliff, 8 Eng. L. & Eq. 217. In short, each case must be governed by the circumstances that surround it and by relative equities. Wood on Nuisances, § 550." Nevertheless the department sustained the judgment granting an injunction, by which defendant, a large city, was restrained from polluting the waters of Santa Rosa creek, although plaintiff's damages were found by the jury to amount merely to one dollar. The case is really in exact accord with the views which we have expressed above, for this language is used with reference to plaintiff: "Her right as a riparian owner was, not only to have the water of the stream flow over her land in its usual volume, but to have it flow in its natural purity, and such pollution of the stream by the defendant as substantially impaired its value for the ordinary purposes of life, and render it measurably unfit for domestic purposes, is an actionable nuisance, and the fact that the defendant is a municipal corporation does not enhance its rights or palliate its wrongs in this respect. Wood on Nuisances, § 427; High on Injunc. (3d Ed.) § 810." We are convinced that upon reason and upon great weight of authority we should deny petitioner's prayer, considering the subject upon the assumption that we have power under the Constitution, in aid of our appellate jurisdiction in a proper case, to suspend the operation of a prohibitory injunction pending an appeal.

Let the temporary order staying the operation of the injunction be dismissed, and the petition be denied.

I concur: LORIGAN, J.

HENSHAW, J., deems himself disqualified to participate herein, and therefore declines to act.

SLOSS, J. I concur in the order. It seems to me, however, that the discussion concerning the right of a court of equity to refuse an injunction where the injury resulting to the plaintiff from a denial of the relief would be far less than that sustained by the defendant, if the injunction were granted, is applicable to a consideration of appeals on their merits, rather than to the question here involved. If the court may balance the extent of the losses to be suffered by the respective parties, it exercises its discretion in this behalf when it grants or refuses the injunction. In this case the lower court has determined that it was essential, or at least proper, for the protection of the plaintiffs' rights that the defendant should be restrained. We are not now reviewing the correctness of that determination. The petitioner cannot, of course, ask us in this proceeding to stay the force of the injunction, on the ground that the trial court abused its discretion, or that it erred otherwise in granting the injunction. What is claimed is that a suspension of the judgment "is necessary or proper to the complete exercise" of our appellate jurisdiction (Const. art. 6, § 4); it is claimed that a refusal to stay the injunction will so affect the subject of the controversy that, if the judgment should ultimately be reversed, the appellant will in large measure be deprived of the fruits of its successful appeal.

But we must consider the rights of the respondents, as well as those of the plaintiffs. If the judgment of the court below is right, the plaintiffs are absolutely entitled to have the wrongful acts stopped, not only after the determination of the appeal, but pending the appeal. Under the findings, the acts complained of are inflicting a continuing injury upon the plaintiffs and their lands, an injury of a kind which has always been regarded by courts of chancery as irremediable, and not capable of adequate redress by damages. If the appellant may ask that it shall not lose the fruits of an appeal which may turn out to be meritorious, the respondents are in at least as good a position to demand that the appellate court shall not irrevocably take away from them the benefit which they have already won, and which will be confirmed to them if the judgment should be sustained. The exercise of the appellate jurisdiction must contemplate the possibility of affirmances, as well as reversals. I do not think a stay of execution can be said to be necessary or proper to the complete exercise of appellate jurisdiction when such stay can be granted only at the risk of destroying rights which will unquestionably belong to the respondent, if the judgment of the lower court shall be confirmed. This will always be the situation in the case of an appeal from a judgment enjoining acts which are found to be destructive of the plaintiff's real property. I think, therefore, that in such cases, at any rate, this court should not undertake to suspend the force of a prohibitory injunction pending appeal. Swift v. Shepard, 64 Cal. 423, 1 Pac. 493. The statutory law gives no stay, and there should be none, unless the trial court, which is in the best position to weigh the respective equities, concludes to exercise its power (Pasadena v. Superior Court, 157 Cal. 781, 109 Pac. 620) to suspend the injunction until the merits are finally determined.

It may be suggested, further, that the effect of an order by this court, suspending the operation of a prohibitory injunction, is to reverse, pro tanto, the judgment granting the injunction, and that in advance of a hearing on the merits. That this is so will appear more clearly if we suppose the case of an appeal from an order of the superior court, granting an injunction pendente lite. In such case, an application for a suspension of the injunction pending the appeal could be urged upon precisely the same grounds as those here presented by petitioner. The thing decided by the trial court, in the case supposed, was that the defendant should be restrained until a trial on the merits, or until that court should order otherwise. That conclusion is reviewable on appeal; but to suspend the order before a hearing of the appeal would clearly be to set aside the very thing decided below, viz., that the defendant should be enjoined until a trial or a further order. The situation does not differ where the injunction is embraced in a final judgment. There, too, it is a part of the adjudication that the defendant should be enjoined at once, and this adjudication should not be set aside on appeal before a hearing on the merits of the appeal.

We concur: ANGELLOTTI, J.; SHAW, J.

17 Cal. App. 96

PEOPLE v. DELUCCHI. (Cr. 156.)

(District Court of Appeal, Third District, California. Sept. 14, 1911. On Petition for Rehearing, Oct. 14, 1911.)

1. Criminal Law (§ 829*)—Trial—Requests to Charge—Instruction Given.

Where the court charged that defendant's plea of not guilty put in issue every material allegation, and placed the burden on and made it the duty of the prosecution, before a conviction could be had, to establish to the jury's satisfaction, to a moral certainty beyond and to the exclusion of a reasonable doubt, by legal and creditable evidence, each and every material fact essential to a conviction, such instruction covered a request to charge that, by accused's plea of not guilty, "he has said that he is not guilty of the crime with which he is charged, or of any crime included therein."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

2. Criminal Law (§ 770*)—Trial—Requests to Charge—Commonplace.

A request to charge that defendant's plea of not guilty amounted in effect to a statement by accused that he was not guilty of the crime with which he was charged, or of any crime included therein, was properly refused, as a mere commonplace proposition.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 770.*]

3. Criminal Law (§ 829*)—Trial—Requests to Charge—Instructions Given.

An instruction that defendant should be accorded the benefit of the presumption of innocence until the contrary was proved beyond a reasonable doubt, that such presumption accompanied defendant all through the case, and did not cease on the submission of the cause to the jury, but operated during their deliberations and until verdict, and that the jury must examine the evidence by the light of the presumption, and, unless they found it sufficiently strong to overcome the presumption, to remove it, and to satisfy them of defendant's guilt beyond and to the exclusion of a reasonable doubt he should be acquitted, sufficiently covered a request to charge that the presumption of innocence is not a mere form to be disregarded at the jury's pleasure, but is a substantial part of the law binding on the jury in the case, and that defendant is not required to prove his innocence, etc.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

4. Criminal Law (§ 829*)—Trial—Requests to Charge—Instructions Given—Information.

An instruction that the information was a mere accusation by the district attorney, and was not to be considered as evidence, nor was the jury to infer therefrom or presume defendant's guilt, covered a request to charge that the fact that defendant had been arrested, charged with an offense, and that an information had been filed against him, created no presumption of his guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

5. Criminal Law (§ 785*) — Impeachment — Effect—Instructions.

An instruction that, if any witness had willfully sworn falsely as to any material matter, "it was the jury's duty" to distrust his entire evidence, was objectionable, since, though the jury may reject the entire evidence of such a witness, it is not necessarily their duty to do so.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1785; Dec. Dig. § 785.*]

6. CRIMINAL LAW (§ 1173*)—APPEAL—PREJUDICE—INSTRUCTIONS.

Defendant was not prejudiced by the court's refusal to charge that, if a witness had willfully sworn falsely, the jury were at liberty to disregard his entire testimony, not shown by other evidence to be, or which the jury did not believe to be, true, where the court improperly, but to defendant's benefit, charged that, if a witness had willfully sworn falsely as to any material matter, "it was the jury's duty" to distrust his entire testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3164-3168; Dec. Dig. § 1173.*]

7. CRIMINAL LAW (§ 829*)—TRIAL—REQUESTS TO CHARGE—INSTRUCTIONS GIVEN.

The court properly refused a request to charge, defining a deadly weapon, where such term was correctly defined in the main charge as one which, from the manner in which it is used, is likely to produce death or great bodily injury, and the jury were informed that whether the weapon alleged and proved to have been used in the case in question was a deadly weapon, was a question of fact for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

8. CRIMINAL LAW (§ 829*)—TRIAL—REQUESTS TO CHARGE—INSTRUCTIONS GIVEN.

It is not error to refuse requests for instructions, the subject of which is fully covered by instructions given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

9. CRIMINAL LAW (§ 1173*)—APPEAL—REFUSAL OF REQUESTS—PREJUDICE.

On the cessation of an original difficulty between prosecutor and defendant, the latter went to a hotel, while prosecutor crossed the street, and remained with others until defendant shortly after returned from the hotel, holding a revolver behind him. Prosecutor was warned, whereupon a struggle took place, resulting in prosecutor finally wresting the revolver from defendant, who testified that he had the revolver only to protect himself from the crowd, from which he had heard threats while in the hotel. Prosecutor, however, testified that defendant leveled the revolver at him, and attempted to fire it. *Held*, that defendant was not prejudiced by the refusal of a request to charge on exhibiting a deadly weapon in a rude, angry, and threatening manner, in violation of Pen. Code, § 417, though the instruction might have been given in a proper exercise of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3164-3168; Dec. Dig. § 1173.*]

10. CRIMINAL LAW (§ 1170½*)—EVIDENCE—PREJUDICE.

Defendant in a prosecution for assault with a deadly weapon with intent to kill was asked on cross-examination to define the attitude of all the people present toward him, and answered that a majority of the men he did not know. "I never do anything to anybody. I know many people in Amador. They are always against me, and the time I got a little trouble at Amador I was boss in there. Lot of people there they were against, how to go buy that job. I no buy that job. I no ask for that job. I no say whether those people Amador City were business men or not business men." *Held* that, though the question was objectionable as calling for a conclusion, the answer was not only not responsive, but unintelligible, and defendant was therefore not harmed by the court allowing it to stand.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1170½.*]

Appeal from Superior Court, Amador County; F. V. Wood, Judge.

John Delucchi was convicted of assault with a deadly weapon, with intent to commit murder, and he appeals. Affirmed.

A. L. Frick, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

HART, J. By information the district attorney of Amador county charged the defendant with the crime of an assault with a deadly weapon with the intent to commit murder. The jury found the defendant guilty of the crime of assault with a deadly weapon, and the court thereupon imposed upon him a fine in the sum of $600, "and, in default of the payment of said fine, that he be imprisoned in the county jail of Amador county, Cal., one day for each $2 of said fine until said fine is satisfied." This appeal is from the judgment and the order refusing the defendant a new trial.

The points urged against the judgment and order are that the court erred in refusing to give to the jury certain instructions requested by the defendant and in its rulings permitting certain questions to be asked defendant on his cross-examination.

The evidence, briefly epitomized, developed the following facts: The defendant and the prosecuting witness, one Manuel Lopez, prior to the day on which occurred the difficulty bringing about this prosecution, had worked together at the Little Amador mine, situated near Amador City, in the county of Amador, the first named being a "shift boss" and the last named an ordinary laborer; that on the 29th day of August, 1910, the two men met in the street in Amador City, near the Amador Hotel, and engaged in an altercation which finally led to blows being exchanged; that, immediately thereafter, the defendant, accompanied by one J. M. Coffman, a barkeeper in the hotel, who had been attracted to the scene of the trouble by the noise made by the men, went into the hotel, where Coffman gave the defendant a 45-caliber Colt's revolver, at the same time saying to the defendant, "Take this and protect yourself if they come in and jump you—maul their brains out." After the difficulty Lopez started across the street, where a large number of persons had gathered, having been attracted to the street by the trouble between the former and the defendant. Shortly after going into the hotel, the defendant returned to the street with the revolver in his hand, which he held behind him as he approached the spot where Lopez was standing. Some one in the crowd, in a loud voice, warned Lopez that defendant had a revolver, and the former turned and faced the defendant, whereupon, according to Lopez, the defendant presented the revolver, saying to Lopez, "Come here, you s—n of a b—h, I will give you that $10. I will fight you now." Lopez at once grappled with the defendant, and undertook to and did at last succeed in wrenching the weapon from the latter's grasp. Lopez testified that, while the struggle for the revolver was in progress, the defendant attempted to fire the weapon, having several times pulled the trigger which failed to strike the cartridge because he (Lopez) kept his fingers between the cartridge and the hammer. There is also testimony showing that when the weapon was taken from the defendant the latter inserted his teeth into Lopez' chin, holding the latter thus for some seconds. There is some conflict in the testimony, but it is not contended that the evidence is insufficient to support the verdict, or that this court would be justified in substituting its judgment as to the effect and weight of the evidence for that of the jury. We have found no prejudicial error in the court's refusal to allow certain instructions proposed by the defendant.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] The first complaint of appellant, as to the matter of the instructions, is that the court seriously erred in not reading to the jury an instruction which would have declared, in express terms, that, by the plea of not guilty entered by the defendant to the information, "he has said that he is not guilty of the crime with which he is charged, or of any crime included therein." The reason assigned by the court for its refusal to give said instruction was that the proposition it contained was covered by its charge to the jury, and we think the court was right. The instruction, given by the court, which declared that the defendant's plea of not guilty "puts in issue every material allegation of the information and places the burden upon, and makes it the duty of the prosecution, before a conviction can be had, to establish to your satisfaction, to a moral certainty beyond and to the exclusion of a reasonable doubt, by legal and creditable evidence, each and every material fact essential to a conviction," in effect fully and clearly covered the proposition enunciated in the rejected instruction. We cannot perceive how a statement that a plea of not guilty tenders an issue upon the question of the defendant's guilt, and that the prosecution has the burden of proving his guilt by the proper degree of proof, can by any possibility be construed by intelligent men to mean anything less than that the defendant has denied his guilt of any offense alleged against him, or, as the refused instruction puts it, that he has thus "said that he is not guilty of the crime with which he is charged, or of any crime included therein." The given instruction, it will be noted, declares that the prosecution is compelled to produce the required proof "before *a* conviction can be had," which language clearly implies a conviction of *any* crime embraced within the allegations of the information.

[2] Moreover, to tell the jury that the plea of not guilty by the defendant is tantamount to a declaration by him that "he is not guilty of the crime with which he is charged, or of any crime included therein," would only involve the statement of a commonplace proposition. Obviously no other possible view could be taken of such a plea. The court made it very clear in its charge that the responsibility of proving the defendant's guilt of any offense comprehended within the averments of the information rested on the people, and this part of the charge itself was sufficient to impress upon the jury, if indeed, it was necessary to do so, the very obvious proposition that the defendant's plea of not guilty constituted no mere perfunctory act, but involved a serious, earnest protest of his innocence of the crime directly charged or of any other crime included therein.

[3] It is next insisted that the instructions submitted to the court by the defendant, and rejected, upon the doctrine of the presumption of innocence, should have been allowed, and that the refusal to give them constituted prejudicial error. The court told the jury that the defendant was to be accorded the benefit of the presumption of innocence until the contrary was proved beyond a reasonable doubt; that such presumption "goes with the defendant all through the case, and does not cease upon the submission of the cause to the jury, but operates in favor of the defendant not only during the taking of testimony, but during the deliberation of the jury, until they have arrived at a verdict"; that the jury "must examine the evidence by the light of this presumption," and that "unless, upon examining the evidence, you find it sufficiently strong to overcome the presumption of innocence, to remove it and to satisfy you of defendant's guilt beyond and to the exclusion of all reasonable doubt, he is entitled to an acquittal at your hands." The instructions proposed by the defendant upon said presumption, and which the court declined to give because "covered by the charge," merely state the doctrine in a slightly differen form from that in which it is explained in the court's charge. For instance, they would have said to the jury that "the presumption of innocence is not a mere form to be disregarded by you at your pleasure, but it is an essential, substantial part of the law of the land, binding upon you in this case;" that "the defendant is not required to prove his innocence," etc. We are unable to see how the court could have made it appear any more clearly than it did in its charge that the presumption of innocence is not a

mere form, which the jury were at liberty to disregard, or that the defendant was not required to prove his innocence. It plainly told the jury, as we have seen, that the defendant was entitled to the benefit of this presumption through all the stages of the trial and up to the very moment, while deliberating upon their verdict, that they became convinced that the evidence was sufficient to overcome it beyond and to the exclusion of any reasonable doubt. If the language as thus used is not sufficiently clear to demonstrate to any person of common intelligence that the presumption of innocence is not "a mere form to be disregarded by the jury at pleasure," and that the defendant in a criminal case is not compelled to prove his innocence, and that the doctrine is "an essential, substantial part of the law," then it must be confessed that it has no meaning at all. The very statement that the presumption must stand until dissipated by evidence establishing the defendant's guilt beyond a reasonable doubt is itself, if to ordinary language its ordinary meaning is to be ascribed, a plain and unambiguous declaration that the doctrine is a substantial one which may not be arbitrarily disregarded by the jury.

[4] The court's action in refusing to read to the jury instruction No. 10, proposed by defendant, is also criticised. The part of the instruction which the defendant insists that the court erred in omitting from its charge reads: "The fact that the defendant has been arrested and charged with an offense, and that an information has been filed against him, creates no presumption of his guilt." The court properly disallowed this instruction for the reason, as assigned by it, that the principle embodied therein was given in its charge. The rule proposed to be stated to the jury by said instruction was sufficiently covered in a general way by the court's instructions on the doctrine of the presumption of innocence and particularly by the following instruction which the court gave to the jury: "The information in this case *is a mere accusation* by the district attorney against the defendant, and *is not to be considered by the jury as evidence, nor are you in the slightest degree to infer or presume the guilt of the defendant therefrom.*" It is manifest that there is absolutely no difference, except as to form of language, between the foregoing and the rejected instruction. It is clear that if the jury, from the instructions declaring the defendant to be entitled to the presumption of innocence and explaining the only means by which that presumption may be overcome, were not made to clearly understand that they were not justified in encouraging the slightest inference militating against the accused from the mere information itself or the mere filing thereof, the instruction just quoted would most surely leave no doubt in the minds of the triers as to their duty in that regard.

[5] There was no error in the refusal to give defendant's instruction No. 14. The principle set out in said instruction, though in perhaps less amplified form, was stated to the jury much more broadly than we think the law justifies. As given, the instruction reads: "If any witness examined before you has willfully sworn falsely as to any material matter, *it is your duty to distrust his entire evidence.*" The rejected instruction states the rule more nearly in the language of the statute than does the given instruction; that is, it declares that, where the witness has willfully testified falsely as to any material matter, "such witness *is to be* distrusted in other portions of his testimony," and to this language is added: "And you are at liberty to disregard from your consideration all of the testimony of such witness, which has not been shown by other evidence to be, or which you do not believe to be, true." It will be observed that the court's instruction declared it to be *the duty* of the jury to distrust the entire testimony of a witness who has been found to have sworn falsely as to any material part thereof. We do not conceive this to be an accurate statement of the rule. We do not understand it to be binding upon the jury to distrust all of a witness' testimony because he may have sworn falsely in a material part thereof. The rule, as it is laid down by the Code, merely offers a test by which the testimony of a witness who has willfully not been truthful in all material parts thereof may be weighed. We see no inconsistency in believing a portion of the testimony of a witness who, in certain parts thereof, has deliberately testified falsely, and in disbelieving the part or parts that are false, and we do not believe it to be intended by the law that the court should tell the jury, in effect, that, because of the willful falsity of a material part of a witness' testimony, it is their unqualified duty to distrust his entire evidence.

[6] But we may assume that counsel for defendant had a special reason, arising in the trial of the case, for asking the court to state to the jury the principle contained in the court's instruction upon that subject, and, so viewing it, it can only be said that, even if the rule as thus given to the jury may not be said to be a strictly correct statement of the law, it was manifestly stated to the jury more favorably to the defendant than the one proposed by him and disallowed by the court; for, as will be readily noticed, his instruction would have told the jury that they were *at liberty* to disregard such witness' entire testimony—that is, they could believe or disbelieve those parts not found to be willfully false, according to whether, in their opinion, it was worthy or unworthy of belief—whereas, the court's in-

struction declares that it is *the duty* of the jury to distrust his entire evidence—language that can mean nothing less than that it was the duty of the jury to arbitrarily disregard the entire testimony of any witness who has willfully sworn falsely in any material part thereof.

[7] The court refused defendant's instruction No. 31, defining a deadly weapon. It was properly refused, the court having covered the same matter in its charge. The instruction relating to this subject, as submitted to the jury, reads, in part, "A deadly weapon is one which, from the manner in which it is used, is likely to produce death or great bodily injury," following which definition is a statement that whether the weapon alleged and proved to have been used in the case at bar was or was not a deadly weapon was a question of fact, to be determined by the jury from all the evidence, considered in connection with the definition of a deadly weapon as thus given.

[8] Instructions 32 and 33, proposed by defendant, and setting forth the law of justifiable homicide. were properly refused, as the court, in its charge, fully, clearly, and correctly explained to the jury the several occasions, under the law, on which homicide is justifiable. To have given the instructions as offered by the defendant upon the law of self-defense would have been only to unnecessarily repeat to the jury the law on that subject. Refusal to allow defendant's proposed instruction 37, relating to threats which certain testimony disclosed that the complaining witness had made against the defendant, and explaining the circumstances on which the latter would be justified in using a deadly weapon in his rencounter with said witness, was not erroneous, the court having in its charge fully and with sufficient clearness explained to the jury the law in that respect.

It is further objected that the court erred, to the serious injury of the defendant, by declining to read to the jury certain other instructions proposed by the accused. These instructions are numbered 43, 45, 46, 50, 51, and 53, and they merely in effect declare that, unless the jury are convinced by the evidence beyond a reasonable doubt of the guilt of the defendant of some one of the three offenses of which he could be convicted, under the allegations of the information, if the evidence justified it, it would be their duty to return a verdict of acquittal. We shall not examine these instructions here in detail. It will be enough to say as to these that an examination of the court's charge will disclose that the jury were thus clearly instructed on all the propositions of law stated in the rejected instructions. Indeed, while expressing the opinion that the evidence would not justify a verdict of guilty of assault with the intent to commit murder, the court nevertheless explicitly and with marked clearness defined the elements of that offense as well as those constituting, respectively, the crimes of assault with a deadly weapon and simple assault, and, in short, with the exception of failing to state concretely the rule laid down in defendant's rejected instruction 55, which we shall presently consider, announced to the jury, in very plain and simple language, and correctly, all the principles of law necessary to a fair and just consideration by the jury of any question of fact which might pertinently arise under the information.

[9] As to said instruction 55, while we are of the opinion that the court should have allowed it, we think that the refusal to read it to the jury was without prejudice to the defendant in view of the given instructions and some of the important facts which stand in the record without contradiction. After briefly recapitulating the circumstances of the trouble between Lopez and the defendant from the time of the occurrence of the original difficulty up to and including the circumstance of the return of the defendant to the street, carrying a revolver and holding the weapon behind his back as he approached Lopez, who was standing in the street with a number of other persons, said instruction proceeds: "And that, upon reaching the edge of the porch in front of said hotel, said defendant drew said revolver and *exhibited it to said Lopez, and to one or more other persons, in a rude, and angry and threatening manner*, but entertain a reasonable doubt as to whether he attempted to shoot said Lopez, and also entertain a reasonable doubt as to whether he attempted to strike said Lopez in such manner as would have been likely to inflict upon said Lopez great bodily injury, you must find the defendant not guilty of assault with intent to commit murder, and you must also find him not guilty of the crime of assault with a deadly weapon." The claim of the defense is, and there is testimony in the record tending to support it, that Lopez and certain other persons, who were among the crowd that had gathered at the scene of the trouble and remained in the street until defendant's return thereto, had threatened to inflict upon the latter bodily injury, and that defendant, upon his return to the street, assaulted no one, but simply exhibited the weapon in the manner described by section 417 of the Penal Code for no other purpose than to frighten his enemies who were in the crowd. Said section reads: "Every person who, not in necessary self-defense, in the presence of two or more persons, draws or exhibits a deadly weapon in a rude, angry and threatening manner, or who in any manner unlawfully uses the same, in any fight or quarrel, is guilty of a misdemeanor." The obvious purpose of the rejected instruction was to submit to the jury's consideration the question whether the defendant, if committing any crime at all, was guilty only of the crime defined by said section 417 of the Penal Code.

The court, as already noted, correctly and with clearness instructed the jury that "an assault is an unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another," and further instructed the jury that if they were not satisfied, from the evidence beyond a reasonable doubt, that the defendant was guilty either of an assault with the intent to commit murder, or of an assault with a deadly weapon or of simple assault, as those crimes were defined in the charge, then it would be their duty to acquit the defendant. Thus it will be observed that the court made it clearly to appear to the jury that, if the evidence failed to disclose an assault of any kind or character upon Lopez by the defendant, it would be their duty to acquit the latter; and it would certainly be an unwarranted reproach upon the intelligence of the jury to hold that, if the evidence showed that the defendant made no assault, but merely exhibited the weapon in the presence of the crowd that had collected on the street, in a "rude, angry and threatening manner," they would not have promptly returned, as, under such circumstances it would have been their duty to have done, a verdict of acquittal.

But we do not think that it is at all probable, in view of certain facts brought out at the trial, that, had the rejected instruction been given to the jury, it would have had the effect of causing them to have reached and returned any different verdict from the one found and recorded. The undisputed evidence, as seen, shows that the original trouble was between the defendant and Lopez; that, upon the cessation of said difficulty, defendant went into the hotel, and that Lopez started across the street, and there remained with others until the defendant, a short time after going into the hotel, returned, holding a revolver in his hand; that the defendant approached the spot where Lopez was standing and held, presumably for the purpose of concealing it from view, the revolver behind him; that Lopez was warned by some one on the street that the defendant held a weapon in his hand, and that thereupon a struggle between the two men took place, resulting, finally, in Lopez wresting the revolver from the defendant. The defendant testified that he left the hotel for the purpose of going to the mine at which he was employed and carried the pistol for the purpose of protecting himself against Lopez and others of the crowd by whom he heard threats made against him while he was in the hotel. But, from the undisputed fact that the original difficulty was between the defendant and Lopez, the former, according to his version, getting a little the worst of the affray, and from the admitted manner in which the defendant was carrying the revolver, the jury were clearly warranted in finding that the defendant procured the revolver, and returned to the street with the purpose of resuming hostilities with Lopez, and not with an intention of keeping Lopez and other enemies mingling in the crowd (if any others were there than Lopez) from attacking him. It is, of course, to be assumed that the jury, as manifestly they had a right to do, believed Lopez when he declared that the defendant leveled the revolver at him and at the same time attempted to fire it, and we cannot say that the instruction would have operated to change that belief.

Our conclusion upon this point is, as before stated, that, while the court might just as well have allowed the instruction, its refusal to do so could not have so prejudiced the defendant as to have denied to him a fair and impartial trial.

[10] The only objection specified here against the rulings of the court on the question of the admissibility of testimony arose on the cross-examination of the defendant. The district attorney first asked the defendant how many people were in the crowd at the time the alleged assault took place, and he replied: "Oh 25 or 30; might be less and might be more." The prosecuting officer then asked these questions, to each of which counsel for defendant objected, the court overruling the objections: "Q. Were those men all laboring men? A. Most of them, I think. I do not know everybody over there. Q. There were quite a number of business men looking on, weren't there? A. I could not say; might be, and might be not; I have not time to look around who was the men looking on. Q. What was the attitude of all the people there to you, Mr. Delucchi, against you, or how were they? A. A big majority of the men here I do not know. I never do anything to anybody. I know many people in Amador. They are always against me, and time I got a little trouble at Amador, I was boss in there; lot of people there they were against, how to go buy that job. I no buy that job. I no ask for that job. I no say whether those people Amador City were business men or not business men." The ground of the objection to the foregoing questions was that they did not constitute pertinent cross-examination. The district attorney did not explain to the court the purpose of that line of cross-examination, but we think that it is clear, barring the form of the last question, that they were proper questions. The defendant, as we have seen, sought to convey the impression to the jury that a number of the persons, including the complaining witness, composing the crowd standing on the street when he left the hotel and entered said street after the first trouble, were his enemies, bent on doing him violence. He was asked by his counsel about the people in the crowd and, in reply, explained his reason for procuring and carrying a weapon, as follows: "I did not go out to kill anybody. I go out with this idea: Probably if I go out with a pistol, all bunch scatter away and make, clear them up and be all trouble done," or "all the trouble over," as his counsel made him say.

The district attorney (the defendant himself having first stated that those of the crowd who had arrayed themselves against him were laboring men) no doubt sought to show by the cross-examination to which objection was there and is here made that as a matter of fact a majority of the crowd were business men who were mere lookers-on and entertained no feeling of hostility whatever toward the defendant, and thus, if he could, weaken defendant's story about the "bunch" being against him, and that his purpose in carrying the revolver to the street was not to "scatter the bunch," but to resume the fight with Lopez. The question propounded to the defendant as to the "attitude of all the people there to you," etc., called for a conclusion of the defendant, and could have been successfully objected to on that ground; but it was eminently proper for the district attorney, in view of the theory of the defense, as disclosed by the defendant's story, to put to the latter proper questions, the object of which was to secure from the defendant himself a description of the manner in which "all the people" acted toward him—whether they sided with or encouraged or manifested, by words or actions, or both, a disposition to assist Lopez as against him or were apparently indifferent and took no part in the trouble. But the answer to the question was not only not responsive, but was, so far as we are able to judge it by the bare record, altogether unintelligible, and would have been stricken out on motion on either ground. There is nothing in the answer, nor in the nature or form of the question, if it may be assumed not to have been proper in substance, that could have done the defendant any harm.

We have now examined all the points pressed on this appeal, and have found no error that in our judgment calls for a reversal.

The judgment and order are therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Petition for Rehearing.

HART, J. We are satisfied with the conclusion reached in the former opinion in this case. We think, as announced therein, that the court's charge clearly and correctly covered every important question arising upon the evidence, and do not think that it has been or can be shown that any different verdict would have followed from the giving of the special instructions proposed by the defendant and rejected by the court.

But we may not improperly here say, lest a misapprehension may arise from our criticism of the instruction given by the court based upon subdivision 3 of section 2061 of the Code of Civil Procedure—that a witness false in a material part of his testimony is to be distrusted in others—that we did not intend to be understood as intimating that it was our opinion that an instruction announcing that proposition in the language in which it was expressed by the court would be prejudicial in any case, whatever the facts and circumstances thereof might be. The instruction obviously involves the statement of a mere commonplace or the statement of a proposition which every person of common sense knows or ought to know. Indeed, he would be radically deficient in natural mental equipment who would not know, without being warned, that his duty would be to distrust or not implicitly rely upon important statements of a person who he had found had deliberately lied as to other matters of equal importance. In the case of a trial, about the first thought that would naturally run through the minds of jurors, if they possessed common intelligence, would be their duty to consider with great caution and distrust the testimony of a witness who they had found had been untruthful in a material part thereof, and the court's warning that it is their duty to so view the testimony of such witness has always appeared to the writer to be unnecessary, and, indeed, a reflection upon the intelligence of the jury. The truth is that any man having sense enough to discharge the duties of a juror would distrust the entire testimony of such a witness, whether told by the court to do so or not, unless there were parts of it that harmoniously coincided with the general theory of the case or with evidence as to the reliability of which no question could arise or had arisen.

While, as pointed out in the original opinion, there is a slight variance between the language of the section and that in which the court announced that commonplace to the jury, the difference is so immaterial that we are unable to see wherein the giving of it could have prejudiced the rights of the defendant in the remotest degree, or that the jury would have probably reached any other conclusion had the instruction in the language proposed by the defendant been given in lieu thereof.

We are satisfied that the defendant was fairly tried, and that the judgment and order should not be disturbed.

The petition for a rehearing is therefore denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

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17 Cal. App. 111

PINHEIRO v. BETTENCOURT et al.

(Civ. 764.)

(District Court of Appeal, Third District, California. Sept. 21, 1911.)

1. LICENSES (§ 44*)—USE OF REAL PROPERTY—PAROL LICENSE—EVIDENCE.

Evidence *held* to establish a mere parol license to use certain land in controversy belonging to defendant, and not an easement.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 99; Dec. Dig. § 44;* Easements, Cent. Dig. § 4.]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. LICENSES (§ 58*)—USE OF LAND—REVOCATION.

A parol license to use the land of another is revocable by the owner at any time.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 116; Dec. Dig. § 58.*]

3. EASEMENTS (§ 1*)—CREATION.

An easement over land of another can only be created by grant, or by prescriptive title.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 1; Dec. Dig. § 1.*]

4. EASEMENTS (§ 6*)—PRESCRIPTION.

An easement by prescription cannot arise out of an agreement, license, or mere neighborly accommodation, but must be acquired adversely.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 15; Dec. Dig. § 6.*]

5. APPEAL AND ERROR (§ 1071*)—REVIEW—HARMLESS ERROR—FINDINGS—PREJUDICE.

Where, in a suit to quiet title to plaintiff's own land, he denied any claim to defendants' land, defendants were not prejudiced by the court's failure to adjudge an easement over their land, not claimed by plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4234; Dec. Dig. § 1071.*]

6. APPEAL AND ERROR (§ 1071*)—REVIEW—HARMLESS ERROR—FINDINGS.

Where all the material issues are passed upon, and the findings support the judgment, an insufficient general finding that all the averments of defendants' answer and cross-complaint, adverse to or inconsistent with plaintiff's complaint, were untrue will be disregarded as immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4234; Dec. Dig. § 1071.*]

7. TRIAL (§ 396*)—FINDINGS—NECESSITY.

It is not necessary for the court to make a specific finding on a matter not in issue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 935; Dec. Dig. § 396.*]

8. COSTS (§ 93*)—PERSONS LIABLE FOR COSTS—MORTGAGEE MADE PARTY.

Where a mortgagee was made a defendant with the owners of the fee, in an action to quiet title, and united with such owners in unsuccessfully contesting the action, he was equally liable for costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 370; Dec. Dig. § 93.*]

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by M. V. Pinheiro against M. M. Bettencourt and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Royal A. Carter, for appellants. Joel H. Smith and M. G. Gallaher, for respondent.

CHIPMAN, P. J. Action to quiet title. In his amended complaint, plaintiff alleges ownership and possession of the E. ½ of the E. ½ of the N. E. ¼ of the N. E. ¼ of section 11, township 16 S., range 22 E., M. D. B. & M., "being ten acres of land, more or less, and more particularly described and bounded as follows: Beginning at the northeast corner of said section 11, and running westerly along the north line of said section, a distance of 326 feet; thence southerly and parallel with the east line of said section, a distance of 1,322 feet; thence easterly and parallel with the north line of said section, a distance of 326 feet, to the east line of said section; thence north along said east line of said section, a distance of 1,322 feet, to the place of beginning;" alleges the payment of all taxes which have been assessed against said land; also alleges adverse possession since February 2, 1901, "as against all the world of all of the said land, except that defendants and each of them claim some right, title, interest, or estate in and to, and possession of, that portion of said land particularly described as a strip of land about four or five feet in width along the east side of and adjacent to the west line of said land, and extending north and south the entire length of said land; and that said claim of defendants and each of them is adverse to plaintiff," without right, etc. This latter description is involved in some obscurity, but it was intended to describe a strip of land along the west side of plaintiff's land. This is in a degree cleared up by the answer, and the trial seems to have been addressed to the issues affecting land on the west side of plaintiff's land.

The answer is a voluminous document of some 75 folios, but its substance may be stated in much less space. Defendants admit title in plaintiff to the land, as first described in the complaint, but deny that the tract contains more than 9⅞ acres, and deny that the north and south boundary line is but 326 feet in length, and allege its length to be 330 feet, but they do not admit or deny the length of the land north and south to be as alleged; admit adverse possession, as alleged, and payment of all taxes, except "on the right of way or easement hereinafter specified"; deny that they claim any right to or interest in plaintiff's said land, "except as hereinafter specified"; allege that in October, 1900, defendant Joaquin was the owner of the N. E. ¼ of said section, and in that month sold the E. ½ of E. ½ of N. E. ¼ of the N. E. ¼ to plaintiff, and plaintiff went into possession, and ever since has been in possession of the same, "except as to the easement and right of way herein referred to," and on February 2, 1901, said defendant Joaquin conveyed said land to plaintiff, "subject only to said easement," and thereafter conveyed the W. ½ of the E. ½ of the N. E. ¼ of the N. E. ¼ of said section—an undivided eleven fourteenths to defendant M. M. Bettencourt and three fourteenths to defendant Ida—"subject only to the easement and right of way therein in favor of plaintiff, as hereinafter specified"; deny that defendant Joaquin has any interest in either said tracts of land, and he disclaims any right therein, "other than such contingent interest as he has therein on said W. ½ of said E. ½ of the N. E. ¼ of the N. E. ¼ of said section 11, by virtue of a mortgage from defendants" M. M. and Ida on their said land. It is then alleged that, in the year 1901, plaintiff, being the owner of the land now claimed by him, and defendant Joaquin, the owner of the tract owned by the other defendants, agreed to leave a strip of land 17 feet in width along the dividing line of the two tracts; that is to say, plaintiff was to leave a strip 9½ feet wide on his side of the line and Joaquin 7½ feet on his side from a point about 400 feet south of the north line, to which point a fence ran along the dividing line, said strip of land 17 feet wide to be used jointly by Joaquin and his successors in interest and plaintiff for their mutual convenience in turning their horses when cultivating the vines planted by Joaquin and the trees planted by plaintiff, and also to be used for a roadway and for irrigating ditches; and it is alleged that since 1902 this strip of land has been jointly used by plaintiff and by defendants, the Bettencourts, in accordance with this agreement, to the point where said division fence was erected, which latter had been by plaintiff and Joaquin placed on or near the dividing line of their said land. For convenience, the plaintiff's land will hereinafter be designated as tract A and defendants' land as tract B.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is alleged, as a further defense, that, about the year 1902, plaintiff was the owner of tract A and defendant Joaquin was the owner of tract B; that there was then along the dividing line between said tracts a strip of land about 17 feet in width, which plaintiff and defendant Joaquin "had left, and which was then, and ever since has been, vacant and unplanted, for the purpose of being jointly used by them and the future owners of said land as and for a turn row, or turning space, whereon to turn teams in the cultivation of each of said several tracts of land," which said strip extended and now extends northerly from the south line of said tracts to a point about 400 feet south of the north line of said tracts, at or near "the termination of a fence, built by plaintiff and defendant Joaquin jointly as a partition fence, at or near the division line," said strip extending easterly about 9½ feet from the division line on plaintiff's land and about 7½ feet westerly on defendant Joaquin's land; and that, in 1902, "and more than five years before the commencement of this action," plaintiff and said defendant "jointly entered into and upon and used said strip of land jointly as a turn row, or turning space in the cultivation of said two several tracts of land, respectively, and for ditches and a roadway, and thereafter said plaintiff continuously to the present time, and jointly with defendant M. M. Joaquin and his successors in interest, and with their full knowledge, under a claim of right thereto, used, occupied, possessed, and enjoyed an easement and right of way upon, along, and over and across said portion" of defendants' land, and defendants enjoyed like uses and privilege over plaintiff's portion of said land, "and said use * * * of said land for said purposes was done openly * * * and under claim of right thereto by plaintiff and said Joaquin and his successors in interest adversely by said plaintiff to said defendant Joaquin and his successors in interest, but jointly with him and them, and not exclusively, and adversely by said defendant Joaquin and his successors in interest to said plaintiff, but jointly with him, and not exclusively, which said use * * * has existed and continued, as aforesaid, for more than five years immediately before the commencement of the action;" that the parties paid all taxes assessed against their said lands, respectively, and that no taxes were levied to either party or imposed on said easement and right of way, except as the same was assessed in the assessment upon the land. Two other separate defenses are set up, which so far as we can see, allege an easement by adverse user, for the purposes hereinbefore stated, acquired by plaintiff jointly with defendants over the strip of land, part of tract B, and the like acquisition by defendants of an easement by defendants jointly with plaintiff over the strip of land situated on tract A, having a length along said division line, north from the south line of the tracts, of 920 feet. Finally, substantially the same facts are averred as a counterclaim. Defendants pray that this 17-foot strip of land, 920 feet long, be decreed to be subject to an easement for the joint use of the parties, and for the purposes already described.

The court found that plaintiff was the owner of the land as described in the complaint, and "that ever since said 2d day of February, 1901, plaintiff has been and is now in the open, notorious, peaceable, and adverse possession, as against the whole world, of said land," and has paid all the taxes assessed thereon. That plaintiff did not, in the year 1901, or at any time, enter into an agreement with defendant Joaquin that any portion of plaintiff's land "should be used as a turning row or space to turn teams in cultivating said tract of land, or in cultivating the west half of the east half of the northeast quarter of the northeast quarter of said section (defendants' land), or any tract of land, or at all, or that any portion of said (land) should be used for an avenue or driveway, or for the construction thereon of an irrigating ditch, or of irrigating ditches." That at various times during a period of about four years next before the commencement of the action defendants Joaquin and M. M. Bettencourt "have used the strip of land between the west row of trees and vines" on plaintiff's land "and the west line of said land as a space to turn their teams or turning row in cultivating" defendants' said land, "and for irrigating ditches constructed thereon from time to time; but such use was in the nature of a neighborly accommodation, and was not pursuant to any agreement between plaintiff and defendants, or either of them, and was not under any claim of right, nor adverse to plaintiff, nor continuous, nor uninterrupted." It is then further found that plaintiff, "by the license and neighborly accommodation of defendants Joaquin and M. M. Bettencourt, at various times during said four years, used as and for a part of a turning row a part of a small strip of land lying between the east row of vines" on defendants' land, "and that said use was with the consent of said defendants, and not under any claim of right, and not adverse to said defendants or either of them, and not under any agreement therefor, and was not continuous and uninterrupted." "That all the allegations and averments of plaintiff's complaint are true, and that all of the denials of defendants' answer, and all of the allegations and averments of said answer, and all the allegations and averments of defendants' cross-complaint, adverse to or inconsistent with plaintiff's complaint, are untrue."

Plaintiff had judgment accordingly, with costs assessed "against all the defendants." Defendants appeal from the judgment and order denying their motion for a new trial.

Defendants admit plaintiff's ownership of the land claimed by him, except that they aver that the north and south boundary lines are 330 feet in length; whereas plaintiff claims that they are 326 feet long, and the court so found. As to the length of the division line, or plaintiff's west boundary line, he alleged and the court found it to be 1,322 feet. Defendants make no denial of this, except in their brief they say that, according to the rule governing United States surveys, that line could not have been over 1,320 feet in length. We do not see that the fact is material, for the length of this line in no wise affects defendants' land, and no controversy has arisen over the location of the south boundary of plaintiff's land. There is, indeed, no issue as to the precise location of the line dividing plaintiff's and defendants' land. But the evidence is that a survey was made of plaintiff's land by County Surveyor McKay, in the presence of defendant Joaquin and plaintiff, and he found a stake on its northwest corner 326.1 feet from the east section line, and another stake a the southwest corner 326.3 feet from the section line, and he found "a crooked wire fence on the west side of the property, but not on the line, probably 200 yards long," along the north end of the line. He testified: "It seems to me that Mr. Joaquin called my attention to the fence, and that it ran very close to the line, but just how close I can't say exactly."

[1] However, the point contended for by defendants does not concern this part of the land; they claimed in their answer an easement over the land of plaintiff south of this fence, i. e., "the southerly 920 feet of the westerly 9½ feet" of plaintiff's land, and this is the real issue in the case. Defendants claim an easement over the land of plaintiff, which they themselves admit is east of the division line. Defendant Joaquin testified that about the time he conveyed the land to plaintiff, in February, 1901, he and plaintiff measured the width of the tract with a board, and they then agreed upon the division line thus established. Upon this point, plaintiff's testimony, and that of his wife, was that Joaquin said if the survey they had made was not satisfactory plaintiff could call a surveyor any time, and have the line established. Defendant Joaquin testified "In regard to leaving a space unplanted, he [plaintiff] said he would leave an avenue there, and I said that was all right. He did not say at that time how much he would leave, because he planted one year before I did, and left 9½ feet, and afterwards, when I started to plant, I left 7 feet, because mine were vines and his were trees. That was left as an avenue to turn in and to ditch. He said he left 9½ feet to turn the horses, and he asked me to leave 7½ feet for the same purpose. When I used that, I turned the horses, going between his trees and coming right back; then when he turned from his trees, and reached my vines, he had room to turn. He drove across to my vines and turned, and I drove across to his and turned." He also testified that the space was used as an avenue "to haul things out," and he also built ditches through there.

Plaintiff testified that there was nothing said between him and Joaquin about an avenue between his land and Joaquin's. "I never had any discussion with Mr. Joaquin about the use of an avenue between Mr. Bettencourt's present land and my land. * * * I didn't know until last April that Mr. Bettencourt was claiming a right to the use of that road, or so-called avenue, on the line between his land and mine. * * * The space between the vines and trees on my land, and the space between the vines on the land of Bettencourt, has been used by us to turn our teams on. He asked me for it one year to run water on. * * * The only conversation I had with Mr. Joaquin about the use of that ditch was the first year. Nothing was said about the ditch after that." Bettencourt testified: "I have used the strip between his vineyard and orchard and my vineyard as a turnway and for a ditch. Neither he nor I objected to the other using the strip for a turnway. He consented to me using that avenue, and we used it in a neighborly way. He started to put some posts there (1908), and I objected, because I could not turn my horses." And Bettencourt pulled the posts out of the ground, and threw them on plaintiff's land.

[2-4] It seems to us that the findings of the court are justified by the evidence and sufficiently meet all material issues. The most that can be said of the right claimed by defendants is that they had a mere license by parol to cross over plaintiff's land for their convenience in cultivating their land, and plaintiff had a like privilege to

use defendants' land, and that the use for a ditch and "to haul out things" was of a similar character. Such a license is revocable at any time. An easement can only be created by grant, or by prescriptive title. Defendants are claiming under an agreement, but a prescriptive title cannot arise out of agreement; it must be acquired adversely; it cannot be adverse when it rests upon a license, or mere neighborly accommodation. Franz v. Mendonca, 131 Cal. 205, 63 Pac. 361; Clarke v. Clarke, 133 Cal. 667; 66 Pac. 10. See, also, Abbott v. Pond, 142 Cal. 393, 76 Pac. 60. We are unable to discover any legal basis upon which defendants can build.

[5] Defendants, in their cross-complaint, claimed an easement over plaintiff's land, and they also set up in plaintiff an easement and right of way over their lands, and defendants now complain that the court made no finding on this latter issue. The action was brought to quiet plaintiff's title to his own land. He denied any claim to defendants' land, thus disclaiming any interest in it. Defendants are not prejudiced by failure of the court to adjudge an easement over defendants' land, not claimed by plaintiff. This issue seems to us to be immaterial, and a failure to find on an immaterial issue is not sufficient ground for ordering a new trial. Garvey v. Lashells, 151 Cal. 526, 534, 91 Pac. 498.

[6] The finding that all the averments of defendants' answer and cross-complaint, "adverse to or inconsistent with plaintiff's complaint, are untrue" may be conceded to be an insufficient finding. But where all the material issues are found upon, and the findings support the judgment, such a general finding as is complained of may be disregarded.

[7] There was no necessity for a finding of ownership by defendants of their land. No issue was raised as to such ownership, for it was admitted by plaintiff, as was plaintiff's ownership of the land claimed by him admitted by defendants, except as to the right of way claimed, and on this there was a finding. Nor was it material for the court to find on defendants' averment that they had a right of way over their own land. This was not denied, and, besides, such right was appurtenant to the fee. Nothing more is required than that the material issues should be covered by the findings. And where a pretermitted finding must necessarily have been adverse to appellants they are not aggrieved. A fact which is implied by law need not be found upon. Aydelotte v. Billing, 8 Cal. App. 673, 97 Pac. 698.

[8] Appellant Joaquin complains that judgment should not have gone against him, with the other defendants, for costs. If he made an unqualified disclaimer, this would be true. But he expressly stated that he had an interest in defendants' land as mortgagee, and he claimed and urged at the trial that defendants' title carried with it the easement contended for by them. In Castro v. Barry, 79 Cal. 443, 21 Pac. 946, the court quoted approvingly from cases there cited: "The statute does not confine the remedy to the case of an adverse claimant setting up a legal title, or even an equitable one; but the act is intended to embrace every description of claim, whereby the plaintiff might be deprived of his property, or its title clouded, or its value depreciated, or whereby the plaintiff might be incommoded and damnified by the assertion of an outstanding title already held, or to grow out of the adverse pretention." And the court said: "If the defendant by his answer disclaimed all interest whatever, judgment may, nevertheless, be entered against him, though in such case it must be without costs." We think that when a mortgagee is made a defendant with the owners of the fee, and unites with them in contesting the action, he is with them liable for the costs, should they fail in their defense.

It seems to us that the findings sufficiently meet all the material issues, and are sufficient to support the judgment. We discover no prejudicial errors in the trial of the cause.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

17 Cal. App. 154

PEOPLE v. McNABB. (Cr. 199.)

(District Court of Appeal, Second District, California. Sept. 25, 1911.)

1. ROBBERY (§ 24*)—ASSAULT WITH INTENT TO ROB—SUFFICIENCY OF EVIDENCE.

Evidence *held* to sustain a conviction of assault with intent to rob.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 33; Dec. Dig. § 24.*]

2. CRIMINAL LAW (§ 1166½*)—APPEAL—HARMLESS ERROR—REMARKS OF JUDGE.

Where, on the sustaining of an objection to a question asked by a district attorney concerning defendant's prior statement to a witness that he was about to go into the hold-up business, the court directed the jury to disregard the offer to prove such matter, defendant was not prejudiced thereby.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3125; Dec. Dig. § 1166½.*]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

H. A. McNabb was convicted of assault with intent to rob, and he appeals. Affirmed

Earl Newmire and Isador Morris, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted of the crime of assault with intent to commit robbery. By the judgment it was ordered that he be imprisoned in the state prison for a period of two years. The judgment and also an order denying defendant's motion for a new trial are appealed from. But two points are urged as grounds for reversal. It is contended, first that the evidence was insufficient to justify the verdict; and, second, that the district attorney was guilty of prejudicial misconduct in asking certain questions of a witness relative to statements alleged to have been made by defendant prior to the commission of the crime charged.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] The evidence was sufficient to justify the verdict. The complaining witness testified to the attempt made by two men to rob him on the evening of January 27, 1911, as he left a car on his way home, and within the easterly limits of the city of Los Angeles. He told how he had wrestled with one of his assailants, and, after escaping from him, had run to his home near by and telephoned the police; that he had then returned to the place where he had been assaulted, and found the defendant not far away. The latter was leaving the scene of the assault, and appeared to be intoxicated at the time. Complaining witness pursued and overtook him, and caused him to be detained until a policeman arrived. Complaining witness further testified positively that the defendant was one of the two men who attempted to rob him. If the jury believed this testimony to be true, as it must be assumed it did, then the verdict as rendered was the proper one to be returned. In no view of the case can it be said that the evidence was insufficient to support the conclusion of the jury.

[2] While a witness named Powell was being examined at the trial the district attorney asked him several questions touching a statement alleged to have been made by defendant a few days prior to the day on which the attempted robbery was committed. The question finally propounded to the witness was as follows: "Q. Did Mr. McNabb at that time in the presence of other people say he was going into the hold-up business?" To this and preceding preliminary questions the defendant's counsel objected. Defendant's counsel made a general objection that the matter sought to be elicited was incompetent, irrelevant, and immaterial, and this objection was sustained. The district attorney then announced that he had finished with the witness, and the court, without any request from counsel prompting him so to do, addressed the jury and said: "The jury will disregard the offer to prove this matter." It was not pointed out specifically, either by any objection of counsel to the questions indicated, or any exception then taken, that misconduct was attributable to the district attorney on account of his having pursued this line of examination. If we admit that the matter sought to be brought out was subject to the objections as made, which we do not decide, it does appear that the trial judge was careful to admonish the jury and directed it to disregard the offer to prove the matter objected to. And conceding that a proper exception has been preserved (which, in our opinion, the record fails to show, under the decisions in People v. Shem Ah Fook, 64 Cal. 380, 1 Pac. 347; People v. Kramer, 117 Cal. 650, 49 Pac. 842; People v. Frigerio, 107 Cal. 153, 40 Pac. 107; People v. Osborn, 12 Cal. App. 148, 106 Pac. 891), still it does clearly appear that the rights of defendant were fully guarded, and that prejudice could not reasonably be said to have resulted where the court so promptly admonished the jury to disregard the matter which defendant claims was improperly suggested by the questions of the district attorney.

In our opinion this appeal is without substantial merit, and the judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

17 Cal. App. 152

PEOPLE v. NITTA. (Cr. 352.)

(District Court of Appeal, First District, California. Sept. 23, 1911.)

1. PROSTITUTION (§ 3*) — INDICTMENT — CONSENT OF HUSBAND—EVIDENCE.

Under an information charging that defendant did willfully connive at, consent to, and permit the placing and leaving of his wife in a house of prostitution, and that he did then and there willfully allow and permit her to remain there, evidence *held* sufficient to sustain the conviction under the charge of willfully permitting her to remain there.

[Ed. Note.—For other cases, see Prostitution, Dec. Dig. § 3.*]

2. PROSTITUTION (§ 3*)—REPUTATION OF HOUSE —EVIDENCE.

In a prosecution of a husband for willfully permitting and allowing his wife to remain in a house of prostitution, evidence *held* to sufficiently show the bad character of the house.

[Ed. Note.—For other cases, see Prostitution, Dec. Dig. § 3.*]

Appeal from Superior Court, City and County of San Francisco; Wm. P. Lawlor, Judge.

Haruzo Nitta was convicted of permitting and allowing his wife to remain in a disorderly house, and he appeals. Affirmed.

Philip C. Boardman, for appellant. Attorney General Webb, for the People.

HALL, J. Defendant was convicted for violating the provisions of section 266g of the Penal Code, and, upon judgment being rendered, appealed to this court.

It is charged in the information that the defendant did willfully connive at, consent to, and permit the placing and leaving of his wife in a house of prostitution, and that he did then and there willfully permit and allow her to remain there.

[1] It is contended that the verdict is not supported by the evidence, because the evi-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

dence shows that the defendant placed his wife in the house of prostitution, and the argument is that this state of facts does not support a charge of conniving at, consenting to, or permitting the placing of his wife in such house.

The information however, also charges him with permitting his wife to remain in such house of prostitution, which act constitutes a complete offense. The evidence shows that the defendant placed his wife in the house in question on a given date, and received from the keeper thereof $350, and departed, leaving his wife in the house, where she remained, and for several months followed the calling of a prostitute. Subsequently after an interval of several months, defendant returned and demanded of his wife that she give him $250. This she did, on his agreeing to a separation after the Japanese custom, paying the money from her earnings as such prostitute. Whether or not the evidence may be said to support a charge of conniving at the placing of the wife in a house of prostitution or not, it certainly supports the charge that he permitted her to remain in such house, which is all that is required to support a conviction under the information. People v. Shotwell, 27 Cal. 403; People v. Frank, 28 Cal. 507; People v. Sheldon, 68 Cal. 434, 9 Pac. 457.

[2] It is also contended that the character of the house was not sufficiently proved. This is also without merit. Several witnesses, police officers, testified to the general reputation of the premises as being a house of prostitution, and which they described as consisting of the third floor of a certain house containing little rooms, at the door of which gaudily dressed Japanese girls were accustomed to sit, and in which rooms they received the visits of Chinese men. At the entrance to the premises was a sign, "No white men allowed." During the time the wife of defendant remained in the house there were no other inmates, but during such time she and the keeper, a woman, followed the calling of prostitutes. The character of the house was amply proved.

No other points are made for a reversal, and the judgment and order are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

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17 Cal. App. 121

WANIOREK v. UNITED RAILROADS OF SAN FRANCISCO. (Civ. 836.)

(District Court of Appeal, Third District, California. Sept. 21, 1911.)

1. CARRIERS (§ 348*)—INJURIES TO PASSENGER—ACTION—EMERGENCY—INSTRUCTIONS.

Where plaintiff, a street car passenger, jumped from the car by reason of defendant's alleged negligence in permitting the controller to blow out, and was injured, an instruction that if such fact created in plaintiff's mind a reasonable apprehension of great peril, and, in order to avoid the same, plaintiff jumped while the car was in motion, and an ordinarily prudent person under like conditions would have acted likewise, then plaintiff was not negligent, was proper.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1403; Dec. Dig. § 348.*]

2. TRIAL (§ 203*)—INSTRUCTIONS—THEORY OF CASE.

Either party is entitled to have an instruction given based on his theory of the case, if there is any evidence to support it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 478; Dec. Dig. § 203.*]

3. TRIAL (§ 260*) — INSTRUCTIONS — REQUEST TO CHARGE—INSTRUCTIONS GIVEN.

In an action for injuries to a passenger caused by jumping from a street car while in motion in an alleged emergency, the court charged that in considering whether plaintiff was negligent in jumping the jury should consider all the circumstances prior to the jumping and the situation as then presented to his mind, and, if plaintiff did not act as a prudent man would have acted under the same circumstances, he was negligent. *Held* not to cover a request to charge that, if the blowing out of the controller created in plaintiff's mind a reasonable apprehension of great peril, and in order to avoid such anticipated peril plaintiff jumped from the car while in motion sustaining the injuries complained of, and that an ordinarily prudent person under like circumstances would have jumped, then he was not negligent, though, had he remained on the car, he would not have been injured.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 260;* Carriers, Cent. Dig. § 1407.]

4. CARRIERS (§ 315*)—INJURIES TO PASSENGERS—ACTION—PLEADING—THEORY OF CASE.

Where a passenger jumped from a street car to avoid a supposed impending peril because of the explosion of the controller, but the complaint was not framed on the theory that he acted in obedience to the direction of the conductor in telling the passengers to jump, plaintiff could not recover on the theory that the railway company was liable for the result of such direction given by the conductor in the course of his employment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1281, 1282; Dec. Dig. § 315.*]

5. CARRIERS (§ 345*)—INJURIES TO PASSENGERS—ACTION—EVIDENCE—ADMISSIBILITY.

Where plaintiff jumped from a moving street car to avoid what he thought was an impending peril resulting from the explosion of the controller, evidence that the conductor told the passengers to "Jump for your lives" was admissible as bearing on the question whether, as a reasonable man, plaintiff was justified in jumping from the car.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1400; Dec. Dig. § 345.*]

6. CARRIERS (§ 317*)—INJURIES TO PASSENGERS —ACTION—EVIDENCE — MATERIALITY TO ISSUES.

Where, in an action for injuries to a passenger in jumping from a street car as the result of an explosion of the controller, there was no allegation that the conductor's direction to the passengers to "Jump for your lives" constituted actionable negligence, evidence that the conductor had no authority to give such direction was immaterial.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1295; Dec. Dig. § 317.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

7. EVIDENCE (§ 471*)—OPINION EVIDENCE—AUTHORITY OF AGENT—CONCLUSION OF WITNESS.

A question as to whether a street car motorman or conductor in a sudden emergency had authority to order any one to jump from the car while it was in motion was objectionable as calling for a conclusion of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2176; Dec. Dig. § 471.*]

8. PRINCIPAL AND AGENT (§ 120*)—AGENT'S AUTHORITY—PROOF.

The proper way to show the extent of an agent's authority is to offer evidence of the orders given him or of the rules adopted for his guidance, and, if such evidence is not available, it is proper to describe the work performed by the agent in his employment with knowledge and implied acquiescence of the principal, or tracing it to some word or act of the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 402-412; Dec. Dig. § 120.*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by M. Waniorek against the United Railroads of San Francisco. Judgment for defendant, and plaintiff appeals. Reversed, and new trial ordered.

Sullivan & Sullivan and Theo. J. Roche, for appellant. A. A. Moore, Stanley Moore, and Wm. M. Cannon, for respondent.

BURNETT, J. The action was for damages for personal injuries and defendant had the verdict. Plaintiff appeals from the order denying his motion for a new trial. The facts deemed essential for a proper understanding of the case will appear as we proceed.

[1] Among the instructions requested by plaintiff and refused by the court was the following: "If you believe from the evidence that on the 12th day of February, 1903, and while plaintiff was being transported as a passenger on said car of said defendant, as alleged in plaintiff's complaint, by reason of the negligence of the defendant, the controller on said car blew up or caught fire, and that the blowing up or catching on fire of said controller created in the mind of said plaintiff a reasonable apprehension of great peril or injury, and that by reason thereof, and in order to avoid such anticipated peril or injury, plaintiff jumped from said car, while said car was in motion, sustaining the injuries complained of, and that an ordinarily prudent and cautious person, under like conditions and circumstances would have jumped off and from said car, then I instruct you that, under such circumstances, plaintiff was not guilty of contributory negligence in jumping off and from said car, even though you also believe from the evidence that, had he remained upon said car, said plaintiff would not have been injured." Whether prejudicial error was committed by the refusal to give said instruction depends upon the proper solution of the following questions: Does said proposed instruction embody an authenticated principle of law? Does the hypothesis contained therein find substantial support in the evidence? If the foregoing be answered in the affirmative, then, could the court legally decline to give the instruction and was the refusal without prejudice by reason of other instructions which were given to the jury? Of these the last only can be the subject of serious controversy.

As a proposition of law, indeed, the instruction is hardly questioned by respondent. It presents a hypothetical situation of peril to a passenger produced by the negligence of the carrier and which creates in that passenger's mind a reasonable apprehension of danger; and upon the basis of the passenger acting as a reasonably prudent man in his effort to escape the danger is predicated the absence of contributory negligence. This is in harmony, we may say, with the test universally prescribed by the authorities. The only possible objection to it as a principle of law arises from the suggestion that the act of jumping from a moving car is irreconcilable with the theory of prudent and reasonable conduct. But the authorities are agreed that the circumstances may be such as to justify and even demand this perilous step, and they positively affirm the doctrine of the instruction, many of them stating the rule even more favorably for the injured person.

In Thompson on Negligence, § 2927, it is said: "It is a principle of obvious justice that one person cannot impute negligence to the act of another which act has been induced by the negligence or wrongful act or omission of the former; and this rule applies as between carriers and passengers. It follows that where the passenger acts erroneously under a sudden impulse of fear produced by the negligence of the carrier or his servants, in consequence of which erroneous action the passenger is killed or injured, whereas he would have escaped unharmed but for the same, there may be a recovery of damages; for here, though the error of the passenger is nearer in time to the hurt which he receives than is the negligence of the carrier, yet in a juridical sense it is more remote. Perhaps it is a better statement of this doctrine to say that in theory of law the passenger is not guilty of contributory negligence at all, but that his error is the natural, and consequently the blameless consequence of the fault of the carrier. The real rule proceeds upon the theory that the misconduct of the carrier has produced the erroneous action of the passenger, and that it does not therefore lie in the mouth of the carrier to defend an action for damages on the ground of such erroneous action, thereby taking advantage of his own wrong."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Among the illustrations of the rule given in section 2978 by the learned author is one in the following language: "So, where a passenger upon a railway train is, in consequence of the negligent and unskillful operation of its train by the company, placed in a situation so perilous as to render it seemingly prudent for him to leap from the train, as where he sees another train rapidly approaching from the rear on the same track, and he so leaps and is injured, he is entitled to recover damages, although he would not have been hurt if he had remained on the train." Many cases in support of the doctrine of said text are cited by appellant. Of these we refer to the following: Robinson v. Railroad Co., 48 Cal. 421; Lawrence v. Green, 70 Cal. 417, 11 Pac. 750, 59 Am. Rep. 428; Green v. Pacific Lumber Co., 130 Cal. 435, 62 Pac. 747; Schneider v. Market St. R. Co., 134 Cal. 482, 66 Pac. 734; Dinnigan v. Peterson, 3 Cal. App. 765, 87 Pac. 218; St. Louis & S. F. R. Co. v. Murray, 55 Ark. 248, 18 S. W. 50, 16 L. R. A. 787, 29 Am. St. Rep. 32; Firebaugh v. Seattle, etc., Co., 40 Wash. 658, 82 Pac. 995, 2 L. R. A. (N. S.) 836, 111 Am. St. Rep. 990; Baber v. Broadway & S. A. R. Co., 10 Misc. Rep. 109, 30 N. Y. Supp. 931; St. Louis, etc., R. Co. v. Maddry, 57 Ark. 306, 21 S. W. 472; Budd v. United Carriage Co., 25 Or. 314, 35 Pac. 660, 27 L. R. A. 279; Buel v. N. Y. Cent. R. R. Co., 31 N. Y. 314, 88 Am Dec. 271. See, also, Braly v. Fresno City Ry. Co., 9 Cal. App. 417, 99 Pac. 400.

In the case of Green v. Pacific Lumber Co., supra, a lady passenger had jumped with other passengers from a train going at the rate of from eight to ten miles an hour, under an apprehension of great danger from collision with a freight train, discovered to be rapidly approaching from around a curve. Recovery was opposed on the ground of contributory negligence. In discussing the question our Supreme Court said, through the late Mr. Justice Garoutte: "If the danger of collision is hanging right over a passenger's head, the proprieties and niceties usually demanded of passengers in alighting from trains need not be observed to their full extent. Under these circumstances, a person does not stand and ponder upon the order of his going, but goes at once. A safe or unsafe spot may be chosen upon which to alight from the car. If the spot be unsafe and dangerous, that fact of itself will not necessarily defeat a right of recovery, even though a safe and secure spot was at hand and equally ready of access," and it was held to be "essentially a question of fact for the jury whether or not plaintiff was justified, in view of all the surrounding conditions, in jumping from the train."

The Firebaugh Case was very much like the one at bar. There, as here, a passenger being placed in danger in consequence of the blowing out of the controller in an electric trolley car, jumped from the car, with a view of saving himself, and was thereby injured. The Supreme Court of Washington upheld the action of the lower court in giving the following instruction: "When a controller upon a car of a street railway company blows out or burns out, the law presumes that such blowing or burning resulted from some defect of the controller or other appliances of the car, and in such a case it devolves upon the company to show that such burning or blowing out did not result from any cause which the highest degree of care on its part could have prevented." It was also held that plaintiff could not properly be charged with contributory negligence for jumping from the car; it being said: "We think, upon an examination of the cases, that they do not in any manner sustain appellant's contention, and that, when it is conceded, as it must be from an examination of the testimony in this case, that the plaintiff was warranted in retreating from the peril which threatened him, and when, in fact, he would have been guilty of contributory negligence if he had not attempted to save himself by retreating, there is no equitable rule which could deprive him, by reason of such cautionary action on his part, from pleading negligence on the part of the carrier." In Baber v. Broadway & S. A. R. Co., supra, it is said: "Contributory negligence was not predicable of the fact that the plaintiff leaped from the moving car. * * * Neither is error of judgment in a sudden and instinctive effort to escape impending danger to be accepted as a proximate cause of resultant injury."

In the case of St. Louis, etc., R. Co. v. Maddry, supra, also, the complaining party, who was a passenger, attempted to escape from the car. The court said: "Self-preservation dictated flight, and all the passengers attempted it. In the attempt Maddry was killed, while others reached places of safety, and one, who was caught in the car, strangely enough survived its wreck. But there is nothing to show that Maddry's fate was due to any careless, negligent, or incautious act of his. It certainly did not appear safe, and was not incumbent upon him to keep his seat in the car about to be wrecked." The rule is well stated by the Supreme Court of Oregon, in the Budd Case, supra, as follows: "Whether the plaintiff was contributorily negligent in jumping from the carriage, under the circumstances, depends upon whether her act was precipitate or rash, or such as a person of ordinary prudence might do. The evidence shows that the plaintiff was in a closed coupé, that the horses were running and kicking, and that the driver, who appeared to be frightened and unable to control them, was calling excitedly to the plaintiff and her daughter, 'For God's sake, jump out.' These circumstances showed presumptively that the negligence of defendant had placed the plaintiff in a situation of imminent peril. In such case the law does not require of the passenger the exercise of all the presence of mind and care of a prudent man; and if the plaintiff, in endeavoring to escape from such danger, either by following the directions of the driver or the dictates of her own judgment, acted as a person of ordinary prudence would have done under similar circumstances, she was not negligent. Hence whether she acted negligently or not was a question of fact, to be submitted to the jury." So in the Buel Case the New York Court of Appeals says: "But it is insisted that, although the defendant's negligence caused the injury complained of, the plaintiff should have been nonsuited, because his careless conduct contributed to produce it. The misconduct alluded to is that, upon seeing the approaching train, and men jumping from other cars, to avoid the impending danger, he left his seat, and rushed to the forward door of the car, with the view of escaping himself, and had stepped one foot upon the platform at the instant of the collision. This, it is said, was such negligence as to have required the court to nonsuit the plaintiff. That is, as a matter of law, a passenger in a railroad car, who sees that he is placed in peril by the culpable conduct of the managers of the road, and judges correctly that a collision is inevitable is guilty of a wrong, if he does not control the instinct of self-preservation and sit still and take the chances of safety. This is not the law. Seeing the danger in which he was placed, the plaintiff was justifiable in seeking to escape injury by leaving the car." The proposed instruction here, it must be remembered, contains no direction to the jury to find that plaintiff was not guilty of contributory negligence if they believed that he was under a reasonable apprehension of danger when he jumped from the car, but it requires that the jury shall go further in order to acquit him of contributory negligence and hold that, in attempting to escape from the danger, he acted as a reasonably prudent man would under the same circumstances.

As a basis in the evidence for the instruction, we refer to the following: Plaintiff's witness, Camencind, testified: "It was a loud report. I looked towards the place where it came from and saw a light, the sparks, and lightning. This kept on for some time. I saw nothing else but fire—I saw the motorman. The fire was around the controller and around the motorman. It was a large flame and was all around the motorman. The conductor was there in the front end of the car. He came running through the car, and told us to jump off of the car. He said 'Jump for your lives, get off the car.' At the time I jumped the car was going at a terrific speed." The plaintiff also testified to the same effect, and he declared that he jumped off the car "because it was the rule of the conductor, and then there was danger that the car might get all on fire, and I was the first time in an accident, or the car may come out of all that and fall over and kill me in any way and maybe the whole people," and that he believed it was the best thing he could do under the circumstances as they existed.

The theory of the instruction being, therefore, within the sanction of the law and supported by substantial evidence, it was the duty of the court to direct the jury what should be their conclusion as to contributory negligence in case they found the facts as recited in said instruction.

[2] "Either party has a right to have an instruction given to the jury based upon his theory of the case, if there is any evidence to support it." Buckley v. Silverberg, 113 Cal. 673, 45 Pac. 804; People v. Hemple, 4 Cal. App. 120, 87 Pac. 227.

[3] The remaining question is whether the ground was covered by instructions which were given. The better course is for the court to give a proposed instruction where there is no valid objection to it (People v. Lachanais, 32 Cal. 436); but, where the substance of an instruction refused is fairly embraced and expressed in those given, no injury is presumed to have resulted (Merguire v. O'Donnell, 103 Cal. 50, 36 Pac. 1033; People v. Schmitt, 106 Cal. 48, 39 Pac. 204). The only instructions that could possibly be claimed to supply the omission were as follows: No. 5: "Contributory negligence of a passenger, in its legal signification, is such an act or omission on the part of a passenger amounting to want of ordinary care, as, concurring or co-operating with the negligent act of the defendant, is a proximate cause or occasion of the injury to the passenger complained of. To constitute contributory negligence on the part of a passenger, there must be a want of ordinary care on the part of the passenger, and a proximate connection between that and the injury sustained by the passenger." No. 7: "You are instructed that in considering the question as to whether plaintiff, M. Waniorek, was guilty of contributory negligence in jumping off the car upon which he was riding as a passenger on the 12th day of February, 1903, you should take into consideration all of the conditions and circumstances, as proven, existing at and immediately prior to the time he so jumped, and the situation as it was then presented to his mind, as established by the evidence." No. 19: "If you find from the evidence that the plaintiff in jumping from the car in question (if you find that he did jump therefrom) did not act as a reasonable and prudent man would have acted under the same circumstances, then I instruct you that plaintiff was guilty of contributory negligence, and your verdict must be in favor of the United Railroads of San Francisco." The first of these, "No. 5," it is apparent, is a mere abstract definition of contributory

negligence, and it does not reach the question under consideration. No. 7 comes nearer the point. "All the conditions and circumstances existing at and immediately prior to the time he so jumped" comprehends, of course, in a general way, every circumstance referred to in said proposed instruction as occurring before the accident; but said instruction No. 7 does not purport to present plaintiff's theory of the case. It is a mere general instruction, directing the jury to consider all the facts and circumstances proven in the case. It might be given just as well for the defendant as for the plaintiff and, by changing the language describing the accident itself so as to conform to each particular case, it might very properly be given in any damage suit whatever. In fact, it contains a mere legal platitude and directs the jury to do something which every intelligent juror, in the absence of any such instructions, understands to be his duty.

That the omission was not supplied by instruction No. 19 is at once apparent. Said instruction presented the theory of defendant to the effect that plaintiff, in jumping from the car, did not act as a reasonably prudent and cautious person. Some astute juror might get from that the impression that the converse was equally binding, but it was just as important to present the affirmative as well as the negative phase of the legal proposition.

Plaintiff's whole case depended upon the theory embodied in said proposed instruction, and we are left to conjecture whether the jury accepted the facts as recited in the instruction and drew the erroneous inference that plaintiff was guilty of contributory negligence, and therefore not entitled to recover, or whether they rejected the theory as to some or all of the facts, and therefore reached a legal conclusion as to plaintiff's culpability. The other feature, relative to the result if he had remained in the car, was also a matter of importance to call to the attention of the jury. There is no doubt he would have escaped uninjured if he had not jumped from the car, and, from this circumstance, alone, in the absence of a caution to the contrary, the jury were likely to conclude that he acted in a precipitate and unreasonable manner.

It may be, as suggested by respondent, that the jury found all the facts in favor of defendant's theory. It is beyond controversy that they had the legal right to do so, and, if they believed the testimony of defendant's witnesses, it was their bounden duty to so find. But respondent is entirely at fault in the contention that for this reason any error in ruling upon evidence or in giving or refusing instructions is without prejudice. There were no special findings, and hence we do not know what theory as to the facts was adopted by the jury. They may have found for defendant because of an erroneous view as to the law of contributory negligence, and this might have been corrected had the proposed instruction been given. Of course, if there had been no evidence in support of plaintiff's theory, a different question would be presented.

Appellant devotes much space to a learned discussion of the proposition that "Common carriers of passengers are responsible for the negligent or willful acts of their employés, done within the scope of their employment, whether directly authorized or not. Waniorek, therefore, was justified in acting upon the suggestion or direction of the motorman or conductor to jump for his life." But, conceding that appellant states the law correctly, it is difficult to perceive how it can be of any advantage to him on this appeal.

[4] There was no proposed instruction embodying said principle, nor was the complaint, indeed, framed upon the theory that plaintiff, in jumping from the car, acted in obedience to the direction of defendant's agents given in the course of their employment. Likewise, since the evidence was strikingly conflicting as to whether any such direction was given, the verdict of the jury cannot be said to be against law, even upon the hypothesis that the motorman or conductor was authorized to direct the passenger to "jump for his life." The fact is, as conceded by appellant in his closing brief, that, under the pleadings, the question of whether the agent acted within the scope of his authority was entirely immaterial. [5] The true position, as we conceive it, is that the direction, if given, was an additional circumstance to be considered by the jury in determining whether the plaintiff acted as a reasonable man. Since the motorman or conductor was presumably better qualified than plaintiff to judge of the exigency of the situation, the passenger would naturally rely largely upon the judgment of the employé, and it is apparent that, if such direction were actually given, it would have an important bearing upon the question whether as a reasonable man he was justified in jumping from the car.

[6] The only other contention of appellant is that the court erred in admitting evidence of the witness Allen as to the duty or authority of the motorman and conductor. The question and answers in this connection that we deem important are as follows: "Q. Has the motorman any power or authority, or it is his duty in any way, to order any one to jump from the car while it is in motion? A. No, sir; it is not. Q. Even in the case of a sudden emergency, such as I have suggested, has he any such power? A. He has not. Q. Has the conductor any power or authority in that regard? A. Not at all." To these questions the general objection was made, and also that each of them called for the conclusion of the witness. As already stated, the questions related to immaterial matter. It was not charged in the com-

plaint as an act of negligence, or at all, that plaintiff was directed to jump from the car, and therefore said directions, if given, were not made the basis for recovery, and they could only be considered as affecting the reasonableness of the conduct of plaintiff. But for this purpose it is clear that the question whether said directions were authorized or not was a matter of indifference, especially since plaintiff had no knowledge as to the extent of the agent's authority.

[7] But the question called for the opinion of the witness, and upon this ground also the objection, we think, should have been sustained.

[8] Manifestly the proper way to show the extent of the agent's authority is to offer evidence of the orders or direction given him or of the rules adopted for his guidance by the principal. If there were no such evidence available, it would be proper to describe the work performed by the agent in the course of his employment, bringing it home to the knowledge and implied acquiescence of the principal, or, in the language of Mechem, "tracing it to some word or act of the alleged principal." But without any such showing it is a palpable invasion of the province of the jury to ask a witness whether a certain act is within the scope of the agent's authority. Neither can it be justified upon the theory that the witness was an expert upon the subject, as the duty of these employés is not a matter of expert testimony.

In Cent. R. R. Co. v. De Bray, 71 Ga. 406, the plaintiff had been directed by the conductor to get off the train while in motion. It is said in the opinion: "The court refused to allow W. A. Tinsley and R. Schmidt to testify that, if one obeys the order of a conductor and gets off of a moving train, 'he does it at his own risk.' To allow testimony of this kind would be to allow a witness to testify what the law is. Witnesses must testify to facts, and the court is responsible for the law." It was also held that the court below properly rejected the offer to prove by one A. J. White that "no conductor or other officer had the right to order an employé to get off or on a moving train, and, if such orders were given, the employé could not be required to obey the order," on the ground that it was immaterial and irrelevant, and also not the subject of expert testimony. McIsaac v. Northampton Electric Co., 172 Mass. 89, 51 N. E. 524, 70 Am. St. Rep. 244, was an action by a lineman employed by an electric lighting company to recover damages for injuries sustained by the breaking and falling down of a pole carrying the wires. It was sought to charge the plaintiff with contributory negligence in failing to inspect the pole before going upon it. In striking out some of the testimony in reference to the duty of inspection, the court said: "The words, 'It is not the lineman's business to do it,' in Dorsey's answer, were rightly stricken out. To say nothing of other objections, they were not responsive to the question. The question whether it was a part of the work of a lineman to make that inspection was properly ruled out. It called for an opinion of the witness in regard to the legal effect of a contract." It was held in Krueger v. Chic., etc., Ry. Co., 84 Mo. App. 366, that it was improper to ask a brakeman the question whether certain acts were in the line of his duties, but that the proper course to follow would be to state what he had been directed to do, or that he had been accustomed to perform certain acts, and how long he had been accustomed to perform them. In Providence Tool Co. v. Mfg. Co., 120 Mass. 35, it was held improper to ask a treasurer whether, as treasurer, he had authority to make and execute a promissory note, the court stating that "all that could properly be obtained from him were the facts by which the inference of authority was to be supported or repelled, and it was for the counsel to argue, and for the jury to find, under the instructions of the court, whether the facts so given proved that he had the authority which he denied." In Short Mountain Coal Co. v. Hardy, 114 Mass. 197, it was held improper to ask whether an agent had authority to make a sale.

It is no doubt true, as stated in Kiesel v. Sun Ins. Co., 88 Fed. 243, 31 C. C. A. 515, that "The general rule that facts, and not conclusions, should be stated, is a wise and salutary one, and cannot be too strictly followed. It tends to prevent fraud and perjury, and is one of the strongest safeguards of personal liberty and private rights. Whenever it is doubtful whether a case falls under the rule or under one of its exceptions, the wise course is to place it under the rule." Other cases, cited by appellant, discussing and illustrating the same principle are the following: Kendall Co. v. Baine, 46 Mo. App. 588; Muff v. Railway, 22 Mo. App. 588; Madden v. Railway, 50 Mo. App. 673; Fogel v. S. F., etc., Ry. Co., 42 Pac. 566;[1] People v. Westlake, 62 Cal. 303; Conner v. Stanley, 67 Cal. 315, 7 Pac. 723; Sappenfield v. Main St. R. R. Co., 91 Cal. 59, 27 Pac. 590; Kauffman v. Maier, 94 Cal. 281, 29 Pac. 481, 18 L. R. A. 124; Kerrigan v. Market St. R. Co., 138 Cal. 506, 71 Pac. 621; Luman v. Golden Ancient Channel M. Co., 140 Cal. 708, 74 Pac. 307.

It is evident that the testimony thus admitted may have had an important bearing upon the verdict of the jury. They may have believed that the direction was given to plaintiff as claimed by him, but have concluded that he had no right to regard or be influenced by it, for the reason that the act was beyond the scope of the employé's authority. We cannot tell, of course, what weight was given by the jury to the testimony, or whether without it their verdict would have been for defendant. It is sufficient to say that, in view of the probability that such testimony influenced the verdict, the ruling of the court must be held to be prejudicial.

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[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 110 Cal. xvii.

Respondent asks: "When a master is sought to be held liable for the act of his servant, is he precluded from showing the facts concerning the employment and from asserting his defense that it was not within the scope of the servant's authority?" As we have already seen, plaintiff has not sought to hold the defendant liable for the said direction alleged to have been given to plaintiff; but, if such were the case, there is no doubt that the facts concerning the employment could be shown. But the opinion of a witness is not legal evidence of these facts.

No fault can be found with the authorities cited by respondent. For instance, quotation is made from Mechem on Agency, § 106, as follows: "It is impossible to lay down any inflexible rule by which it can be determined what evidence shall be sufficient to establish an agency in any given case, but it may be said in general terms that whatever evidence has a tendency to prove the agency is admissible, even though it be not full and satisfactory, as it is the province of the jury to pass upon it." We have examined the cases cited by respondent, but find that none of them involves the same situation as is presented here. They contain, however, some interesting reflections upon the subject of agency, and may be consulted with profit. The cases are Howe Machine Co. v. Clark, 15 Kan. 492; Piercy v. Hedrick, 2 W. Va. 458, 98 Am. Dec. 774; Van Sickle v. Keith, 88 Iowa, 9, 55 N. W. 42; O'Leary et al. v. German American Ins. Co. of New York, 100 Iowa, 390, 69 N. W. 686; Reeves & Co. v. Breuning, 13 N. D. 157, 100 N. W. 241; Brunner v. American Telegraph & Telephone Co., 151 Pa. 447, 25 Atl. 29; Moe v. Job, 1 N. D. 140, 45 N. W. 700.

For the foregoing reasons, we think plaintiff is entitled to a new trial, and the order is therefore reversed.

We concur: CHIPMAN, P. J.; HART, J.

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17 Cal. App. 162

DRINKHOUSE v. GERMAN SAVINGS & LOAN SOCIETY. (Civ. 792.)

(District Court of Appeal, First District, California. Sept. 26, 1911. Rehearing Denied Oct. 25, 1911. Denied by Supreme Court Nov. 25, 1911.)

1. GIFTS (§ 30*)—BANK DEPOSIT—EVIDENCE.

Decedent went to a bank with W., and transferred an account to the joint credit of herself and W., in order that on her death W. might receive the balance on surrendering the passbook. Decedent at all times prior to her death retained exclusive possession of the books, as well as the right to withdraw at will, and at one time did draw money from the account. *Held*, that such facts were insufficient to show a gift of the deposit.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 52–75; Dec. Dig. § 30.*]

2. TRUSTS (§ 34*)—EXPRESS TRUSTS—CREATION.

In order to create an express trust of a bank deposit, it was not necessary that the depositor should have technically declared her intent to create a trust, or that the bank, in order to be charged with the duties of a trustee, should have indicated its willingness to undertake the trust by any formal words of acceptance.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 44; Dec. Dig. § 34.*]

3. TRUSTS (§ 25*) — PERSONAL PROPERTY — CREATION.

A voluntary trust in personal property may be created as to the donor, beneficiary, and trustee, by any words or acts of the donor and trustee which indicate with reasonable certainty an intention on the donor's part to create a trust, the subject, purpose, and beneficiary, and by the acceptance of the trust by the trustee, as provided by Civ. Code, §§ 2221 and 2222.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 34–37; Dec. Dig. § 25.*]

4. TRUSTS (§ 42*)—DECLARATIONS OF DONOR.

All the declarations of a donor, made to a trustee in relation to a trust before acceptance, except where the trust is declared in writing, are admissible as part of the declaration of the trust, as provided by Civ. Code, § 2254.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 61; Dec. Dig. § 42.*]

5. TRUSTS (§ 34*) — PERSONAL PROPERTY — BANK DEPOSIT.

Decedent, having certain accounts in a savings bank, went to the bank with claimant, and stated that she desired to sign over to claimant whatever money she had in the account, so that if anything happened to her (decedent) claimant could take the passbook, go to the bank, and receive the money. The clerk suggested that the account be changed to a joint account in the name of decedent and claimant, which was done. Thereafter decedent retained the bank books, and at one time drew a small amount from one of the accounts. *Held* that, notwithstanding such circumstance, the facts indicated the creation of an express trust of the deposits for claimant's benefit.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 44; Dec. Dig. § 34.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by John A. Drinkhouse, as administrator of the estate of Elizabeth Thomsen, deceased, against the German Savings & Loan Society. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Goodfellow & Eells and Edward Lande, for appellant. Fabius T. Finch, for respondent.

LENNON, P. J. This is an appeal upon a bill of exceptions from a judgment rendered in favor of the plaintiff, and from an order denying the defendant's motion for a new trial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The plaintiff, as the administrator of the estate of Elizabeth Thomsen, deceased, brought suit against the defendant, to recover a specific sum of money which it was alleged the deceased had deposited for her use and benefit with the defendant. The defendant in its answer alleged, in substance, that on the 14th day of September, 1898, the deceased, Elizabeth Thomsen, and one Louisa H. Wilson deposited with the defendant the sum of $1,597.34, and that the amount of said account, with accrued dividends to date of July 17, 1899, was the sum of $1,636.35; that at the time of the making of said deposit the defendant issued and delivered a passbook to the said Elizabeth Thomsen and to said Louisa H. Wilson, and that they, when depositing the money and opening the account, instructed the defendant to pay, and the defendant agreed with them and each of them to pay, the said sum of money so deposited and entered in the said passbook to whichever of them should demand and receipt for the same and produce the said passbook. That on the 17th day of July, 1899, the said Louisa H. Wilson produced the said passbook, and demanded and received from the defendant the sum of $1,616.35.

For a further and separate defense, the defendant averred that, on or about the said 14th day of September, the money in controversy was deposited with the defendant by the said Elizabeth Thomsen, in trust for the said Louisa H. Wilson, and was, in the event of the death of the said Elizabeth Thomsen, to be paid to the said Louisa H. Wilson, and that at the time of the deposit of said money the said Elizabeth Thomsen gave and transferred all of said money and all of her interest therein, as well as her claims and demands against the defendant in respect thereof, to the said Louisa H. Wilson.

The undisputed facts of the case as developed upon the trial are, in substance these: On the 14th day of September, 1898, Elizabeth Thomsen had on deposit in two accounts with the defendant bank the sum of $1,697.34. On that day, accompanied by Louisa H. Wilson, she called at the bank of defendant, surrendered her bank books, and closed those particular accounts by withdrawing all of the money therein standing to her credit. Thereupon, and in the presence and hearing of the said Louisa H. Wilson, she opened two new accounts with the bank which, at the request of Mrs. Thomsen, were entered upon the books of the bank in the name of "Elizabeth Thomsen or Louisa H. Wilson." The sum of $1,597.34 was placed to the credit of one of these accounts, and the sum of $100 to the credit of the other. Two new bank books in the name of "Elizabeth Thomsen or Louisa H. Wilson" were issued and delivered into the personal possession of Mrs. Thomsen. Mrs. Wilson, it seems, went to the bank on this occasion at the request of Mrs. Thomsen. Mrs. Thomsen had previously said that she had some money in the bank, and that if anything happened to her she wanted the money to go to Mrs. Wilson. After withdrawing the money from the old accounts, and before establishing the new accounts, Mrs. Thomsen said to the bank clerk who waited upon her that she desired to sign over to Mrs. Wilson whatever money she (Mrs. Thomsen) had in the old accounts, so that if anything happened to her Mrs. Wilson "could take the passbooks and go to the bank and draw the money." The clerk, in reply to Mrs. Thomsen, clearly indicated that a deposit of the money in the joint name of the two women, and upon the condition stated, would be accepted by the bank, and thereupon the accounts were opened with the bank and entered upon its books in the form hereinbefore stated. Upon leaving the bank, Hrs. Thomsen gave the passbooks to Mrs. Wilson, but later in the day, at the home of Mrs. Thomsen, the books were given into the possession of Mrs. Thomsen, who placed them in a trunk.

On July 16, 1899, Mrs. Thomsen died intestate. At the time of her death, as the record affirmatively shows, she had no living relations or next kin in the state of California, or elsewhere, and on the 31st day of July, 1889 letters of administration upon her estate were duly issued to the plaintiff herein. The bank books in question were in the possession of Mrs. Thomsen at the time of her death, and they were taken from her effects on the morning of her death by the husband of Mrs. Wilson. On July 17, 1899, Mrs. Wilson appeared at the bank and, presenting the bank books, demanded payment to her of the money entered therein. The bank complied with the demand upon the surrender of the books by paying to Mrs. Wilson the full sum of the deposits which, together with the accrued interest, totaled the sum of $1,729.99. Some time during the day of July 17, 1899, there was served upon the defendant's secretary a notice from the public administrator, the plaintiff herein, not to make payment of these particular deposits to any one but himself. The plaintiff, however, at that time had not been appointed the administrator of the estate of Mrs. Thomsen, and whether the notice which it was claimed was served upon the bank was served prior to or after the money was paid to Mrs. Wilson is not entirely clear. Incidentally it appears that Mrs. Thomsen, on April 6, 1899, and without the knowledge of Mrs. Wilson drew against the larger account in the sum of $39.91.

The trial court found that Mrs. Thomsen was at all times the individual owner of the money; that the passbooks in question had been originally delivered to Mrs. Thomsen, and were at all times thereafter, and up to the time of her death, in her exclusive possession; that the deposit of the money was made by Mrs. Thomsen alone; that Mrs. Thomsen did not establish a trust in favor of Mrs. Wilson; that said money was not deposited with defendant upon trust to pay the same to Mrs. Wilson; that Mrs.Wilson never had any interest whatever in the money; that Mrs. Thomsen did not at any time make an assignment of her interest in the money to Mrs. Wilson; that the defendant never had any agreement with Louisa H. Wilson in relation to the said passbooks or said money so deposited; and that the defendant, prior to paying the money to Mrs Wilson, was notified by the plaintiff that the money belonged to the estate of Mrs. Thomsen, and to pay said money to no one but plaintiff. However, the trial court did find as facts: (1) That the passbooks in question were indorsed and inscribed "Elizabeth Thomsen or Louisa H. Wilson, in account with the German Savings & Loan Society"; (2) that Louisa H. Wilson, on July 17, 1899, presented the said passbooks to defendant, and demanded payment to her of the money entered and credited therein, and that the same ($1,729.99) was then paid to her by the defendant; (3) that at the time of the opening of the accounts and the delivery of the passbooks to said Elizabeth Thomsen she instructed the defendant bank to pay, and defendant agreed with her to pay, the money then deposited by her, and any other money which she might deposit with the defendant to the credit of those particular accounts, to her or to Louisa H. Wilson, upon demand of either, accompanied by the passbooks.

As a conclusion of law from those findings of fact, the trial court held that plaintiff was entitled to judgment for the sum of $1,729.99, together with interest thereon at the rate of 7 per cent. per annum from the 17th day of July, 1899. Judgment was entered accordingly for the sum of $2,392.33.

In support of this appeal, counsel for defendant insists that a judgment upon the pleaded and proven facts should have been rendered for the defendant upon any one of the following grounds: (1) "Mrs. Thomsen in her lifetime made a legal and valid gift to Mrs. Wilson of whatever interest she had in the moneys on deposit." (2) "If Mrs. Thomsen had any interest in the money deposited (as distinguished from having a claim or credit against the bank) she created a trust in favor of Mrs. Wilson, the terms of which were that the bank should pay to Mrs. Wilson alone upon the death of Mrs. Thomsen." (3) "The relation between the bank and Mrs. Thomsen and Mrs. Wilson was that of debtor and creditor. By the terms of the contract, the debt was made payable to either. Payment to one was satisfaction as to both." The sum and substance of defendant's several contentions may be reduced to the one general proposition that the essential findings of fact are in direct conflict with the uncontradicted and undisputed evidence adduced at the trial.

[1] The claim of the defendant that "Mrs. Thomsen in her lifetime made a legal and valid gift to Mrs. Wilson of * * * the moneys on deposit" does not require extended consideration. The evidence, upon that phase of the case, not only warrants, but fully supports, the finding of the trial court that Mrs. Thomsen did not make or intend to make an immediate gift of the money in controversy to Mrs. Wilson. The mere form of the deposit was not, in and of itself, evidence of a completed gift; and the fact that Mrs. Thomsen at all times retained exclusive possession of the bank books, as well as the right to withdraw at will all or any portion of the money credited therein, is inconsistent with the theory that she made or intended to make a present and perfected gift to Mrs. Wilson. "Although the deposit was in the names of either, and either could draw therefrom as between themselves and the bank, this does not show a gift. * * *" (Robinson v. Mutual Sav. Bank, 7 Cal. App. 642, 95 Pac. 533); and a finding in this case that a gift had been fully created and executed during the lifetime of Mrs. Thomsen would have been clearly contrary to the evidence, and opposed to the rule of law in such cases established in this state. Dennigan v. Hib. Savings & Loan Soc., 127 Cal. 138, 59 Pac. 389; Dennigan v. San Francisco Sav. Union, 127 Cal. 142, 59 Pac. 390, 78 Am. St. Rep. 35; Estate of Hall, 154 Cal. 532, 98 Pac. 269.

[2] It is the contention of the plaintiff that the transaction cannot be considered or treated as an executed trust, because Mrs. Thomsen never made a formal declaration of trust, or parted with control of the property claimed to be the subject of the trust. It is urged further that the defendant never formally accepted the trust. It is true that Mrs. Thomsen did not say, in so many words, that it was her purpose to deposit the money with the defendant bank in trust for Mrs. Wilson. It was not necessary, however, to the creation of a trust that Mrs. Thomsen should have technically and precisely declared her purpose and intent to create a trust, or that the bank, in order to be charged with the duties and responsibilities of a trustee, should indicate its willingness to undertake the trust by any formal words of acceptance; and the circumstance that Mrs. Thomsen retained the bank books in her possession, with power to withdraw the whole or any part of the deposits, would not affect the validity of the trust, if one in fact was created. Booth v. Oak. Bank of Sav., 122 Cal. 19, 54 Pac. 370; Carr v. Carr, 115 Pac. 261.

[3, 4] The subject of the trust was personal property, and a voluntary trust in per-

sonal property may be created, as to the trustor, beneficiary, and trustee by any words or acts of the trustor and trustee which indicate with reasonable certainty (1) an intention on the part of the trustor to create a trust; (2) the subject, purpose, and beneficiary of the trust; and (3) the acceptance of the trust by the trustee. Civ. Code, §§ 2221, 2222. And all of the declarations of a trustor, made to the trustee in relation to the trust before its acceptance, save and except where the trust is declared in writing, are deemed part of the declaration of trust. Civ. Code, § 2254.

[5] The facts and circumstances of the whole case, in our opinion, are not only not inconsistent with, but fully sustain, the defendant's theory and pleaded defense that the transaction, in its entirety, was intended by all of the parties thereto to be, and was in legal effect, a perfected trust. While, as heretofore indicated, the facts of the case would not have supported a finding that the transaction in question created, or was intended to create, either a gift inter vivos or causa mortis (Civ. Code, §§ 1146, 1147, 1149), yet we think, following the doctrine announced in Booth v. Oakland Bank of Savings, supra, that the form in which the account in each instance was opened and entered upon the books of the bank, coupled with all that was said and done by all of the parties to the transaction before and at the time the deposits were made, indicated with reasonable certainty the purpose and intent of Mrs. Thomsen to be that upon her death Mrs. Wilson, as the survivor, should have and take the money in question, or so much thereof as might then be remaining to the credit of each account.

In brief, it is our opinion that the evidence, which was entirely free from conflict, not only warranted, but required, a finding by the trial court that Mrs. Thomsen intended to create, and, by her acts and declarations in conjunction with the acceptance by the defendant did in fact create, a voluntary trust in the money in question, with Mrs. Wilson as the beneficiary and the defendant as the trustee, and that upon the death of said Elizabeth Thomsen the said Louisa H. Wilson became entitled to have and receive from the defendant the said money.

The two cases of Dennigan v. Hibernia Savings & Loan Society and Dennigan v. S. F. Savings Union, supra, are strongly relied upon by the plaintiff to support the judgment in his favor. It is claimed that these cases not only dispose of the defendant's contention with regard to the gift feature of the case, but completely dissipate the claim that the transaction was in legal effect a trust. Those cases, upon the law and the facts, are readily distinguishable, upon the question of the creation of a trust, from the case at bar. As was said in a very recent case, the facts of which were not essentially different from the present case: "Under our theory of the case at bar, it is obvious that these cases are not in point. There are no acts or language connected with the transactions which would furnish the slightest indication of an intention on the part of Ellen Dennigan to create out of the deposits a trust, either in favor of herself and husband, or in favor of her husband alone. While, as seen, no certain form of words is required in the creation of a trust, there must nevertheless be some words—it matters not what they are—which indicate with reasonable certainty a purpose to create a trust. Nor is there anything decided in the Dennigan Cases at cross-purposes with the proposition that a valid trust in money may be created, with the power reserved by the trustor to practically revoke it by drawing on the trust fund until it is completely exhausted, before the beneficiary can enjoy the fruits thereof." Carr v. Carr, supra.

Much stress is placed by counsel for the plaintiff upon the fact that the defendant was notified not to pay the money to Mrs. Wilson. The question of notice, in the view we have taken of the case, is now of no consequence. If the defendant was, as we think the evidence clearly shows, a trustee of the fund in question, it was bound to follow the directions of the trustor and fulfill the purposes of the trust as declared at its creation (Civ. Code, 2258), and the defendant could not be relieved of, nor restricted in the performance of, its obligation by a notice from a disinterested third person.

It follows from what has been said that the findings of the trial court are contrary to the evidence, in so far as it is found to be a fact that a trust was not created in the money in question, and that Louisa H. Wilson did not have any interest therein. This conclusion necessitates a reversal of the judgment and the order denying the defendant's motion for a new trial, and makes it unnecessary for us to discuss or decide the remaining question as to whether or not the relation between the bank and the other parties to the transaction was that of debtor and creditor, and created a contract, by the terms of which a payment of the debt to either Mrs. Thomsen or Mrs. Wilson would have been a satisfaction of the debt as to both.

The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: KERRIGAN, J.; HALL, J.

17 Cal. App. 160

McCOLGAN v. PIERCY. (Civ. 874.)

(District Court of Appeal, First District, California. Sept. 26, 1911.)

1. RECORDS (§ 17*)—LOST RECORDS—RESTORATION.

Where the records of an action were lost and destroyed in a conflagration, an order restoring the record merely restores the papers as filed, and does not affect their operation.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 17.*]

2. DISMISSAL AND NONSUIT (§ 60*)—PROSECUTION—DELAY.

Code Civ. Proc. § 581a provides, among other things, that an action must be dismissed by the court on its own motion, or on motion of any party interested, if summons be not served and return made thereon, or appearance be made by defendant within three years after the commencement of the action. *Held* that, where a complaint was filed and summons issued July 13, 1904, and an affidavit of personal service filed July 16th following, after which no further action was taken until December 7, 1909, when an order was made for the restoration of the records which had been destroyed in a conflagration, and defendant then filed an affidavit, denying that he had ever been served with summons, or had ever appeared in the action, defendant's motion for dismissal was properly granted.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Dce. Dig. § 60.*]

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Emma C. McColgan against Andrew J. Piercy. Judgment for defendant, and plaintiff appeals. Affirmed.

C. H. Garoutte and E. J. Talbott, for appellant. J. E. Alexander, for respondent.

HALL, J. This is an appeal from an order dismissing an action, made after hearing upon notice and motion of defendant.

The original records in the action were destroyed in the conflagration of April, 1906. No action whatever was thereafter taken in the action until December 7, 1909, when plaintiff filed a petition for the restoration of the records. Defendant thereupon gave notice of a motion for a dismissal of the action, as well as for a denial of the petition for a restoration of the records, upon grounds stated in the notice, involving laches in the plaintiff in failing to serve summons in the action, or to take any steps to bring the action to trial, and in failing to take steps to restore the records for nearly four years, and for the further reason that all rights of plaintiff were barred by the provisions of section 581a of the Code of Civil Procedure.

The court granted the motion to restore the records, as prayed for by plaintiff, but dismissed the action. The order dismissing the action is general, and does not state the particular grounds upon which it is based. Taking the evidence contained in the record and in the affidavits most favorable to the respondent as true, which we are obliged to do in support of the order of the court, the order is amply supported.

The restored record consists of: (1) The complaint, on promissory notes, for $500, filed July 13, 1904; (2) summons issued on same day; and (3) affidavit of personal service thereof, filed July 16, 1904, and nothing else.

[1] The defendant made affidavit that he had never been served with summons, and had never appeared in said action. The restored record contains a return of personal service, and the person making such return also filed an affidavit, used on the motion, showing such service of summons on defendant. But these matters simply presented a conflict with the affidavit of defendant that no service had ever been made, which we must assume the court determined in favor of respondent. The order restoring the record does not determine nor purport to determine the fact of service, but simply restores to the record the return as filed.

[2] The affidavit of defendant also sets out that he never appeared in said action, and the restored record is in full harmony with his affidavit on this point. Section 581a provides, among other things, that an action must be dismissed by the court upon its own motion, or upon motion of any party interested, if summons be not *served* and return made thereon, or appearance be made by defendant, within three years after the commencement of the action. There was, as we have already shown, evidence to support the conclusion that the summons had never been served, and defendant had never appeared in the action, though it had been commenced more than five years before the motion for a dismissal was made. Upon such facts being established, it was not only the right, but the plain duty, of the court to dismiss the action. Sharpstein v. Eells, 132 Cal. 507, 64 Pac. 1080, and cases there cited; section 581a, Code Civ. Proc.

The order is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

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17 Cal. App. 135

PEOPLE v. SAMPO. (Cr. 160.)

(District Court of Appeal, Third District, California. Sept. 22, 1911.)

1. HOMICIDE (§ 129*)—INFORMATION—MALICE.

An information, alleging that defendants did willfully, etc., and of malice aforethought, kill and murder deceased, a human being, was substantially in the language of the statute and was not defective for failure to allege that defendants of "their" malice aforethought did kill and murder, etc.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 197, 198; Dec. Dig. § 129.*]

2. JURY (§ 112*)—QUALIFICATION OF JURORS—IMPLIED BIAS—ORDER OF CHALLENGE.

Code Civ. Proc. § 198, declares that one of the qualifications of jurors shall be assessment on the last assessment roll on property belonging to him. Pen. Code, § 1087, provides that challenges for cause must be taken in the following order: To the panel; to an individual juror, for general disqualification; to an individual juror for an implied bias; and lastly for actual bias. *Held*, that section 1087, in so far as it provided the order for challenges, was mandatory, and hence, where a challenge for implied bias had been overruled, defendant could not then examine the juror, and on his admitting that he had not been assessed on the last assessment roll, challenge him for general disqualification; such objection being waived by prior challenge for implied bias.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 498; Dec. Dig. § 112.*]

3. HOMICIDE (§ 174*)—EVIDENCE—SUBSEQUENT DECLARATIONS.

Evidence that, within less than half an hour after defendant had inflicted the blows which caused decedent's death, he said to his brother: "Come on, Brother, we might as well kill them all; we are not scared"—was admissible as indicating defendant's frame of mind immediately after the difficulty and as implying that defendant had either killed or attempted to kill some other person.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 359-371; Dec. Dig. § 174.*]

4. CRIMINAL LAW (§ 404*) — EVIDENCE—INSTRUMENT USED.

The state claimed that defendant killed deceased by striking him on the head with a rock. A physician testified that the wound was inflicted by a blunt instrument and could have been caused by a rock identified by a witness as found by her on the morning following the night of the difficulty at the spot where it occurred, on which rock she testified there were then fresh blood spots. *Held*, that the rock was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 891; Dec. Dig. § 404.*]

5. CRIMINAL LAW (§ 476*)—OPINION EVIDENCE—PHYSICIANS.

It was proper to permit physicians to testify that the wound from which deceased died could have been inflicted by means of a rock offered in evidence by which the state claimed defendant struck deceased.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1062; Dec. Dig. § 476.*]

6. CRIMINAL LAW (§ 406*)—EVIDENCE—ADMISSIONS OF ACCUSED.

Evidence that defendant, immediately after his arrest, admitted that he had engaged in a fight, was not in the nature of a confession, but was admissible as an admission of his connection with the difficulty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 894; Dec. Dig. § 406.*]

7. HOMICIDE (§ 260*)—TRIAL—VIEW BY JURY—DISCRETION.

Where a homicide resulted from a difficulty in a public street, refusal of the court to order that the jury be taken to view the scene of the difficulty, as authorized by Code Civ. Proc. § 610, was not an abuse of discretion.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 555; Dec. Dig. § 260.*]

8. CRIMINAL LAW (§ 829*)—TRIAL—REQUEST TO CHARGE—INSTRUCTIONS GIVEN.

Refusal of a request to charge is not error, where the court's charge fully covered every vital phase of the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Appeal from Superior Court, Amador County; F. V. Wood, Judge.

Giacomo Sampo was convicted of murder in the second degree, and he appeals. Affirmed.

Spagnoli & Spagnoli, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

HART, J. The defendant and one Stefano Conte were jointly charged by information with the crime of murder. They were awarded separate trials, and the defendant, having been tried on said information, was found guilty by the jury of murder of the second degree. The cause is brought to this court by an appeal from the judgment and from the order denying defendant's motion for a new trial.

No question is raised as to the sufficiency of the evidence to support the verdict, but it is claimed by the defendant for a reversal: (1) That the information does not correctly state the crime of murder and that, therefore, the demurrer thereto should have been sustained; (2) that the court erred in its rulings in disallowing challenges to certain jurors; (3) that certain rulings of the court involving the question of the admissibility of certain evidence were erroneous; and (4) that the rejection of certain instructions proposed by the defendant constituted serious and prejudicial error.

The homicide, or rather the difficulty which resulted in the death of the deceased a few hours thereafter, occurred in Drytown, Amador county, on the 19th day of November, 1910. The facts as disclosed by the evidence may thus be stated:

The deceased, Stefano Pistone, a mere boy, of about the age of 19 years, was employed as a laborer in one of the mines situated near Drytown. He had been in Amador county for about one year, having gone directly to said county from Italy, his native country. A family by the name of Cavallero, consisting of the husband, wife, and young daughter, Eva by name, and aged about 15 years, resided in Drytown, where they conducted a boarding house. On the afternoon of the 19th day of November, 1910, the deceased went to Drytown and stopped at Cavallero's boarding house. At the boarding house, at the time of Pistone's arrival there, were the defendant, his codefendant, Conte, and a brother of the defendant. Nothing of importance occurred between the parties named during the afternoon, nor until after the evening meal at the boarding house had been served and partaken of by all said parties. It appears that, after dinner had been served, a young man who was then stopping at the house, picked up and proceeded to play an old accordion, whereupon it was suggested that "they have a dance." This suggestion seemed agreeable, and the brother of defendant started to dance with the young daughter of the Cavalleros. Others of the party took a turn at dancing with the young lady, and finally the deceased danced with her. For some reason, not made to appear very clear by the evidence, when the deceased and the young lady were engaged in dancing together, the defendant's brother, George Sampo, became very much incensed and began using profane and abusive language, "calling everybody names," as Eva Cavallero testified, and then attempted to strike the deceased. The latter thereupon ceased dancing, and, saying that he did not want to fight, left the house through the back door. About five minutes thereafter, the defendant and his codefendant, Conte, departed from the house through the front door. These circumstances occurred somewhere in the neighborhood of 10 o'clock at night. At about that hour, a Mrs. Callandri, who, with her husband, resided in their home, situated a distance of about 60 feet from the Cavallero boarding house, heard loud noises on the street in front of and near her home. She had retired for the night, but, upon hearing the noises, arose from her bed and went out on the porch for the purpose of ascertaining the cause of the noises which had attracted her attention. It was, as she testified, a "bright, moonlight night," and when she reached the porch she observed the defendant, the deceased, and Conte in the street directly in front of her house and about 40 feet therefrom. She was personally acquainted with the defendant and the deceased, but knew Conte only by sight. The defendant was engaged in striking the deceased on the head, while Conte was back of the latter and holding him. The deceased was all the time loudly exclaiming: "Please let me alone! I have nothing with you! Don't hit me! Let me alone, please!" The defendant did not cease beating the deceased, saying that he would kill him, until one Burdisso made his appearance on the scene and made defendant drop a large rock with which he was striking deceased. While the defendant was striking Pistone, the latter was in a stooping position, being held, as we have seen, by Conte. Burdisso first took hold of Pistone for the purpose of assisting him to the hotel, but the defendant again picked up the rock and made demonstrations indicating an intention of renewing the attack, when Burdisso again made him drop the rock to the ground and then, taking defendant by the arm, escorted him into the boarding house. The deceased unsteadily walked to the fence leading from Callandri's house to Cavallero's, and, holding on to the fence, walked to the latter place, where he immediately went to bed and died early on the following morning.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Mrs. Callandri's husband, having also been attracted to the porch of their house by the noise, witnessed and heard all that the first named saw and heard of the difficulty, and corroborated his wife's testimony.

On the morning following the trouble as thus described Mrs. Callandri went to the spot where the trouble occurred, and there she found a large rock upon which, according to her positive statement, there were blood stains which were yet fresh.

Drs. Endicott and Griffin made a thorough autoptical examination of the body of the deceased, and the two physicians concurred in saying that all the vital organs of the deceased, with the exception of the brain, were in a normal or healthy condition. They, however, found a linear or straight fracture of the skull back of the right ear, and a large blood clot, approximately of the size of an ordinary baseball, pressing on the right side of the brain. As is manifestly true, they testified that the fracture caused the blood clot, and the pressure of the latter on the brain caused the death of Pistone. They gave it as their opinion that the fracture was produced by a blunt instrument of some character and could have been caused by means of the rock which Mrs. Callandri found lying on the spot where the affray occurred; said rock having been kept by the authorities and introduced in evidence.

The defense attempted to prove an alibi, and introduced some proof to that end; but it is very clear that this contention was erected and attempted to be sustained upon a very frail foundation. Assuming that the witnesses introduced by the people told the truth (and this court must presume that they did, since the jury must have believed them), the evidence so advanced amply sustains the verdict. Indeed, the evidence presented by the people discloses, in our judgment, a deliberate, cold-blooded murder—in truth, the destruction of the life of a mere boy under circumstances devoid of the slightest semblance of justification or excuse. If the testimony produced by the people is believable (and the jury must have believed it or they would have acquitted the accused), there was but one verdict which should have been returned, viz., murder of the first degree, and the defendant may, indeed, regard himself as having been extremely fortunate in having his fate submitted to a jury that could be persuaded, in the face of what appears to be conclusive evidence of his guilt, to believe that punishment less than the extreme penalty prescribed for the wanton and malicious taking of human life would afford adequate expiation for his diabolical act.

We shall now proceed to a consideration of the points made by defendant on this appeal in the order in which his counsel have presented them in their brief.

[1] 1. There is no merit in the claim that the information does not properly describe the crime of murder, and the demurrer thereto was, therefore, properly disallowed.

It is alleged that the defendants "* * * did then and there willfully, unlawfully, and feloniously and of malice aforethought kill and murder one Stefano Pistone, a human being," etc. The contention is that the charging part of said pleading is defective as descriptive of the crime of murder against the accused, in that it does not allege that the said defendants "did then and there * * * of *their* malice aforethought kill and murder," etc.; that is, that the information fails to charge that the defendants committed the crime sought to be charged with malice. The objection is addressed to form rather than to substance, and, if at all tenable, should have been raised by a special demurrer. The information is, however, substantially in the language of the statute, and is, therefore, sufficient. It is very plain that, merely because of charging the act of killing to have been done "of malice aforethought," without specifically declaring the "malice" thus charged to have been the "malice" of the accused, the information could not, by any possible, torturing of language, be construed to mean that the "malice" so alleged was that of some person or persons not charged to have committed the act. And such would be the result of the construction which appellant gives the information in the respect referred to.

[2] 2. Many objections are urged against the rulings of the court in disallowing challenges interposed by the defendant for various causes; but the only ruling in this regard which, on first blush, appears to menace the judgment and order and to which, therefore, special attention is merited, involves the action of the court in disallowing the challenge to Juror Coffman upon the ground that he was deficient in one of the general qualifications which section 198 of the Code of Civil Procedure provides that a person must possess to render him competent to serve as a juror.

It appears that, after an exhaustive examination of Juror Hughes upon the question whether he was biased, a challenge was interposed by defendant to said juror on the ground of implied bias and denied by the court. Thereafter counsel for defendant asked the juror whether he was "assessed on the last assessment roll of the county on property belonging to him," and, receiving a negative reply, challenged him on that ground. The court disallowed the challenge on the ground that said challenge was not made in the order prescribed by section 1087 of the Penal Code; a challenge for implied bias having, as seen, been previously interposed and denied. The defendant used a peremptory challenge on said juror and, before the completion of the jury, had used all the peremptory challenges allowed by law, in addition to the extra one allowed him by the court; the court having announced to counsel for defendant that it would give or accord to the defendant an extra peremptory challenge—that is, it would allow the defendant 21 peremptory challenges in lieu of 20, the number to which a defendant in a capital case is entitled under the law.

Subsequently to the examination of Juror Hughes, counsel for defendant examined Juror Coffman at great length, and finally interposed a challenge to said juror upon the ground of actual bias; the same having been overruled by the court. Thereafter, counsel for defendant, by the further questioning of Coffman, developed the fact that he, too, was disqualified because of not being assessed "on the last assessment roll of the county on property belonging to him," and challenged the juror on that ground. The court disallowed the challenge, and, in doing so, said: "It seems to me the counsel waived it when he made the challenge on the ground of actual bias. Now, I cannot see the use in consuming half an hour of time in examining into other matters, when the matter can be easily ascertained in the first place, whether the juror is on the last assessment roll. The Code provides specifically that challenges must be taken in a certain order." To which counsel for defendant replied: "* * * But I will say in regard to the matter of this challenge, we do not intend to challenge anybody upon the jury list because they do not possess these qualifications under section 198 of the Code of Civil Procedure, unless we find we do not want that juror on this jury. If we find out we do not want him, and can get him off on no other ground, we are going to get him off on this ground, just as we challenged him."

We think the court was right in holding that the defendant had, under the circumstances shown by the foregoing statement, waived his right to challenge the juror on the ground that he was not assessed on the assessment roll, etc. Section 1087 of the Penal Code reads as follows: "The challenges of either party for cause need not all be taken at once, but they must be taken separately, in the following order: (1) To the panel; (2) to an individual juror, for a general disqualification; (3) to an individual juror, for an implied bias; (4) to an individual juror, for an actual bias."

The foregoing section was, of course, intended to achieve some purpose, and if it can be given effect without impinging upon any of the vital rights of parties to actions, which are tried by a jury, it is manifestly the duty of the courts to so construe and apply it as that it may be enforced in all proper cases.

It is very clear that the consideration which prompted the Legislature to provide for the challenging of a person drawn as a juror for a general disqualification first in the order in which said section of the Penal Code declares that challenges to an individual juror shall be taken was to save time and expense in the trial of cases by jury; it being a matter of common notoriety that the examination of jurors upon the question whether they entertain bias, actual or implied, for or against either party or with reference to the case, ordinarily consumes a vast amount of time. The design of the section was, therefore, to require litigants, in the matter of impaneling juries, to ascertain, first of all, whether persons drawn into the jury box possess the general qualifications prescribed by section 198 of the Code of Civil Procedure, and that, if grounds exist therefor, to challenge and thus get rid of such persons without taking up the time of the court, at great expense to the litigants, or to the county, if the case is one that involves the prosecution of a criminal charge, with a lengthy voir dire examination addressed to the question whether they do or do not entertain such personal opinions with regard to the case as would or would not prevent them from trying the issues of fact intelligently and with perfect fairness and impartiality.

The language of said section is, on its face, mandatory, and we think that, in so far as it can be made applicable to the provisions of section 198 of the Code of Civil Procedure, without actually invading the substantial rights of the parties to the action, the order therein prescribed for taking challenges ought to be held to be, as unquestionably it was intended to be, imperative and to be invariably followed.

Section 198 of the Code of Civil Procedure provides that a person is competent to serve as a juror if he be: "(1) A citizen of the United States of the age of twenty-one years, who shall have been a resident of the state one year, and of the county or city and county, ninety days before being selected and returned; (2) in possession of his natural faculties, and of ordinary intelligence, and not decrepit; (3) possessed of sufficient knowledge of the English language; (4) assessed on the last assessment roll of the county, or city and county, on property belonging to him."

Section 199 of the same Code provides that "a person is not competent to act as a juror who does not possess the qualifications prescribed by the preceding section. * * *"

It will be observed that by section 198 of said Code there are prescribed two distinct classes of qualifications to render a person competent to serve as a juror, the one class resting on an entirely different reason or principle from the other, viz.: (1) Those qualifications which inhere in the mental capacity of a person to intelligently or at all discharge the duties of a juror and which are set forth in subdivisions 2 and 3 of said section; (2) those qualifications, prescribed by subdivisions 1 and 4, which, in and of themselves, do not affect the ability of a person to fairly, impartially and intelligently discharge such duties, but which were established by the Legislature upon a principle of policy. The causes of challenge for a general disqualification are, therefore, divided into two classes founded upon like distinction, and it is our view that the provisions of section 1087 of the Penal Code may and were intended to apply solely to causes of challenge based upon the want of the qualifications of the second class or those that are prescribed by subdivisions 1 and 4 of section 198 of the Code of Civil Procedure. This conclusion is fortified, we think, by the following considerations: Where a person is deficient in any of those qualifications prescribed by subdivisions 1 and 4 of said section 198—i. e., not a citizen of the United States, of the required age, etc., or not "assessed on the last assessment roll of the county on property belonging to him"—the fact of such disqualification must be made to appear, if disclosed at all, by the prosecution of a special inquiry to that end on his voir dire examination. In other words, whether he is or is not shown to be incompetent to act as a juror for wanting in any of those qualifications prescribed by subdivisions 1 and 4 of said section of the Code of Civil Procedure depends entirely upon whether or not he is specifically questioned upon his voir dire with a view to the ascertainment of that fact. In the case, however, of a disqualification of a person for any of the reasons enumerated in subdivisions 2 and 3 of section 198 of said Code—that is, where the person is not "in possession of his natural faculties," or not "of ordinary intelligence," or not "possessed of sufficient knowledge of the English language" to understand the testimony or to comprehend the general nature and purpose of the proceedings, or, in short, not capable of appreciating in a general way the duties of a juror—the fact of such incompetency would readily be discovered on a very brief and general examination of the juror. If he were deficient in those respects, his manner of answering questions propounded to him on his voir dire, if, indeed, he could answer them at all, would at once develop his incompetency by reason of such deficiency. But where, at any time during the course of the voir dire examination, such incompetency is thus made satisfactorily to appear, it would undoubtedly be the imperative duty of the court, regardless of whether a formal challenge was interposed on that ground, to excuse such person from sitting on the jury, for, manifestly, to knowingly permit a person so disqualified to act in the capacity of a juror would, in practical effect, amount to a distinct denial to the parties to the action of a trial by a legal jury, since a trial by a jury composed either in whole or in part of persons wanting in the degree of intelligence prescribed by the statute would be no trial at all. And herein lies another ground of distinction between those qualifications prescribed by subdivisions 1 and 4 and those of subdivisions 2 and 3 of section 198 of the Code of Civil Procedure. To permit a person to sit on a jury who is wanting in the general qualifications prescribed by subdivisions 1 and 4 would not, like a want of those qualifications prescribed by the other subdivisions of said section, necessarily result in *actual* prejudice to the party objecting to him, for it cannot be laid down as an abstract proposition that *actual* prejudice to the rights of parties to an action would necessarily follow from permitting either an alien or one not of the required age or a nonresident of the county within the purview of subdivision 1 of section 198 or one not assessed on the "last assessment roll," etc., to serve as a juror. Abstractly speaking, there is no reason why one not a citizen or not of the prescribed age or not on the assessment roll, as required by the statute, should and would not make equally as fair and impartial and as intelligent a juror as one so qualified. Obviously, as before shown, this cannot be true in the case of a person incompetent because not possessing those qualifications affecting his intelligence.

In view of the distinction thus pointed out between the two classes of general qualifications essential to the competency of a person to serve as a juror, our conclusion is, as before declared, that the provisions of section 1087 are mandatory in their application to subdivisions 1 and 4 of section 198 of the Code of Civil Procedure, but cannot apply to the other subdivisions of said last-mentioned section and were not intended to so apply. The result of this conclusion is (tô repeat) that, in impaneling a jury, it is the duty of the parties to an action, whether civil or criminal, to first inquire whether persons drawn into the jury box possess the qualifications prescribed by subdivisions 1 and 4 of section 198 of the Code of Civil Procedure, and, if found deficient in any thereof, to challenge them on that ground, and that, where they fail to pursue such course and first challenge a person, without success, on grounds involving particular causes of challenge, they then forfeit or waive their right, at the cost perhaps of the loss of a peremptory challenge, to challenge such person for wanting in those qualifications prescribed by those subdivisions of said section.

It may be argued that to hold section 1087 to be applicable to a part only of section 198 of the Code of Civil Procedure involves a strained and unnatural construction of the first-named section. We do not think so. Section 1087 of the Penal Code was first enacted by the Legislature of 1851, and sections 198 and 199 of the Code of Civil Procedure by the Legislature of 1863. All three of those sections were re-enacted in substantially their present form of language by the Legislature of 1872. As previously declared, it must be assumed that, in the enactment of section 1087 of the Penal Code, the Legislature had in mind the accomplishment of some useful or beneficial purpose in the trial of jury cases, and we must further assume that the Legislature, when re-enacting the three sections at practically the same time, recognized and understood the proposition that said section could not, with reason, be made to apply to subdivisions 2 and 3 of section 198 of the Code of Civil Procedure. We must therefore assume that the section was intended to subserve that purpose only which it could with propriety and reason accomplish, and that, since it can with perfect propriety and the soundest reason apply to subdivisions 1 and 4 of the said section, such was the specific intention in and object of its enactment and re-enactment.

In the case at bar, it may be well to note, the defendant, apart from the consideration of the point under discussion in its legal aspect, has no cause for complaint. The court, it will be remembered, called the attention of his counsel to the provisions of section 1087 of the Penal Code when they challenged Juror Hughes for not being on the assessment roll and long prior to the challenging of Coffman on the same ground. They displayed their defiance of the mandates of that section and of the opinion of the court with reference thereto by refusing to first inquire into the general qualifications of the persons in the jury box, examined subsequently to the examination of Juror Hughes, and, furthermore, by declaring that they did not intend to challenge persons for general causes unless such persons proved unsatisfactory to the defense and they were unable to exclude them from the jury on other grounds. Thus, we say, it is clear that from every standpoint from which the proposition may be viewed, the approval by this court of the ruling complained of only brings to the defendant consequences for which his own attorneys are alone responsible.

[3] 3. Eva Cavallero was permitted to testify, over the objection of the defendant, that, within less than a half hour after he had inflicted the blows which caused the death of Pistone, the defendant said, addressing his brother: "Come on, Brother, we might as well kill them all; we are not scared." It is now claimed that the ruling allowing that testimony was erroneous and damaging to the accused. There was, as we have seen, testimony showing that George Sampo, the defendant's brother, became very angry for some reason when the deceased started to dance with Eva Cavallero, and that he angrily used very ugly language at that time. The theory of the prosecution was that a general row was started in the boarding house at that time, and that thereupon the deceased left the house by the back door, and that immediately thereafter the defendant and Conte left the house by the front door; that their purpose was to overtake the deceased and punish him for some fancied insult to the defendant's brother; and that they did overtake Pistone and administer to him the beating already described. The declaration imputed to the defendant did not, of course, amount to a confession of his guilt of the crime charged against him, but was merely a statement indicating that he was in an ugly frame of mind immediately after the infliction upon

the deceased of the wound which caused the latter's death, and, furthermore, as perhaps implying, according as the jury might view the declaration, that the defendant had either killed or attempted to kill some other person. We think the testimony here objected to was proper.

[4] The court did not err in admitting in evidence as an exhibit in the people's case the rock to which we have hitherto referred as having been found by Mrs. Callandri, on the morning following the night of the difficulty, on the spot where the defendant administered the beating to Pistone. Burdisso declared that he saw defendant strike deceased with a rock, and Mrs. Callandri, as we have shown, testified that there were fresh blood spots on the rock, and in this she was corroborated by her husband. The rock was given into the hands of the officers shortly after it was picked up and was fully identified as the rock found and picked up by Mrs. Callandri. Moreover, the doctors testified that the wound inflicted upon Pistone's head appeared to have been produced by some blunt instrument and that it could have been caused by the use of the rock in question. Having been found at the very place where the beating occurred, with fresh blood stains thereon, and in view of the testimony of the physicians that the wound could have been made by means thereof, the rock itself constituted a pertinent circumstance, to be considered with the other evidence, in determining the question of the guilt of the accused.

[5] Nor was it error, it may be observed in this connection, to permit the physicians to testify that the wound could have been inflicted by means of said rock. The physicians were not asked by whom the wound was inflicted, nor whether the wound was caused by the use of the rock exhibited to them, but were simply asked whether, in their opinion, such a wound as the one they found on the head of the deceased could have been inflicted by means of the rock found by Mrs. Callandri. People v. Bowers, (Sup.) 18 Pac. 660; People v. Olsen, 1 Cal. App. 22, 81 Pac. 676. Opinions of medical doctors as to the means which might have been employed in producing wounds upon the human body are always receivable in evidence as those of experts upon that proposition, and we know of no principle to which the admission of such testimony is repugnant. The manner by which a wound is produced is as much within the range of subjects as to which opinions of experts may be given in evidence as is the proximate or approximate cause of death, and no one will dispute the competency, as evidence, of the opinion of a physician as to the direct or remote cause of one's death.

[6] It is next contended that the court erroneously allowed the witness Bona, a deputy constable, who arrested the defendant for the crime of which he was accused by the information herein, to give testimony of the reply the defendant made to the following question put to him by Bona, immediately after the arrest: "Giac, you fellows had a fight outside in the road there, too, didn't you?" The answer of the defendant to said question, and which it is claimed the court improperly allowed to be given in evidence, was: "I think we did." The objection to this testimony was that a proper foundation had not been laid for the introduction of proof of any declarations by the accused concerning the crime with which he is charged. The ruling was clearly correct. The statement proved by the witness was not a confession, but a mere admission, in the technical sense of the term, which might or might not be incriminatory in its effect, according to the other circumstances developed in the case, and it was therefore unnecessary to lay any foundation or to show that the statement was voluntary. The fact that he admitted having a "fight outside in the road," while a circumstance, where one is charged with actual, physical participation in the commission of the crime, tending to prove one of the essential elements of guilt—that is, that he was at the scene of the trouble when it occurred—did not constitute an acknowledgment of guilt, for he might have had a fight and still be guiltless of the particular crime with which he is charged or of any crime.

[7] We cannot sustain defendant's claim that the court's refusal to permit the jury to be taken to Drytown for the purpose of viewing the scene of the difficulty leading to Pistone's death is erroneous. The law vests in trial courts the discretion of allowing or disallowing a "view of the premises" or other physical objects relevant to the case which it is impracticable to bring into court, and whether, in any case, such discretion has been abused by a denial of a motion to permit such view, depends upon the circumstances upon which the order has been refused (section 610, Code Civ. Proc.); and the burden on appeal is upon the moving party to affirmatively show that such discretion has been abused. There is no showing in the record here indicating an abuse of discretion in the respect referred to, and we must therefore assume that the course of the court was justified. It may be remarked that the power vested in trial courts by section 610 of the Code of Civil Procedure is one that should be exercised, if at all, with great caution and circumspection, lest more harm than good will result to the parties by thus receiving evidence out of the courtroom or perhaps on a public street, as would have been the case here.

We are asked to review certain exceptions to the rulings of the court permitting the district attorney to ask the defendant's witnesses George Sampo and Stefano Conte certain questions on cross-examination. We have examined these assignments, but, as the answers to the questions so asked were, if anything, invariably favorable to the defendant and innocuous in form, there is no necessity for specially reviewing them.

4. The defendant does not contend that, so far as it goes, the charge of the court is amenable to just criticism. Indeed, an examination of the instructions given by the court to the jury will at once disclose that, as to them, there is no ground for complaint. But the defendant does challenge the correctness of the action of the court in refusing to allow a large number of instructions proposed by him; the claim being that he was thus deprived of a full exposition to the jury of the law covering all the features of the case as disclosed by the evidence. We shall not review in detail here the points thus made.

[8] It must be enough to say that the charge of the court fully covered every vital phase of the case, and that the principles contained in those of the rejected instructions that correctly stated the law pertinent to the important questions of fact developed by the evidence were embodied, in singularly clear language, in the court's charge.

We have given every point urged upon us by defendant the most critical consideration. and our conclusion is that the accused was accorded, as most certainly he had a right to expect, a perfectly fair and impartial trial.

For the reasons herein set out, the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

17 Cal. App. 157

PEOPLE v. MENDOZA. (Cr. 205.)

(District Court of Appeal, Second District, California. Sept. 25, 1911.)

1. BURGLARY (§ 33*)—BUILDING—OWNERSHIP—EVIDENCE.

In a prosecution for burglary the ownership of the building is inadmissible except for identification.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 86-89; Dec. Dig. § 33.*]

2. BURGLARY (§ 20*)—BUILDING—IDENTIFICATION—EVIDENCE.

Where an information for burglary charged that defendant entered a toolhouse situated at specified streets in the city of Los Angeles, such allegations sufficiently identified the building without an allegation of ownership, in the absence of proof that there was more than one such building so located.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 51-54; Dec. Dig. § 20.*]

3. BURGLARY (41*)—BUILDING—OWNERSHIP.

In a prosecution for burglary of a toolhouse belonging to the city of Los Angeles, evidence of a waterworks foreman that as foreman he was engaged with others in constructing a water tank, and while so engaged for the purpose of storing the tools constructed the toolhouse out of materials furnished him by the city, sufficiently showed ownership of the toolhouse in the city.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. § 102; Dec. Dig. § 41.*]

4. BURGLARY (§ 41*)—"NIGHTTIME."

Evidence that a building was entered by accused "in the evening some time after dark" was sufficient to establish burglary in the "nighttime" within Pen. Code, § 463, making burglary in the "nighttime" burglary in the first degree and defining "nighttime" as the period between sunset and sunrise.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. § 98; Dec. Dig. § 41.*

For other definitions, see Words and Phrases, vol. 5, p. 4808.]

5. CRIMINAL LAW (§ 1169*)—APPEAL—PREJUDICE—PRODUCTION OF JOINT DEFENDANT FOR IDENTIFICATION.

Manner of production of the person jointly indicted with accused for identification was not prejudicial, where the court instructed that the production of such person for identification was not to be considered by the jury as evidence of anything.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3141; Dec Dig. § 1169.*]

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Pasqual Mendoza was convicted of burglary, and he appeals. Affirmed.

Newmire & Morris, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was prosecuted under an information charging him with the crime of burglary, and upon trial was found guilty in the first degree of the offense charged. As grounds for reversal of the judgment he presents three assignments of error.

[1] The information charged defendant with entering a toolhouse of the city of Los Angeles situated at Lemoyne street and Marcom avenue in said city. At the request of defendant the court instructed the jury that in order to convict defendant it was incumbent upon the prosecution to prove, among other things, that the house alleged to have been feloniously entered was the property of the city of Los Angeles as alleged in the information.

[2] The ownership of the building was immaterial, except for the purpose of affording a means of its identification. This was done by alleging it to be a toolhouse located at Lemoyne street and Marcom avenue in the city of Los Angeles. In the absence of proof that there was more than one such building so located, such description was sufficient, and fully apprised defendant of the house he was charged with feloniously entering; hence the allegation of ownership was surplusage. People v. Price, 143 Cal. 352, 77 Pac. 73; People v. Bitancourt, 74 Cal. 190, 15 Pac. 744; People v. White, 116 Cal. 17, 47 Pac. 771.

[3] Conceding, however, that by reason of

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the instruction given it was necessary to prove ownership in the city of Los Angeles, the uncontradicted testimony of witness Neisse was, we think, sufficient to establish such fact. His evidence was to the effect that he was foreman of the city waterworks and as such foreman was engaged with others working under him in constructing a water tank, and while so engaged in such capacity he, for the purpose of storing the tools used in the prosecution of the work in which he and others were engaged, constructed the toolhouse out of material furnished him by the city.

[4] The jury by its verdict found defendant guilty of burglary in the first degree. Appellant contends that there was no evidence tending to show that the offense was committed in the nighttime, as defined by section 3260 of the Political Code and section 463 of the Penal Code, according to which "nighttime" is the period between sunset and sunrise. The evidence, however, without contradiction, shows that the entry to the building was made "in the evening some time after dark." This was clearly sufficient to justify the conclusion of the jury that the offense was committed after sunset.

[5] It appears that one Ruiz, who was jointly charged with defendant in the commission of the crime, was during the trial brought into court and witness Neisse, the foreman who had charge of the toolhouse, was by the district attorney told to "look at this man here," referring to Ruiz, and asked if he had ever given him permission to go into the toolhouse and take the tools. Appellant contends that the production of Ruiz in this manner was misconduct on the part of the district attorney. No objection was made to the question, and we are unable to perceive in what possible manner the substantial rights of defendant could have been prejudiced by such act, particularly inasmuch as the court instructed the jury that the production of Ruiz for identification was not to be considered by them as evidence of anything.

The appeal is without merit, and the judgment and order denying defendant's motion for a new trial are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

17 Cal. App. 171

PEOPLE v. PRIESTLEY. (Cr. 342.)

(District Court of Appeal, First District, California. Sept. 27, 1911.)

1. INDICTMENT AND INFORMATION (§ 111*)—NEGATIVING EXCEPTIONS.

Pen. Code, § 281, provides that every person having a husband or wife living, who marries any other person, except in the cases specified in the next section, shall be guilty of bigamy. Section 282 declares that the preceding section shall not extend to any person by reason of any former marriage, whose husband or wife by such marriage has been absent for five successive years without being known to such person within that time to be living nor to any person by reason of any former marriage which has been pronounced void, annulled, or dissolved by a judge of a competent court. *Held*, that the exceptions contained in section 282 did not constitute a part of the definition of the crime defined by section 281, and hence it was not necessary that they be negatived in an information for bigamy under such section.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 295–298; Dec. Dig. § 111;* Bigamy, Cent. Dig. § 23.]

2. INDICTMENT AND INFORMATION (§ 111*)—STATUTORY OFFENSE — EXCEPTIONS — NEGATION.

In a proceeding based on a penal statute, the subject of an exception in the enacting or prohibitory clause of the act must be excluded by averment in the indictment or information, but any proviso or qualification in a separate substantive clause need not be so negatived.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 295–298; Dec. Dig. § 111.*]

3. BIGAMY (§ 4*)—INFORMATION—FIRST MARRIAGE—DATE AND PLACE.

Where an information for bigamy alleged that accused at the time of the second marriage had a wife living, it was immaterial that it failed to allege the date or place of the first marriage.

[Ed. Note.—For other cases, see Bigamy, Cent. Dig. §§ 19–29; Dec. Dig. § 4.*]

4. BIGAMY (§ 4*)—INFORMATION—FIRST MARRIAGE—LEGALITY—KNOWLEDGE.

An information for bigamy was not defective for failure to charge that defendant knew that his alleged first wife was his lawful wife since a second marriage under an erroneous assumption that the first marriage was void or had been annulled or dissolved was no defense to a prosecution for bigamy.

[Ed. Note.—For other cases, see Bigamy, Cent. Dig. §§ 19–29; Dec. Dig. § 4.*]

5. BIGAMY (§ 4*)—INFORMATION—OTHER PERSON.

Pen. Code, § 281, provides that every person having a husband or wife living who marries any other person, except in the cases specified in the succeeding section, is guilty of bigamy. An information alleged that defendant on January 19, 1911, was the lawful husband of S. who was then alive, and that defendant on that day did feloniously marry M., the prior marriage between defendant and S. not having been dissolved, annulled, or pronounced void by a court of competent jurisdiction. *Held*, that such information sufficiently charged the second marriage to have been with a person other than defendant's first wife.

[Ed. Note.—For other cases, see Bigamy, Cent. Dig. §§ 19–29; Dec. Dig. § 4.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Alfred W. Priestley was informed against for bigamy. From an order sustaining a demurrer to the information, the People appeal. Reversed.

Attorney General Webb, for the People. F. Goodwin Williams, for respondent.

KERRIGAN, J. This is an appeal by the people from an order allowing defendant's demurrer to the information.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The information, which charged the defendant with the crime of bigamy, was as follows: "That the said Alfred W. Priestley, on or about the 19th day of January, A. D. 1911, * * * and before the filing of this information, was the lawful husband of one Susan Dunbar Priestley, * * * who was then and there alive, and the said Alfred W. Priestley, * * * to wit, on the 19th day of January, 1911, * * * did feloniously marry one Mabel Addie Cook, the said marriage between the said Susan Dunbar Priestley and the said Alfred W. Priestley * * * not having been dissolved, annulled, or pronounced void by a court of competent jurisdiction." To this information the defendant demurred on general grounds, and also specially upon the ground that the information does not show that the defendant married "any other person" other than his first wife; that the information does not directly charge that the former marriage of the defendant had not been annulled by a judgment of a competent court; that it does not allege that the former wife was not absent for five successive years without being known to the defendant within that time to be living. Other grounds specified in the demurrer are that the information does not allege the date nor the place of the first marriage, nor that the defendant knew that the "alleged first wife was his lawful wife"; nor, says the demurrer, "does the information allege a fact but a conclusion of law in alleging that the defendant was the lawful husband of one Susan Dunbar Priestley."

[1] Section 281 of the Penal Code reads as follows: "Every person having a husband or wife living, who marries any other person, except in the cases specified in the next section, is guilty of bigamy."

Section 282 of the same Code provides: "The last section does not extend—

"1. To any person by reason of any former marriage, whose husband or wife by such marriage has been absent for five successive years without being known to such person within that time to be living; nor,

"2. To any person by reason of any former marriage which has been pronounced void, annulled or dissolved by the judgment of a competent court."

It will be observed that the information does not negative the exception contained in subdivision 1 of section 282, i. e., that the defendant's wife has been absent for five successive years without being known to the defendant within that time to be living. If it be true that this exception is so incorporated into the language defining bigamy as to constitute a part of the description of the offense, then it should have been negatived, and the order of the court sustaining the demurrer was correct. The exceptions to section 281, however, are found in a subsequent and separate section, and neither of them is so related to the previous section as to constitute a part of the definition of the crime.

[2] In a proceeding based upon a penal statute, say the elementary works on pleading, the subject of an exception in the enacting or prohibitory clause of the act must in the charging paper be excluded by averment, but of any proviso or qualification in a separate substantive clause the information or indictment need take no notice. Gould's Common Law Pleading, p. 172; Commonwealth v. Jennings, 121 Mass. 47, 23 Am. Rep. 249. Thus, in this state an information for rape must aver that the act was accomplished with a female "not the wife" of the defendant, because such allegation is a part of the definition of the crime. People v. Miles, 9 Cal. App. 312, 101 Pac. 525. On the other hand, it has been held in Hart v. Cleis, 8 Johns. (N. Y.) 41, that in an action for a penalty under a section which prohibited the exportation of slaves, "except as hereinafter provided," the plaintiff need not negative the proviso of a succeeding section which allowed persons traveling through or removing from the state to take their slaves with them.

In Massachusetts, New York, Vermont, and Ohio the statute on bigamy is like our own in that the portion defining the crime is followed by other sections enumerating certain exceptions. In those states it is held that the subject of the exceptions is not a part of the enacting clause, but that the exceptions constitute matters of excuse or defense.

In Fleming v. People, 27 N. Y. 329, the statute declared that every person having a wife living who shall marry any other person, "except in cases specified in the next section," shall be adjudged guilty of bigamy. The next section embraces six classes of persons and cases to which the preceding section did not extend, one of which was where the former spouse shall have been absent for five years without being known to the party accused within that time to be living; another case was where the accused and his former wife had been divorced. The court held that in matters of pleading as well as of proof it was unnecessary to negative the exceptions found in the second section. At page 335 of the opinion, the court, basing its statement upon Chitty's Criminal Law, says: "It is not necessary to allege that the defendant is not within the benefit of the provisos of the statute, though the purview should expressly notice them, as by saying that none shall do the act prohibited except in the cases hereinafter excepted. This rule is precisely applicable to this statute, and so are the cases." The court then quotes from a number of authorities.

In the case of Commonwealth v. Jennings, 121 Mass. 47, 23 Am. Rep. 249, the court passed on this question. The statute there considered made every marriage during the life of the first spouse a crime, but provided that the statute should not apply to certain cases enumerated in another section. The court said: "The offense of polygamy is fully defined by Gen. St. c. 165, § 4, as consisting in the defendant's, while having a prior husband or wife living, marrying or continuing to cohabit with another person in this state. The words 'except in the cases enumerated in the following section' are not so incorporated with the enacting clause that the one cannot be read without the other, but are inclosed in a parenthesis, inserted after completing the enumeration of the elements necessary to constitute the crime, in the midst of the conclusion which declares its denomination. That the former husband or wife has been absent for seven years and unheard from is a matter of defense or excuse rather than a limit of the definition of the crime."

So in the case of Stanglein v. State, 17 Ohio St. 453, the failure of an indictment for bigamy to allege that "the former wife had not been continually and willfully absent for the space of five years together and unheard from next before the time of the second marriage charged in the indictment," was held no ground for arresting judgment, since such fact is a matter of defense to be proved by the accused.

In the case of State v. Abbey, 29 Vt. 60, 67 Am. Dec. 754, the indictment was for the crime of bigamy, and alleged simply a second marriage by the defendant while his former wife was still alive. The section defining the offense was followed by another which contained a proviso that the statute should not extend to certain specified cases. It was held that the indictment was not bad for omitting to negative the exceptions in the statute, it having averred both marriages and set forth that the first wife was living when the second marriage took place, the court observing, after discussing the question at length and citing many authorities from various jurisdictions: "The fifth section of the act on which this indictment is drawn contains the enacting clause, in which the exceptions are made of those cases which are specified in the sixth section. The cases excepted do not define or qualify the offense created by the enacting clause. If the facts are alleged in the indictment, and proved at the trial, that the respondent had a former husband or wife living, and married another person, * * * the offense is fully made out. * * * If in fact the former husband or wife of the respondent had been continually beyond the seas, or out of the state for seven years together, and the respondent had married again, not knowing the other to be living within that time, or if the respondent had been divorced, or the marriage had been declared null and void by the sentence of a court, or if the former marriage was within the age of consent and not afterward assented to, those facts should be relied upon and proved by the respondent on his defense." The views expressed in the Vermont case are strongly approved in Ex parte Hornef, 154 Cal. 355, 97 Pac. 891. See, also, State v. Williams, 20 Iowa, 98; Barber v. State, 50 Md. 170; 3 Ency. Pl. & Pr. 324.

[3] There is no merit in the respondent's contention that the information is defective in not alleging the date or place of the first marriage. It is immaterial when or where the first marriage took place if the accused, at the time of the second marriage, had a wife living. In People v. Giesea, 61 Cal. 53, 93 Am. Dec. 257, it is held that an allegation of the place of the first marriage is unnecessary. It has also been held expressly in a number of cases that it is unnecessary in a charge of bigamy to allege at what particular date the first marriage occurred. People v. Perriman, 72 Mich. 184, 40 N. W. 425; Faustre v. Commonwealth, 92 Ky. 34, 17 S. W. 189; State v. Armington, 25 Minn. 34; Hutchins v. State, 28 Ind. 34; State v. Bray, 35 N. C. 289. In Hutchins v. State, supra, it is said: "As the first marriage is not criminal, but its existence a condition which makes the second marriage a crime, it is of itself a fact, and there is no substantial reason why the averment of it should ever have been required except in general terms." So in the case of State v. Hughes, 35 Kan. 626, 12 Pac. 28, 57 Am. Rep. 195, the court, commenting upon an objection like the one here, said: "The offense as defined by the statute consists in marrying a second time while the husband or wife of defendant is still living. That the accused had a wife living at the time he contracted the second marriage is an essential allegation which should be stated with precision. * * * It is enough to allege and show that the marriage relation had been entered into and existed between the accused and his first wife at the time of the second marriage."

[4] The respondent also urges that the "information does not charge that the defendant knew that the alleged first wife was his lawful wife." This objection is hardly worthy of notice. A second marriage under an erroneous assumption that the first marriage was void, or had been annulled or dissolved, is not even a defense to the charge; much less need it be alleged in the information. People v. Hartman, 130 Cal. 487, 62 Pac. 823.

The respondent also urges the point that the information does not charge directly that the former marriage of defendant had not been pronounced void by a judgment of a court of competent jurisdiction, but what we have already said disposes of this contention.

[5] The point that the information does

not follow the language of section 281 of the Penal Code, in that it does not allege that the defendant married "another person" other than his first wife, is answered by referring to section 950, subd. 2, and section 958, Penal Code, and to the information itself.

The order appealed from is reversed.

We concur: LENNON, P. J.; HALL, J.

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161 Cal. 310

PEOPLE v. WHITE. (Cr. 1,689.)

(Supreme Court of California. Nov. 8, 1911.)

CRIMINAL LAW (§ 1020*)—APPEAL—JURISDICTION—ORDER QUASHING INFORMATION.

Under Const. art. 6, § 4, providing that the Supreme Court shall have appellate jurisdiction in all criminal cases where a judgment of death has been rendered, and that the District Courts of Appeal shall have jurisdiction in all criminal cases prosecuted by indictment or information in a court of record, excepting criminal cases where a judgment of death has been rendered, an appeal from an order setting aside an information charging defendant with murder prior to any judgment should have been taken to the District Court of Appeal and not to the Supreme Court.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1020.*]

In Bank. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Thomas White was informed against for murder, and from an order setting aside the information the People appeal. Case transferred to the District Court of Appeal.

U. S. Webb, Atty. Gen., and Benjamin K. Knight, Dist. Atty., for the People. W. G. Williams and D. C. Clark, for respondent.

ANGELLOTTI, J. This is an appeal to this court by the people from an order of the superior court of Santa Cruz county made before judgment, setting aside the information presented and filed therein charging the defendant with the crime of murder.

This court is without appellate jurisdiction in this case. While it is true that the information charges a crime punishable by death, neither judgment of death nor any other judgment has yet been rendered. The Constitution gives us appellate jurisdiction "in all criminal cases where judgment of death has been rendered," and gives to the district courts of appeal jurisdiction "in all criminal cases prosecuted by indictment or information in a court of record, excepting criminal cases where judgment of death has been rendered." Const. art. 6, § 4. It is clear that the appeal should have been taken to the District Court of Appeal for the First District, instead of to this court, and it must now be transferred to that court.

It is ordered that the cause be transferred from this court to the District Court of Appeal for the First District.

We concur: SHAW, J.; MELVIN, J.; SLOSS, J.; LORIGAN, J.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

161 Cal. 297

MERING v. SOUTHERN PAC. CO.

(Sac. 1,846.)

(Supreme Court of California. Nov. 7, 1911. Rehearing Denied Dec. 6, 1911.)

1. Carriers (§ 155*)—Contract of Shipment—Validity.

Where a carrier did not refuse to transport freight, except under a special contract limiting liability for gross negligence, and then only to the extent of a valuation fixed in the contract, but such contract was thoroughly discussed before executed, and no objection was made to it by the shipper, who inserted in the contract in his own handwriting the valuation on the property, the contract was not imposed on the shipper and the carrier's liability was as fixed by it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 677, 679, 682–685; Dec. Dig. § 155.*]

2. Carriers (§ 158*)—Contracts of Carriage—Construction.

A shipping contract voluntarily entered into, which fixes an agreed valuation of the property which forms the basis for the freight charges, is an agreement fixing the valuation of the property, and not a contract limiting the liability of the carrier, and under the contract the carrier is only liable as stipulated, and then only to the extent of the valuation fixed.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 663–667, 699–703½, 708–718½; Dec. Dig. § 158.*]

3. Carriers (§ 228*)—Carriage of Live Stock—Negligence—Burden of Proof.

Where an animal shipped in a healthy condition arrived at its destination 46 hours later in a dying condition, the carrier transporting it under a contract limiting its liability for gross negligence was prima facie guilty of gross negligence, and, to escape liability, it had the burden of showing that the death of the animal was not occasioned by such negligence, though the shipper did not accompany the animal, and though under the contract he assumed the duty of accompanying, feeding, and watering the animal, since the shipper's agreement did not relieve the carrier from the duty of properly caring for the animal during transportation, which proper care involved feeding and watering.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 228.*]

Shaw, J., dissenting in part.

In Bank. Appeal from Superior Court, Yolo County; K. S. Mahon, Judge.

Action by E. B. Mering against the Southern Pacific Company. From a judgment for defendant, plaintiff appeals. Reversed.

E. B. Mering and J. E. Strong, for appellant. Arthur C. Huston, for respondent.

LORIGAN, J. This appeal is before us on a hearing granted after a decision of the District Court of Appeal for the Third Appellate District, affirming the judgment and order appealed from.

Plaintiff sued to recover from defendant the value of a certain mare shipped by him over the road of the defendant from the city of Woodland to Redwood City, in this state. The complaint alleged the shipment of the mare; that plaintiff did not accompany her and did not retain exclusive or any control over her in transit; that defendant in transporting said mare to said Redwood City was grossly negligent and grossly failed to properly care for said mare, by reason whereof said mare arrived at Redwood City about 46 hours after being shipped, in a gaunt and emaciated condition, and thereafter on the following day died from the effects of said treatment. Judgment was asked for the sum of $508, the alleged value of the animal.

The defendant in its answer admitted the shipment of the mare, denied the allegations of carelessness and neglect, and averred that the mare was shipped under a certain contract attached to the answer as part thereof, in which contract plaintiff had stated the value of the mare to be $20, agreed to accompany her and feed and water her, and further agreed that in no event "is first party (defendant) * * * to be liable for any loss or damage to said live stock not proven to have been caused by the gross negligence of the first party in performance of, or failure to perform, some duty which under the terms of this contract is due from first party to second party as to said live stock," and averred faithful and complete performance of said contract "and all of the obligations imposed upon it by law as a common carrier or otherwise," that "defendant assumed liability only to the extent of the agreed valuation of said mare as stated in said contract, to wit, the sum of $20, and that the compensation for the transportation of said mare was based on that value." The court found that the mare was shipped under the contract as alleged in the answer, found against plaintiff as to all of his averments of neglect and carelessness of the defendant, and also found that "it is not true that the condition of said mare or the death of said mare was due to any act or omission of said defendant, * * * or that the said mare died from the effects of any treatment of said defendant or from the effects of any act or omission of said defendant; * * * and it is not true that plaintiff has been damaged in the sum of $508, or any other sum, by the defendant." Judgment was entered that plaintiff take nothing by his action, and that defendant recover its costs.

Plaintiff appeals from the judgment, and from an order denying his motion for a new trial, and asserts as grounds for a reversal the insufficiency of the evidence to sustain two findings made by the court.

The first attack is made on the finding that the mare was delivered to the defendant to be transported under a written contract between plaintiff and defendant attached to the answer under which defendant assumed liability for gross negligence, and for this only, and to the extent of the value of the mare as stated in the contract.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] The claim of appellant is that the evidence shows that the contract relied on was not freely and fairly made, but was forced and imposed upon him by the shipping agent of the defendant at Woodland. It is not pretended that the defendant refused to ship the mare under any other contract than by the special contract entered into; or that the alternative of shipping under an ordinary bill of lading which would have rendered the defendant liable for full damages was denied him. As executed the contract was entirely acceptable to the plaintiff at the time. Its provisions were thoroughly discussed between plaintiff, who was a practicing attorney, and the agent of the defendant, before it was executed. There was no objection on the part of the plaintiff as to any of the terms of the contract, the only discussion between himself and the agent being as to the valuation of the mare to be stated in the contract and as to the attention—watering and feeding—which would be given the mare in transit by the defendant, as the plaintiff did not intend to accompany her. These were the only matters discussed, and, fully understanding the terms of the contract and that it was left to himself to put a valuation on the mare and that the freight rates would be proportionate thereto and the liability of the defendant measured by such valuation, the plaintiff inserted in the contract in his own handwriting a valuation upon the mare of $20. Under these circumstances, there is no room for the claim that the contract was imposed upon plaintiff, or that it was not freely and fairly entered into.

[2] This contract so entered into between the parties is similar to the contract which was under consideration in Donlon Bros. v. Southern Pacific Co., 151 Cal. 763, 91 Pac. 603, 11 L. R. A. (N. S.) 811, where it was held that such a contract "is to be construed as an agreement fixing the valuation of the property shipped and not as a contract limiting the liability of the railroad company," that under such a contract the carrier would only be liable as stipulated for gross negligence, and then only as to the value of the animal to be shipped inserted in the contract. In the Donlon Case the railroad company was held liable to the extent of such stated valuation in the contract because it was guilty of gross negligence. In the case at bar as the agreed valuation of the mare under the contract between the parties was $20, this is the only amount the plaintiff could recover even if the defendant had been guilty of gross negligence in her transportation. The trial court found that defendant had not been so negligent, and this brings us to a consideration of the other point for a reversal insisted upon by the plaintiff, namely, that this finding is not supported by the evidence.

[3] It was alleged in the complaint, and not denied by the answer, that the mare arrived in Redwood City about 46 hours after being shipped. The evidence on behalf of plaintiff showed that the day the mare was shipped at Woodland she was well and in good condition, and that plaintiff placed a sack of hay in the car where she could reach it. A witness testified that, "when the mare arrived in Redwood City, she was very thin and gaunt and her sides were drawn. She was very thirsty, and he did not allow her to drink all she wanted. The colt looked well (there was a sucking colt five months old by her side). The next morning she refused to drink, and I called a veterinary, and he told me to take her out of the barn, or she would die, and soon after that she died." A veterinary surgeon at Woodland who had seen the mare the day before she was shipped, and who testified that she was then in good condition and well, replying to a hypothetical question which assumed that the mare was well when shipped, had been in the car 46 hours with a sucking colt by her side "and was taken off the car with her sides drawn and very thirsty and hungry, appearance dull and head drooping, and died the next day," answered as to the cause of the death of the mare, "I would say that it was probably due to not being fed or watered, but it could have been caused by other causes." This was the only evidence offered by plaintiff. Defendant offered no testimony as to whether the mare was fed or watered while in transit, or as to what care or attention she received during transportation.

It is insisted by appellant that this evidence made out a prima facie case on the part of plaintiff of gross negligence which cast upon defendant the onus of disproving the prima facie case so made, and we think this contention must be sustained.

It is not contended by respondent that if the mare had been shipped under an ordinary bill of lading, and was delivered at Redwood City in the dying condition which the evidence disclosed, that, on a showing by a plaintiff of her being in a healthy condition when shipped and arriving at her destination in an injured condition, the burden of proving that the injury or death of the animal was not occasioned by any want of care on the part of defendant would devolve upon defendant. Counsel for respondent, however, insists that under the special contract entered into between the parties and which provided that the defendant should not be liable for any loss or damage not proven to have been caused by the gross negligence of the defendant the burden of proving that the injury or loss resulted from gross negligence was upon the plaintiff.

But we think that the evidence offered by plaintiff was sufficient to make out a prima facie case of gross negligence on the part of defendant, casting the burden of proof on it to show that the death of the mare was not occasioned by such negligence on its part. While the plaintiff under the contract assumed the duty of accompanying, feeding, and watering the mare, he did not in fact accompany her. His agreeing to do so did not relieve the defendant from the duty of properly caring for the animal during her transportation, and proper care involved feeding and watering her during the long period which the evidence shows she was upon the cars. The evidence shows that, when the mare was shipped, she was well and in good condition, and that, after being en route for 46 hours, she reached her destination in a dying condition. The veterinary surgeon testified that her condition when taken from the cars at her destination "while it could have been caused by other causes * * * was probably due to her not having been fed or watered." While this testimony does not directly prove that the death of the animal was caused by a failure to feed or water her while in transit, it still amounts to a sufficient proof of facts from which a reasonable inference could be deduced that the dying condition in which she was delivered at Redwood City was attributable to a failure to feed and water her during the period of transportation. As the defendant was in exclusive control of the mare during transportation, the duty was cast upon it to feed and water her, and as a reasonable inference from the facts testified to, including the testimony of the veterinary surgeon, is that her dying condition when delivered was attributable to a failure to do this, there was a sufficient prima facie showing of gross negligence on the part of the plaintiff casting the burden of proof upon the latter to overcome the prima facie case against defendant so made.

In this view, the finding of the court complained of by appellant is contrary to the evidence, and for that reason the judgment and order denying a new trial are reversed.

We concur: HENSHAW, J.; MELVIN, J.

SHAW, J. I concur in the judgment, but I do not agree to the proposition that the contract limits plaintiff's damages to $20. I adhere to the views expressed in my dissenting opinion in Donlon v. S. P. Co., 151 Cal. 777, 91 Pac. 603, 11 L. R. A. (N. S.) 811.

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161 Cal. 285

HUMBOLDT SAVINGS BANK v. McCLEVERTY. (S. F. 5,572.)

(Supreme Court of California. Nov. 7, 1911. Rehearing Denied Dec. 6, 1911.)

1. MORTGAGES (§ 358*)—SALE OF PREMISES BY TRUSTEE IN DEED OF TRUST—CONTRACTS —VALIDITY.

The parties to a mortgage or deed of trust may contract that the premises shall be sold as a whole, in the absence of any statutory provision requiring the trustees to sell in subdivisions.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 358.*]

2. MORTGAGES (§ 358*)—DEED OF TRUST—SALE BY TRUSTEE—DISCRETIONARY POWER.

A deed of trust which provides that the trustee may sell the premises as a whole or in his discretion in such reasonable parcels as he, in his judgment, may deem advisable, gives the trustee the discretion to sell as a whole or in parcels, and such discretion must be exercised in good faith for the best interests of the beneficiaries, including not only the creditor, but the debtor and his successors in interest.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1072, 1073; Dec. Dig. § 358.*]

3. MORTGAGES (§ 358*) — DEED OF TRUST — SALE BY TRUSTEE—DISCRETIONARY POWER.

A trustee in a deed of trust abuses his discretion to sell the property as a whole or in parcels, where he sells the property as a whole after a parcel has passed as a homestead on the debtor's death to his widow, as provided by Civ. Code, § 1265, and Code Civ. Proc. § 1474, since, as to the enforcement of the claim against the homestead, the widow is a surety with the right to have the other property first sold to pay the debt.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 358.*]

4. MORTGAGES (§ 369*)—SALES BY TRUSTEE—RIGHT TO SET ASIDE—CONDITIONS PRECEDENT.

Where a trustee in a deed of trust abused his discretion by selling the property as a whole after a parcel had, as homestead, passed on the debtor's death to his widow, and the homestead was worth $5,000, while the balance of the property was worth $57,000, and the debt amounted to $57,618.30, the widow, seeking to set aside the sale as to the homestead, was not required to offer to pay the entire debt secured by the deed of trust.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 369.*]

5. MORTGAGES (§ 369*)—SALES BY TRUSTEE—RIGHT TO SET ASIDE—CONDITIONS PRECEDENT.

Where a sale under a deed of trust was improperly made, it should, as a general rule, be set aside on the application of the injured party, and a new sale ordered, but, where the creditor and the trustee placed the property in such a condition that a new sale could not be had, they must submit to such a decree as would most fairly redress the injury inflicted by them, and, where relief could not be given without compelling the creditor to accept the property wrongfully purchased at its true value, he must be held to have purchased at such value.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1093-1100; Dec. Dig. § 369.*]

6. MORTGAGES (§ 370*)—SALES BY TRUSTEE IN DEED OF TRUST—INVALIDITY—ESTOPPEL.

Where a widow of the grantor in a deed of trust was entitled to a decree protecting her homestead rights in a part of the property sold by the trustee, selling the property as a whole, she did not waive her right to such protection by failing to ask for a resale of the other property.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 370.*]

7. MORTGAGES (§ 369*)—SALES BY TRUSTEES IN DEEDS OF TRUST—INVALIDITY—RELIEF.

Where neither the pleadings nor the findings disclosed any reason why the court, finding that the trustee in a deed of trust abused its discretion in selling the property as a whole, while a part had passed as homestead on the debtor's death to his widow, could not order a resale of the nonhomestead property, and, in case of a deficiency, a resale of the homestead, a decree setting aside the sale as to the homestead and adjudging that the value of the balance of the property should be considered in payment of the debt, and that the balance due should be secured by the deed of trust as to the homestead, was unauthorized.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 369.*]

8. APPEAL AND ERROR (§ 1178*)—DISPOSITION OF CASE ON APPEAL.

Where it is probable that the facts authorizing the decree rendered exist, though the pleadings and findings do not disclose such facts, the court on appeal, adjudging the decree erroneous, will not order judgment for the party complaining, but will reverse the case, so that the facts can be established and a proper decree rendered.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1178.*]

Department 1. Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by the Humboldt Savings Bank, substituted as plaintiff on the death of one Weber, the original plaintiff, against Mary C. McCleverty. From a judgment granting insufficient relief, plaintiff appeals. Reversed.

C. E. Hatch and Alexander D. Keyes, for appellant. Fitzgerald & Abbott, for respondent.

SLOSS, J. The action was brought to recover possession of a lot of land situated on Harrison street in the city of Oakland. This is the second appeal. Upon the first appeal a judgment in favor of the defendant was reversed and the cause remanded, with leave to the defendant to file amended or additional pleadings as she might be advised. Weber v. McCleverty, 149 Cal. 316, 86 Pac. 706. During the pendency of the action, Weber, the original plaintiff, died, and Humboldt Savings Bank has been substituted for him.

The land involved, together with another parcel of land situated on Broadway street in Oakland, had originally been owned by Charles McCleverty, the husband of the respondent. In January, 1901, McCleverty made his promissory note for $55,300 to Humboldt Savings Bank, and secured the same by a deed of trust of the two parcels of land. In May, 1901, the defendant Mary C. McCleverty made and recorded a declaration of homestead on the Harrison street lot. In July, 1901, default having been made in the payment of the note, the trustees named in the deed of trust, after notice duly given, sold both parcels, and conveyed the same to Adolph C. Weber, the original plaintiff, for $57,177.40, that being the highest sum bid. In the meanwhile McCleverty had died leaving a will wherein he named his widow, the defendant herein, as executrix, the will had been admitted to probate and letters testamentary issued. Before the sale took place, the defendant demanded of the Humboldt Savings Bank and of the trustees that in any sale to be made under the deed of trust the property which was not impressed with the homestead character should be sold first; but compliance with this demand was refused. These facts, together with the further one that the bank had failed to present a claim against the estate of McCleverty, appeared on the first appeal. The principal question there considered was whether, under section 1475 of the Code of Civil Procedure, the failure to so present a claim barred the creditor of its right to compel a sale of the homestead. Concluding that no such presentation was required as a condition to the enforcement of the rights created by a deed of trust, this court reversed the judgment in favor of the defendant. With reference to the claim that the two properties should not have been sold as a whole, we said that the pleadings were not sufficient to entitle the defendant to defeat the action on this ground, but, as above stated, permission to file amended or further pleadings was accorded to her.

Upon the return of the case to the lower court, she availed herself of such leave by filing an amended answer and a cross-complaint, in which she averred, in addition to what has already been stated, that at the time of the sale, the Broadway property (i. e., that not covered by the homestead) was worth more than $57,177.40, the sum realized at the sale for both parcels; that if said parcel had been sold first, and separately from the homestead, it would have brought a sum in excess of the debt secured, and would have made it unnecessary to sell the homestead. It was alleged, further, that Weber, the purchaser, was the president of the Humboldt Bank, that he purchased the property as agent for the bank, and that before purchasing he had full knowledge of the facts concerning the declaration of homestead, the death of McCleverty, the defendant's demand for a sale in parcels, and the value of the respective parcels. There were also allegations to the effect that the homestead premises had been the community property of McCleverty and his wife, that the latter had remained in possession of the same at all times after her husband's death, and that such title to the said premises as had been acquired by Weber for the bank still remained in the bank.

The court found that the Broadway property was at the time of the trustees' sale of the value of $57,565, "and would and could be sold for said sum of $57,565, at public auction if sold separately as demanded by defendant." The amount then due on the note was $57,618.30. If the Broadway property had been sold first and separate from the homestead property, it would not have been necessary to sell the latter except for the deficiency of $53.30, the difference between the amount due and the value of the Broadway property. In all other respects the findings are in favor of the defendant's allegations in her answer and cross-complaint.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

From these findings the court drew the conclusions of law that the trustees' sale and conveyance to Weber, so far as they concern the homestead property, are invalid, and that the deed as to said homestead property be vacated and set aside; that the amount of $57,565, the value of the Broadway property, be applied and considered in payment of the sum of $57,618.30 due to the bank; that the balance of $53.30, with interest, be and is secured by the deed of trust as to the homestead property; that, if defendant pay such balance within 10 days, then the whole of the debt secured by the deed of trust shall be deemed paid and satisfied, and a reconveyance shall be made to defendant, and said property shall vest in her absolutely, but, in the event of her failure to make such payment, the homestead premises shall be subject to sale under the deed of trust to satisfy said deficiency. A judgment was entered accordingly, and from this judgment the plaintiff appeals.

The facts are not in dispute; none of the findings being attacked. The appellant's position is that the court drew erroneous conclusions from these facts, and entered a judgment which is not supported by them.

[1] 1. The first contention is that under the express terms of the deed of trust the trustees were authorized to sell the property as a whole, and that the failure to sell in parcels, as demanded, afforded to the defendant no ground for setting the sale aside. The deed of trust contained this provision relative to the powers of the trustees: "They may sell said premises, as above described, as a whole, or in their discretion, in such reasonable parcels or subdivisions as they, in their judgment, may deem advisable." We do not doubt that the parties to a mortgage or a deed of trust may contract that the premises shall be sold as a whole, and that their agreement to this end is enforceable. This court has so held in the case of a mortgage, notwithstanding the provisions of the Code of Civil Procedure (sections 694 and 726) that upon an execution on foreclosure, several known lots or parcels must be sold separately. Bank of Sonoma v. Charles, 86 Cal. 322, 24 Pac. 1019. The right of a debtor to waive a sale by parcels applies equally to a deed of trust (Brown v. Mortgage Co., 86 Miss. 388, 38 South. 312), and the validity of an agreement for a sale in bulk follows a fortiori, where, as in this state, there is no statutory provision requiring the trustees to sell in subdivisions. Dunn v. McCoy, 150 Mo. 548, 52 S. W. 21.

[2] But in the case at bar the parties did not make an absolute stipulation that the property should be sold as a whole. The provision above quoted gave the trustees a discretion to sell as a whole or in parcels. This discretion they were bound to exercise in good faith for the best interests of their beneficiaries, who included, not only the creditor, but the debtor and his successors in interest.

[3] At the time of the sale, the Harrison street property did not belong to the estate of McCleverty, the debtor. It had, by virtue of its homestead character, passed, upon McCleverty's death, to his widow. Civ. Code, § 1265; Code Civ. Proc. § 1474. With respect to the enforcement of the bank's claim against this property, she stood, therefore, in the situation of a surety, and, as such, had the right to have the principal debtor's property first sold to pay the debt. Civ. Code, § 2850; McLaughlin v. Hart, 46 Cal. 638; Blood v. Munn, 155 Cal. 228, 100 Pac. 694. In view of the relations of the parties to the different parcels covered by the deed of trust, a sale as a whole, in disregard of the homestead claimant's demand and right to have the principal debtor's property first applied to the payment of the debt, was a manifest abuse of the discretion reposed in the trustees. This consideration alone, without regard to the fact, admitted by plaintiff at the trial, that the property would have realized a larger sum if the parcels had been sold separately, entitled the defendant to disaffirm the sale.

[4] 2. It is urged that the defendant was bound, as a condition precedent to her right to have the sale set aside, to offer to pay the entire debt secured by the deed of trust. It has often been held that an action to set aside a sale by trustees or on foreclosure for irregularities of any kind should ordinarily be accompanied by an offer to redeem by paying the sum due. Sav. & L. Soc. v. Burnett, 106 Cal. 514, 538, 39 Pac. 922; Copsey v. Sacramento Bank, 133 Cal. 659, 66 Pac. 7, 204, 85 Am. St. Rep. 238. The plaintiff is held to compliance with the old maxim that he who seeks equity must do equity. Marvel v. Cobb, 200 Mass. 293, 86 N. E. 360; Phœnix Ins. Co. v. Rink, 110 Ill. 538; Garland v. Watson, 74 Ala. 323; Sloan v. Coolbaugh, 10 Iowa, 31. On the other hand, there are not a few cases holding that, where a party has the right to avoid a sale, he is not bound to tender any payment in redemption. Brewer v. Harrison, 27 Colo. 349, 62 Pac. 224; Lewis v. Hamilton, 26 Colo. 263, 59 Pac. 196; Meyer v. Jefferson Ins. Co., 5 Mo. App. 245; Briggs v. Hall, 16 R. I. 577, 18 Atl. 177. Whatever may be the correct rule, viewing the question generally, it is certainly not the law that an offer to pay the debt must be made, where it would be inequitable to exact such offer of the party complaining of the sale. Benedict v. Gammon Theological Seminary, 122 Ga. 412, 50 S. E. 162. Under the circumstances disclosed by this record, the defendant would be subjected to very evident injustice and hardship if her right to

attack the sale were made dependent upon an offer by her to pay the whole debt. The debt was not hers, and she was not liable for any part of it. Her only interest was in the homestead property, which, with other land, was held as security for McCleverty's note. The property which she was seeking to save from the effect of the sale was worth, according to the finding of the court, $5,000, while the property in which she had no interest was worth over $57,000. The debt amounted to $57,618.30. It must be apparent from a mere statement of these facts that there is no equity in the claim that, in order to be enabled to attack an unauthorized sale of her $5,000 homestead, she must pay, or offer to pay, a debt of $57,000, for which she is in no way liable.

3. The decree set aside the sale, not as an entirety, but only so far as it affected the homestead property. The Broadway parcel was treated by the court as if it had actually been sold separately for the sum which the court found to be its actual value at the time of the sale. To this mode of disposing of the controversy, the appellant makes two objections, which, while they are argued under distinct heads, may well, we think, be treated together. It is contended, first, that by compelling the plaintiff to take the Broadway property at what is found to be its actual value the court is imposing upon the purchaser at the sale a bargain to which he, or his principal, never assented; and, second, that, the sale of both parcels having constituted a single transaction, the defendant is not entitled to ratify a part of the sale, while disaffirming the rest, but must, by reason of her ratification of the sale of the Broadway piece, be held to have confirmed the entire transaction.

[5] Ordinarily, where it appears that a sale was improperly made, it should, on the application of the injured party, be set aside and a new sale ordered. Wright v. Bruschke, 62 Ill. App. 358; Davoue v. Fanning, 2 Johns. Ch. (N. Y.) 252; Mason v. Martin, 4 Md. 124; Imboden v. Hunter, 23 Ark. 622, 79 Am. Dec. 116; Tompkins v. Tompkins, 39 S. C. 537, 18 S. E. 233; Duncan v. Home Co-op. Co., 221 Mo. 315, 120 S. W. 733. This is the normal and proper remedy for the wrong inflicted. The creditor is entitled to have the property sold. The attempted sale has been conducted in an unauthorized manner. The rights of all parties are protected by setting aside the action taken, and directing a new sale which shall be in accordance with the law and the agreement of the parties. But there may be cases in which a new sale is impossible. A part or all of the property may, for example, have passed into the ownership of third parties, who have purchased for value and without notice of any infirmity in the sale. But, if the party entitled to avoid the sale is not by reason of laches or otherwise chargeable with responsibility for this condition, the fact that a resale is impracticable should not deprive him of all remedy for the wrong which he has suffered. It has always been the pride of courts of equity that they will so mould and adjust their decrees as to award substantial justice according to the requirements of the varying complications that may be presented to them for adjudication. Story, Eq. Jur. §§ 28, 439; 1 Pom. Eq. Jur. § 60. And so, if, in a case like this, the creditor and the trustees have put the property in such condition that a new sale cannot be had, they must submit to such decree as will most fairly redress the injury which they have inflicted. If relief cannot be given without compelling the creditor to accept the property wrongfully purchased by him at its true value, he may be held to a purchase at such value. This is, in effect, the principle applied in Blood v. Munn, 155 Cal. 228, 100 Pac. 694. There a mortgagee of property which included a homestead had released the property other than the homestead upon payment of $425. The property so released was worth $1,100 and over. In an action to foreclose the mortgage, it was held that the owners of the homestead were entitled to a credit upon the mortgage debt of the real value of the property released. This result necessarily followed from the fact, common to that case and the one before us, that the homestead property was only secondarily liable for the debt, and that any other holding would deprive the owner of the homestead of the right to have the property primarily liable first exhausted. There, as here, the creditor was held to a bargain (i. e., the release of $1,100 of his demand) to which he had never assented, but this was not deemed an obstacle to granting to the defendants the only relief which was possible. In Drury v. Cross, 74 U. S. 299, 19 L. Ed. 40, the Supreme Court of the United States approved a decree which, in form and effect, was very like the one here made. There the directors of an insolvent railroad corporation had, in order to relieve themselves of liability on indorsements made by them, combined with certain creditors and bondholders to have the assets of the road sold on foreclosure. By a fraudulent contrivance, the amount of bonded indebtedness outstanding was made to appear far greater than it was, and, as a result, the favored creditors succeeded in destroying competition at the sale and purchasing the property at a price greatly below its real value. The decision of the court was that the purchasers must be held liable to other creditors for the full value of the property purchased.

[6] These authorities furnish ample support for the right of a court of equity, under appropriate circumstances, to grant the form of relief embodied in the decree appealed from. What we have said is also, we think, a sufficient answer to the point that a rati-

fication of the sale of the Broadway parcel is a ratification of the entire sale. This point is, indeed, but a statement, in another form, of the proposition first discussed. If the defendant is entitled to a decree protecting her rights in the homestead, notwithstanding the fact that the sale of the other property cannot be annulled, it must follow that she does not waive her right to such protection by failing to ask for a resale of both parcels. Furthermore, it is not entirely accurate to say that the defendant has ratified the sale of the Broadway property. The only sale was one of both parcels for $57,177.40. The Broadway piece was not sold for any specific part of this amount, and the defendant did not ask that any actual sale be permitted to stand. What she did seek and obtain was a decree that the bank be put in the position which it would have occupied if it had purchased the Broadway piece for the sum which would have been realized on a sale properly conducted. This is not a ratification of the sale which was in fact made.

But the difficulty with the case before us is that the record does not show the existence of any circumstances which would render it impracticable to order a new sale of the entire property. As has been said, a decree requiring the purchaser at the trustees' sale to take the Broadway parcel at its true value can be justified only on the ground that it is, under the circumstances, the only relief that equity can give. It is a substitute for the natural relief of ordering a new sale, and is resorted to because such new sale cannot be had.

[7] Neither the pleadings nor the findings disclose any reason why in this case the court could not have ordered a sale of all the property according to the rights of the parties; that is to say, a sale, first of the Broadway property, and, in the event of a deficiency after crediting the debtor with the rents and profits of this piece, a sale of the homestead. The pleadings of the defendant allege that the title to the homestead, conveyed to the purchaser by the trustees, still remains in the plaintiff, and the court so finds. But there is no averment or finding that the title to the Broadway parcel is not in a like situation. It is true that the plaintiff in its answer to the cross-complaint alleged that it had parted with the Broadway property to bona fide purchasers for value, and that it had lost the means of accounting for the rents and profits, but these allegations were on motion of the defendant herself stricken from the answer. She cannot, of course, after having induced the court to eliminate these averments from the issues, rely upon them as establishing a state of facts which she should have pleaded and proved as a foundation for the decree obtained by her. The pleadings and findings, as they stand, do not justify the conclusions of law and the judgment.

[8] But, inasmuch as it is more than probable that the facts authorizing the decree rendered actually exist, we cannot assent to the claim of appellant that judgment in its favor should be ordered on this appeal. An amendment to the answer and cross-complaint, together with evidence establishing the truth of such amendment, would authorize the granting to defendant of the relief embodied in the decree here appealed from.

4. The plaintiff relies, in response to defendant's cross-complaint, upon the defense of laches, and that of the statute of limitations. Code Civ. Proc. §§ 343, 338, subd. 4. It is conceded in the reply brief that, "if the defendant was entitled to have the sale set aside as to the homestead alone without vacating the sale as to the Broadway piece, the plea of the statute of limitation and of laches ought to be overruled." We have already seen that the defendant may be entitled to this very relief. In that aspect the question of limitation and laches need not be further considered. We shall not at this time undertake to decide whether, if it should turn out that a resale of both parcels is the only remedy open to respondent, she should be held barred of her right to seek this relief. If this question should ever arise, which is hardly probable, it will be time enough to then dispose of it.

The judgment is reversed, with directions to the trial court, after permitting the defendant to amend her pleadings, to take such further proceedings as may not be inconsistent with this opinion.

We concur: SHAW, J.; ANGELLOTTI, J.

(161 Cal. 303)

GALBREATH v. SIMAS et al. (Sac. 1,884.)

(Supreme Court of California. Nov. 8, 1911.)

1. MINES AND MINERALS (§ 38*)—CONFLICTING LOCATION—EVIDENCE—FINDINGS.

In a suit to quiet title to a placer mining claim, etc., evidence *held* to warrant a finding that the proper amount of assessment work was not done by defendants' vendor on the land in controversy in 1907 or 1908, and that the land was therefore subject to subsequent relocation by complainant.

[Ed. Note.—For other cases, see Mines and Minerals, Dec Dig. § 38.*]

2. APPEAL AND ERROR (§ 1002*)—FINDINGS—REVIEW—CONFLICTING EVIDENCE.

A verdict on conflicting evidence that the value of assessment work on a mining location was worth less than the required $100 cannot be set aside on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. § 1002.*]

3. MINES AND MINERALS (§ 38*)—RELOCATION—ASSESSMENT WORK—INSTRUCTIONS.

Where, in an action to quiet title to a relocated mining claim, there was evidence that defendants' grantor under the prior location did not complete the required assessment work for the years 1907 and 1908, and that complainant relocated the land in December, 1908, an instruction that, if a proper amount of assessment work was not performed in either 1907 or 1908, complainant was not required to wait until the expiration of the latter year before locating the claim, was proper.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 38.*]

4. Trial (§ 194*)—Instructions.

Where the jury was instructed that the prior location of a mining claim by defendants' grantor was a "pretended one" only in the event the jury found that he was not a citizen of the United States, an instruction that only citizens or persons who had properly declared their intention of becoming such could locate mining claims on vacant public land, and if defendants held the ground in controversy by virtue of a sale from G., who held it by a pretended location, and was not a citizen of the United States at the time he made such pretended location, then defendants had no title, was not objectionable as instructing the jury that the location of defendants' grantor was a pretended one.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 194.*]

Department 2. Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Suit by Wallace Galbreath against Manuel S. Simas and another. Judgment for complainant, and defendants appeal. Affirmed.

Taylor & Tebbe and James D. Fairchild, for appellants. C. J. Luttrell and L. F. Coburn, for respondent.

MELVIN, J. Plaintiff sued to quiet his title as against defendants to a certain placer mining claim known as the "Smugler," and to restrain said defendants from cutting wood or making excavations on said property. Judgment was rendered in favor of plaintiff. From this judgment and from an order denying their motion for new trial the defendants appeal.

The court found that the Smugler claim was a valid mining location made in accordance with the statutes of the United States, and that it covered a large part of the territory to which defendants asserted title and known as the Blue Jay placer mine; that the alleged title of defendants under deed from one Gallagher, who had located the Blue Jay in December, 1905, was invalid as against plaintiff, who located the Smugler claim in December, 1908, because neither Gallagher nor his successors in interest had performed the required assessment work on the Blue Jay claim; and that the land covered by the Smugler claim was open to location when Galbreath located thereon in December, 1908.

[1] The main contention of appellants is that the findings are not supported by the evidence. They maintain (1) that Gallagher's citizenship at the time he located the Blue Jay placer claim was clearly proven; (2) that the proper amount of assessment work was done by Gallagher in 1907; and that (3) more than $100 worth of work was done on the property by Gallagher or those in privity with him during the year 1908 and before the 29th day of December of that year.

Upon the first point little discussion is necessary, because the other two questions were determined adversely to defendants upon conflicting testimony. Gallagher was permitted to testify fully with reference to the years he had spent in the United States, his naturalization, the fact of his registration in California in 1908 by presentation of a certified copy of his naturalization papers to the county clerk of the county in which he lived, and of his participation in elections ever since. Whether or not this was the best evidence need not be considered here, for it seems to have been introduced without objection. Respondent concedes that it was sufficient, if believed, to justify the jury in the conclusion that Gallagher was a citizen, but calls the attention of the court to the impeachment of Gallagher as a witness, which, he asserts, was so complete that probably nothing which Gallagher said was accepted as verity by the jurors.

Regarding the work done on the Blue Jay claim in 1907 and 1908, the evidence, as we have said before, was conflicting. Gallagher himself testified that in the year 1907 he performed more that $100 worth of work, giving in detail the items of labor. He was contradicted by other witnesses in regard to the details of the work which, according to his statement, was performed by him during that year. David Ream testified that no work was done on the Blue Jay in 1907. Zoll contradicted Gallagher with reference to the alleged removal by ground sluicing of a quantity of earth 24 feet long, 9 feet wide, and 3 feet thick from the Blue Jay claim. Gallagher stated that he was accustomed to go by way of a certain shaft on the property into a tunnel where there was water and that he frequently performed work in said tunnel, but according to the witness Ream there was no connection between the shaft and the tunnel. The tunnel itself was on the Hawkins claim, and not within the lines of the Blue Jay at all; and there was no water in said tunnel. Similar testimony was given by witness Le May. There were certain other contradictions of Gallagher's testimony which need not be considered here in detail. It is sufficient to say that they were of enough importance to justify the jury in finding against the defendants with reference to the value of the work performed upon the claim in 1907.

Appellants do not say that Gallagher performed $100 worth of work on the Blue Jay claim in 1908, but they do most positively assert that they, as the equitable owners of the property, put work upon it as the representatives of Gallagher to an amount greatly in excess of $100. They say that there was an oral agreement between themselves and Gallagher which amounted to a lease with the privilege of purchasing; the understanding being that appellants were to do the requisite amount of work which was to apply on the price to be paid for the property. The Blue Jay claim was adjacent to the patented claim which was called by all the witnesses the "Hawkins." This was the property of the appellants. The Blue Jay was on higher ground than the Hawkins. In 1908 the appellants built a reservoir which was partly on the land covered by the Blue Jay claim, and dug a ditch through that territory for a distance of more than 800 feet. Respondent contends in opposition to this that appellants had no contract with Gallagher; that the work done on the Blue Jay was not for the benefit of that claim, but merely to get a better head of water for mining operations on the so-called Hawkins claim; and that the jury was justified in the conclusion that the work performed by appellants in 1908 on the Blue Jay was of a value less than $100.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

One witness testified that while Rose was at work on the reservoir he was asked if he was not working on Gallagher's land. He replied with an uncomplimentary reference to Gallagher who, he said, claimed "the whole country," but did not work on anything. Witness Le May told while on the stand of a conversation which he had had with Gallagher in October, 1908, wherein Gallagher admitted, in effect, that his assessment work had not been done, and made no reference to any contract to sell his property; but the most important evidence offered by plaintiff to show that no contract existed for the sale of the property by Gallagher to the appellants was that which indicates that a line was run between the Hawkins and the Smugler claims by a surveyor who had been engaged for that purpose, establishing the boundaries between these claims to the satisfaction of the parties hereto. The surveyor Nolan testified that appellant Simas, respondent Galbreath, and Ream (who claimed an interest in the Smugler with Galbreath) were present when he ran the line and were satisfied with it. He was corroborated by both Ream and Galbreath, the last-named witness also testifying that appellant Rose suggested the employment of the surveyor and agreed to pay half the expense of establishing the line between the two claims. It seems hardly credible that, if Simas and Rose were the equitable owners of the Blue Jay, they would have thus recognized Galbreath's right in the Smugler which included practically the same territory as the Blue Jay and at a time long subsequent to the performance by them of the work which as they asserted at the trial had been done for the purpose of perfecting Gallagher's title. There is also much force in the position of respondent that the work of Rose and Simas was for the benefit of the Hawkins claim. Much of the Blue Jay is uphill from the reservoir, ditch, and penstock which were constructed by appellants, and the water could be advantageously used on a small part only of that claim.

Upon the subject of the value of the improvements constructed by appellants in 1908 there was a wide diversity of testimony. Both Rose and Perry testified that the reservoir was 70 feet long and from 25 to 35 feet deep, and that the ditch was approximately 600 feet long, 20 inches in width, and 20 inches in depth. The cost of the ditch and the dam they asserted was $200. Appellants' witness Graves, a civil engineer, estimated that the dam constructed by them contained 48.6 cubic yards of earth. Ream testified that the dam could be built for $40 and the ditch for $25. Witnesses Le May, Mathewson, and Utne, all experienced men in such matters, made estimates somewhat lower.

[2] It will thus be seen that there was a distinct conflict of evidence upon the subject of the value of work done by the appellants in 1908, and we cannot say that the jury was not justified in concluding that the improvements made that year were worth less than $100. There is no merit in appellants' contention that no evidence was offered by Galbreath of the posting of his original notice of location and the recordation of a copy thereof. Galbreath and one other witness testified to these facts.

On the cross-examination of Galbreath, he was asked if Ream had not previously located the Smugler claim and an objection to the question was sustained. This ruling was proper, but, even if it had been erroneous, it was cured by subsequent testimony that Ream had been a former claimant and had forfeited his right to the property long before any of the transactions connected with this case occurred. Ream was also permitted, over an objection, to testify how one of the corners of the Hawkins claim was marked according to his observation made at the time Mr. Nolan was running the line between the Hawkins and Smugler claims. If this was error, we cannot see how appellants could possibly have been harmed by it.

Appellants complain that Gallagher's answer to a question on direct examination was stricken out. He had answered in the affirmative the question: "Are you the locator of this claim?" On cross-examination, however, he was compelled to answer the question: "How did you happen to locate this claim that had been located and held by Dave Ream and others?" Even conceding that the rulings of the court on these two matters were not consistent, we cannot say how appellants were prejudiced for subsequently Gallagher testified fully regarding all his acts with reference to the location of the Blue Jay.

[3] Appellants also complain of an instruction in which the jury was told that respondent did not have to wait until January 1, 1909, before relocating the claim, unless the assessment work had been fully performed in 1907. The language criticized is not properly subject to objection when taken in connection with the preceding portion of the instruction which was in part as follows: "If you find that the defendants did construct the reservoir in Stewart Gulch, and did construct the ditch testified to in the year 1908, under an agreement with Gallagher to do his assessment work upon the Blue Jay claim, but that such work was not of the value of $100, and that they did not continue to, in good faith, complete such assessment work, but, on the contrary, did cease work on or about the month of November, then I charge you that the plaintiff had the right to go upon said land and locate it on or about the 29th day of December of that year." By this instruction the jury was told that, if a proper amount of assessment work was not performed in either 1907 or 1908, respondent did not have to wait until the expiration of the latter year before relocating the claim. Applied to the facts of the case we find no error in the instruction.

[4] By another instruction the jurors were told that only citizens or those who had properly declared their intention of becoming such citizens can locate mining claims upon vacant unappropriated public land of the United States, and that, if a person not a citizen go through the form of locating a claim and selling it to others, he has nothing to sell and the buyers acquire nothing by the purchase. The instruction then proceeds as follows: "If, therefore, you find that defendants hold the ground in dispute herein by virtue of a sale from P. J. Gallagher, who held it by a pretended location, but who was not a citizen of the United States at the time he made such pretended location, then I charge you that the defendants have no title whatever to said premises and you must find for the plaintiff." Appellants contend that by this language the jurors were told that Gallagher's location was a pretended one, and that this was an instruction upon a matter of fact. A reading of the quoted language in view of that which immediately precedes it entirely destroys this argument. The jury was instructed that Gallagher's claim was a "pretended one" only in the event of their finding that he was not a citizen of the United States. There was nothing misleading in the instruction.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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161 Cal. 325

CAMPBELL et al. v. MORAN et al.
(L. A. 2,732.)

(Supreme Court of California. Nov. 9, 1911.)

1. Taxation (§ 679*)—Tax Title—Irregularity in Assessment or Sale—Mailing Notice.

Pol. Code, § 3897, as amended by St. 1907, p. 697, requires that a tax collector, making a resale of land under authority from the state, shall not only give notice of the sale by publishing a notice in a newspaper for a specified time, but that he shall also mail a copy of such notice, postage prepaid and registered, to the party to whom the land was last assessed next before the sale at his last known post office address, and sections 3780 and 3817 give the owner of land sold to the state for taxes the right to redeem it before the state disposes of it. Property was assessed in 1902 to James Moran, and on nonpayment of taxes was sold to the state in 1903, and after the lapse of five years from such sale the tax collector attempted a resale of it. The last assessment before the sale was in 1908 and was to "Nellie S. Moran," whose address as written on the assessment book was "833 S. Spring St.," to whom no notice of the sale was ever mailed, but a notice of such sale was sent by registered mail, addressed to James Moran, 249 South Spring street, Los Angeles, Cal., which returned to the tax collector before the sale without having been delivered. *Held*, that the provision as to notice by mailing, being for the benefit of the previous owner, was a jurisdictional prerequisite to a valid sale by the state, and that the sale was ineffectual; so that the purchaser acquired no title.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 679.*]

2. Taxation (§ 679*)—Tax Title—Notice of Sale—Persons to be Notified—"Last Known Post Office Address."

Under Pol. Code, § 3650, which requires an assessor to state in the assessment of property the name and post office address, if known, of the person to whom the property is assessed, the address shown on the last assessment constitutes the last known post office address so far as the tax records are concerned, and, in the absence of other information, the tax collector must take notice of the address so shown and mail the notice of resale to such address.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 679.*]

3. Taxation (§ 788*)—Tax Deeds—Effect as Evidence—Notice of Sale.

The recital, in a deed from the state on a resale of land sold to it for taxes, as to the mailing of a copy of the notice prescribed by Pol. Code, § 3897, as amended by St. 1907, p. 697, is made, by section 3898, only prima facie evidence of the facts recited.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1555–1569; Dec. Dig. § 788.*]

Department 1. Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by Edgar W. Campbell and others against Nellie Skinner Moran and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

C. A. Stice and Walter J. Horgan, for appellants. O. B. Carter and Schweitzer & Hutton, for respondents.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ANGELLOTTI, J. This is an action to quiet plaintiffs' alleged title to the land described in the complaint, being a lot in the city of Los Angeles. Defendant Nellie Skinner Moran had judgment that plaintiffs have no interest in the property, and that, as against them, she is the absolute owner thereof. Plaintiffs appeal from the judgment, and from an order denying their motion for a new trial.

It was stipulated at the trial that plaintiffs have no title to the property except such as they may have acquired by virtue of an attempted sale by the state on account of nonpayment of state and county taxes for the year 1902, and that, unless the title to the property be shown to be vested in plaintiffs by virtue of such attempted sale, the title to the property in controversy is vested in said Nellie Skinner Moran.

[1] For the purposes of a decision herein, it will be necessary to consider only one of the many points made by respondents in support of the determination of the trial court.

The assessment of the property for the year 1902 was to "James Moran." The tax thereon not having been paid, the property was sold to the state on July 1, 1903, and, no redemption having been made within five years from the date of such sale, a deed of the property was made to the state by the tax collector on July 2, 1908. Pol. Code, § 3785. Thereafter, in the year 1909, it was attempted to make a sale of this property through the tax collector of Los Angeles county as authorized by and in accord with the provisions of section 3897, Political Code. The attempted sale was had on February 19, 1909, and plaintiffs were the purchasers at such sale. The last assessment of this property "next before the sale" was in the year 1908 and was to "Nellie S. Moran," defendant herein, and the address of said defendant, written on the assessment book, was "833 S. Spring St." It was definitely shown by the evidence that no notice or copy of notice of this sale was ever mailed by the tax collector to said Nellie S. Moran, or to any person at the address shown by the last assessment. A notice of such sale, with the postage thereon prepaid, and registered, had been mailed, addressed to "James Moran, 249 South Spring street, Los Angeles, California," and this had been returned by the postmaster to the tax collector on February 8, 1909, without having been delivered. As we understand the record, this was the only notice by mail of the sale that was ever attempted to be given, and is the notice by mail referred to in the deed from the state as having been given. No claim to the contrary is made by counsel for plaintiffs.

Upon these facts it must be held, in view of the findings of the trial court in favor of defendants, and in view of the decision of this court in the recent case of Smith v. Furlong, 117 Pac. 527, that the attempted sale by the state was ineffectual for any purpose, and that consequently plaintiffs are without any interest in the property. It is required by section 3897, Political Code, as amended in 1907, that the tax collector making the sale under authorization from the state, shall not only give notice of the sale by publishing a notice in a newspaper for a specified time, but also that he shall "mail a copy of said notice, postage thereon prepaid and registered, to the party to whom the land was last assessed next before the sale, at his last known post office address." The owner of land sold to the state for taxes being given by statute the right to redeem the same at any time before the state shall have disposed of it (Pol. Code, §§ 3780 and 3817), it was held that this provision as to notice by mailing, enacted by the Legislature, was a substantial requirement for his benefit, compliance with which was essential to the validity of a sale by the state; in other words, that "the giving of notice by mail, as section 3897 requires, is a jurisdictional prerequisite to a valid sale by the state," at least in all cases where the address of the party is not unknown.

[2] As section 3650, Political Code, requires the assessor to state in the assessment of property "the name and post office address, if known, of the person to whom the property is assessed," it was substantially held in the same case that the address shown on the last assessment constitutes the last known post office address, so far as the tax records are concerned, and that, in the absence of information of a different address, the tax collector must take notice of the address so shown and mail the notice thereto. In this case, as we have seen, not only was no notice mailed to any person at the address so shown, but no notice was mailed to the party to whom the land was last assessed next before the sale, at any address, and the notice in fact mailed, addressed to another person, was returned undelivered to the tax collector.

[3] The recital in the deed from the state as to the mailing of a copy of the notice, even if assumed sufficient to show such mailing as the statute requires, was only prima facie evidence of the facts recited (Pol. Code, § 3898; Smith v. Furlong, supra), and it was open to defendant to show that the recital was untrue, and that the statutory requirement in this regard had not been complied with. This was certainly sufficiently shown to warrant the conclusion of the trial court that the requirement had not been complied with, a conclusion we must assume the court reached, in view of its general findings in favor of defendants.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; SLOSS, J.

161 Cal. 341

SMITH v. BOSTON. (L. A. 2,744.)

(Supreme Court of California. Nov. 10, 1911.)

1. Taxation (§ 811*)—Action to Quiet Tax Title—Judgment—Findings.

A finding, in an action to quiet title under a tax deed, that the plaintiff was not the owner of the premises mentioned in the complaint nor of any part thereof and has no interest in such premises, is sufficient to support a judgment for defendant.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 811.*]

2. Taxation (§ 788*)—Tax Deeds—Effect as Evidence—Recitals.

A recital in the deed of a tax collector, given on a resale of lands by the state, is prima facie evidence of the fact recited.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1555-1569; Dec. Dig. § 788.*]

3. Taxation (§ 788*)—Action to Try Tax Title—Tax Deed—Effect as Evidence.

Pol. Code, § 3897, requires the tax collector, before selling for the state land sold to it for taxes, to mail a copy of notice of sale to the person to whom the land was last assessed next before the sale at his last-known post office address. A deed of a tax collector recited that as the address was unknown, the collector did not mail a copy of such notice to the party to whom the land was last assessed next before such sale, and there was no evidence in conflict therewith or proof of actual notice. It appeared from the record that the property on the year next before the sale was assessed to "Andrew J. Boston, Santa Monica," and that the year previous to that the address was given as "232 S. Ocean avenue, Santa Monica, Cal." *Held* sufficient to warrant a conclusion by the trial court that the recital in the deed of the tax collector, to the effect that the address of the party to whom the property was last assessed was unknown, was false.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1555-1569; Dec. Dig. § 788.*]

4. Taxation (§ 679*)—Tax Title—Effect of Irregularity in Sale—Notice.

The giving of notice by mail, to the party to whom the property was last assessed before the tax sale, of a resale of land, after deed to the state for nonpayment of taxes, is a jurisdictional prerequisite to a valid sale by the state, and a sale without such notice, where the address was not unknown, is invalid and passes no title to the purchaser.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 679.*]

5. Taxation (§ 810*)—Action to Try Tax Title—Evidence.

Evidence, in an action to quiet title under a tax deed, *held* sufficient to support a finding that plaintiff had no interest in the property.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 810.*]

Department 1. Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action to quiet title by J. H. Smith against Andrew Boston. Judgment for defendant, and plaintiff appeals. Affirmed.

Walter J. Horgan and C. A. Stice, for appellant. Tanner, Taft & Odell, for respondent.

ANGELLOTTI, J. This is an appeal by plaintiff from a judgment in favor of defendant and from an order denying plaintiff's motion for a new trial in an action brought by him to quiet his alleged title to a lot of land in the city of Santa Monica, Los Angeles county.

It is admitted that plaintiff has no title to the property except such as he may have acquired by virtue of an attempted sale by the state on account of nonpayment of state and county taxes for the year 1901. If plaintiff acquired no title thereby, admittedly defendant, who is shown by the evidence to have acquired the property in the year 1902 and to have ever since been in possession thereof and living thereon, paying all taxes levied thereon, was entitled to judgment against plaintiff.

It will be necessary to notice but one of the many points made in support of the judgment.

[1] It was found as a fact by the trial court, in response to the issue made by the complaint and answer, that the plaintiff is not the owner of the premises mentioned in the complaint, nor of any part thereof, and has no interest in or to said premises. The finding is in no way dependent upon or inconsistent with other findings of certain specific facts, and without regard to such other findings constitutes sufficient support for and compels the judgment that was given. This finding is fully sustained by the evidence, as we shall proceed to show.

[2, 3] The attempted sale by the state, through the tax collector of Los Angeles county, was in the year 1908, and the last assessment "next before the sale" was in the year 1907. The transcript on appeal shows that the property was then assessed, as it had been for the year 1906, to "Andrew J. Boston," and that his address was given in such assessment of 1907 as "Santa Monica," and in the assessment of 1906 as "232 S. Ocean avenue, Santa Monica, Cal." It furthermore showed "tax statements and receipts to Andrew J. Boston" for the years 1904 and 1905. It was claimed on a motion by plaintiff to amend the transcript, heard at the time of the argument of this appeal, that the engrossed and settled statement on motion for new trial states that the assessment for the year 1907 was to "Andew J. Borton," instead of "Andrew J. Boston." This was denied by defendant, and the case was submitted for decision with the understanding that, if it was found to be a material matter, the submission would be set aside and an opportunity given plaintiff to substantiate his claim. We are satisfied that a determination of this question regarding the correctness of the transcript is not essential to a proper disposition of this appeal, and that it may be assumed that the name of the property owner was given in the assessment of 1907 as "Andrew J. Borton." It still remains that the record shows that the ad-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

dress of the person to whom the property was assessed was given on the assessment as "Santa Monica."

It is established prima facie by the deed of the tax collector, and there is no evidence in conflict therewith, that no copy of the notice of sale was mailed, as required by section 3897 of the Political Code, "to the party to whom the property was last assessed next before the sale, at his last-known post office address"; it being recited in the deed, exactly as it was recited in Smith v. Furlong, 117 Pac. 527, "and whereas the address being unknown, W. O. Welch, tax collector, as aforesaid, did not mail a copy of said notice, postage thereon prepaid, to the party to whom the land was last assessed next before such sale." It thus appears that a copy of the notice was not mailed to "Andrew J. Borton" at the address shown by the assessment or at all. It was further shown by uncontradicted evidence that a copy of the notice was not mailed to Andrew J. Boston at all, so that if we assume that the transcript is correct and that the assessment for the year 1907 was to him instead of to Andrew J. Borton, as claimed by plaintiff, nevertheless the notice by mail required was not given. In either event, the requirement of section 3897 of the Political Code that a copy of the notice be mailed, with the postage thereon prepaid, and registered, "to the party to whom the land was last assessed next before the sale (who was either Borton or Boston), at his last-known post office address," was not complied with, although in such assessment an address was shown. Even if the assessment was, as claimed by plaintiff, to "Borton," instead of "Boston," it is apparent from the record that the use in the name of the letter "r" instead of "s" was a mere clerical error, and it may be that the mailing of a notice to "Boston" would have been sufficient; but as to this it is unnecessary to decide. No notice was mailed to either "Boston" or "Borton." It furthermore appears that Boston never had any actual notice of such proposed sale. It is established by Smith v. Furlong, supra, that the evidence hereinbefore stated was sufficient to warrant a conclusion by the trial court that the recital in the deed of the tax collector to the effect that the address of the party to whom the property was last assessed was unknown was false, and that such post office address was by legal intendment known to the tax collector; the court saying: "It is evident, therefore, that if the address was unknown to the tax collector it was because he had failed to avail himself of the ample means of knowledge readily accessible to him and furnished by law for that purpose, one of these books being the record of the assessment from which his authority to make the deed was derived." It is further established by Smith v. Furlong, supra, that such evidence fully supports a conclusion that the requirement of section 3897 of the Political Code as to mailing a notice of the sale has not been complied with.

[4] It is still further established by that decision that a failure to comply with the requirement renders the attempted sale by the state invalid and ineffectual to pass any interest in the property to the purchaser. See, also, Campbell v. Moran (L. A. No. 2,732, decided November 9, 1911) 119 Pac. 89.

[5] It is therefore manifest that, without regard to any of the other points made in support of the judgment of the lower court, plaintiff was not shown to have any interest in the property, and that the finding to that effect is fully supported by the evidence.

The judgment and order denying a new trial are affirmed.

We concur: SLOSS, J; SHAW, J.

(161 Cal. 311)

WHITTIER v. HOME SAVINGS BANK OF LOS ANGELES et al. (L. A. 2,641.)

(Supreme Court of California. Nov. 8, 1911.)

1. EVIDENCE (§ 417*) — PAROL EVIDENCE—VARYING CONTRACT.

A construction company contracted with a city to improve certain streets, and defendant M. advanced the contractor money, taking as security assignments of the contracts. Afterwards defendant bank made other loans to the contractor, taking assignments of the same contracts, subject to M.'s rights. Plaintiff did part of the work for the construction company, and in payment received orders from it upon M. and the bank, directing them to turn over to plaintiff bonds to cover the amount of the work done, and the bank indorsed on each order, "Accepted for whatever the equity of the" construction company "may be." Thereafter, on March 1, 1909, the construction company being unable to complete the improvements, it, M., and the bank executed a written contract with plaintiff, which recited the latter's interests in doing the work on the remaining two streets to be repaired, and that plaintiff agreed to do the work for the sum of $2,600. The work was done by plaintiff, and that sum paid to him by the bank and M. *Held*, in an action against the bank for money received by it, which plaintiff claims should have been applied to his claims under his orders, that evidence that, when plaintiff presented his orders to the bank for acceptance, he was informed of an agreement by it with the construction company to advance further sums to that company, if necessary, on the security of the contracts assigned, did not vary the terms of the conditional acceptances of plaintiff's orders.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874–1899; Dec. Dig. § 417.*]

2. BILLS AND NOTES (§ 516*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence, in an action for money received by defendant bank, which plaintiff claimed should have been applied to his claims under orders given to him upon the bank, and accepted by it in payment for work done in repairing streets, *held* to show that plaintiff and the bank contemplated that the acceptance should only apply to the equities of the general contractor existing at the completion of all the contracts.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 516.*]

3. EVIDENCE (§ 425*) — PAROL EVIDENCE—COLLATERAL CONTRACT.

Defendants, who were creditors of an insolvent contractor for city work for money advanced, and who held an assignment of the contract as security therefor, agreed in writing with plaintiff, a subcontractor on the work, who had received orders on defendants for payments due him, accepted by defendants to be paid out of any "equity of" the principal contractor, that plaintiff should complete the contract, for which defendants would pay him $2,600, which was done. *Held*, that evidence of an oral agreement between the parties that the $2,600 should be retained by defendants for their reimbursement out of the first collections on the work done by plaintiff was not objectionable, as varying the written contract for the completion of the contract by plaintiff.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1862; Dec. Dig. § 425.*]

4. MONEY RECEIVED (§ 1*)—GROUNDS OF OBLIGATION.

The action for money had and received will not lie against a party into whose hands the money is not shown to have come.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. § 1; Dec. Dig. § 1.*]

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by F. W. Whittier against the Home Savings Bank of Los Angeles and others. From a judgment for plaintiff for a less amount than claimed, he appeals. Affirmed.

Crouch & Crouch, for appellant. Scarborough & Bowen (H. M. Barstow, of counsel), for respondents.

MELVIN, J. Plaintiff sued for something over $6,000 on a count for money had and received to his use and benefit. Judgment was given in his favor against the Bank of Los Angeles for $428.51. From this judgment he appeals.

The Tamped Oil Roads Company, a corporation, had entered into contracts to improve five streets in the city of Los Angeles known as Budlong avenue, Griffin avenue, Matthews street, Scott street, and Montana street. Defendant S. A. McCready had loaned to the corporation certain sums of money, and had taken as security for such loans assignments of certain of the contracts with the city. Subsequently the defendant Bank of Los Angeles made loans to the Tamped Oil Roads Company, and took assignments of the same contracts, subject, however, to the claims of S. A. McCready. During the progress of the work, F. W. Whittier, the plaintiff in this action, was awarded the contracts for the cement work upon all of these streets. In payment of his claims for such work, orders were given by the Tamped Oil Roads Company to Whittier. Four of these orders were dated October 31, 1908, and by each of them S. A. McCready and the Bank of Los Angeles were instructed to turn over to F. W. Whittier sufficient bonds to cover the bill of Whittier for the work done on the street mentioned in the order; the approximate amount being specified in each demand, respectively, as follows: $1,046.90 for Budlong avenue, $1,107.54 for Griffin avenue, $1,084.60 for Matthews street, and $2,948.44 for Montana street; amounts aggregating $6,187.48. On each claim the proper officer of the Bank of Los Angeles wrote, "The above order accepted for whatever the equity of the Tamped Oil Roads Company may be." These acceptances were written on the date of the orders themselves, October 31, 1908. Some time in December, 1908, the Tamped Oil Roads Company gave to Whittier a similar order for cement work done on Scott street. The amount demanded was $3,956.55, and the order was accepted precisely as the others had been. It will be seen that orders, aggregating something over $10,000, had thus been provisionally accepted by the Bank of Los Angeles prior to the year 1909. Before the acceptances of October 31, 1908, McCready and the Bank of Los Angeles had advanced to the Tamped Oil Roads Company on its interest-bearing notes secured by assignments of contracts, sums amounting in all to approximately $15,000. Between that date and December 12, 1908, the Tamped Oil Roads Company gave to the Bank of Los Angeles its notes for sums which amounted in the aggregate to $1,500.

By March 1, 1909, it had become apparent that the Tamped Oil Roads Company was insolvent and unable to complete its contracts with reference to Montana and Scott streets, and on that day an agreement was made, whereby Whittier undertook to finish the work on said streets. This contract was in writing. In it the Tamped Oil Roads Company, McCready, and the Bank of Los Angeles appeared as parties of the first part, and Whittier as the party of the second part. It recited the existence of the contracts for the work on the two streets, specified that McCready and the Bank of Los Angeles had certain interest in said contracts for money loaned for constructing said work, recited that the work had not been fully accomplished, and declared that the parties of the first part desired Whittier to complete the contracts for the street work. Then follows Whittier's engagement to do the work for the sum of $2,600. It was further agreed that this contract should in no wise affect or change the rights of Whittier under his arrangement with the Tamped Oil Roads Company to furnish the cement work for the two streets. The work under this agreement was done by Whittier, and he was paid $2,600, furnished by the Bank of Los Angeles and McCready in equal portions. This money was advanced ostensibly to the Tamped Oil Roads Company on the note of Thomas S. Hutton, its general manager, and was secured by a pledge of the capital stock of the company.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

On August 6, 1909, the plaintiff owed the Bank of Los Angeles and McCready $3,244.51, and this indebtedness was paid on that date, at Whittier's request, from the proceeds of the Scott street contract. On August 9, 1909, the Tamped Oil Roads Company gave the Bank of Los Angeles written instructions, which were in part as follows: "We desire, direct and instruct that the various obligations of the Tamped Oiled Roads Company to S. A. McCready and to your bank, be paid (so far as the funds remaining after the reservations below mentioned will permit) in the order of their dates—the oldest first. In the application of the various funds of the Tamped Oiled Roads Company now in your hands and yet to be received by you, to the payment of your various indebtednesses, you will pay the said indebtednesses from the following sources: (1) Take all but $1,046.90 of the proceeds of Budlong Ave. (2) Take all but $1,107.54 of the proceeds of Griffin Ave. (3) Take all but $1,084.60 of the proceeds of Matthews St. (4) Take all but $2,948.44 of the proceeds of Montana St. These various reservations are for the purpose of paying the orders of Mr. F. W. Whittier, dated October 31, 1908. If, after making the above applications and reservations, there should be an unpaid balance on the Tamped Oiled Roads Company's indebtedness to you incurred prior to October 31, 1908, then you shall pay any such deficiency thus remaining from the amounts above reserved for F. W. Whittier."

[1, 2] Appellant's principal contentions are (1) that plaintiff's orders should have been given priority over the $2,600 advanced March 1, 1909, for the completion of the work on Montana and Scott streets; and (2) that they should have taken precedence also of the notes, aggregating $1,500, given to cover advances made after the provisional acceptances of the orders of October 31, 1908. On the trial Witness Callander, who was an officer of the Bank of Los Angeles, testified, over appellant's objection, that at the time of the making of the contract with Whittier for the completion of Scott and Montana streets there was a parol agreement between the parties to the written contract that the $2,600 advanced by McCready and the bank, for the purpose of paying appellant, should be repaid from the first collections that might come in for the finished work upon those two streets. Appellant insists that the admission of evidence of such parol agreement was in violation of sections 1624, 1625, and 1698 of the Civil Code, and section 1856 of the Code of Civil Procedure. As there was at the date of the written agreement sufficient money in the possession of the Bank of Los Angeles, collected on work performed on the four streets, exclusive of Scott street, to pay all of appellant's claims covered by the orders of October 31, 1908, appellant contends that this money was equitably his own, and that any agreement, whereby he should be obligated to permit the repayment of the note signed by Hutton out of that fund, would necessarily be in writing in order that it might be available against him; and that the introduction of parol testimony to establish such a contract is an endeavor to make him responsible for the "debt, default, or miscarriage" of another, by proof of a verbal agreement. Section 1624, subd. 2, Civ. Code. Respondent's answer to this is that Whittier's orders were accepted, subject to the equity of the Tamped Oil Roads Company, and that he took the acceptances with full knowledge that there might not be any surplus to which such orders could attach. On October 19, 1908, when the bank made a loan on a note from the Tamped Oil Roads Company for $3,500, accompanied by a second assignment of all contracts theretofore assigned, there was also a separate written assignment of the Scott street and Matthews street contracts, which was "given as a partial security for a loan made by the Bank of Los Angeles to the Tamped Oil Roads Company"; said loan bearing even date therewith. At the same time, there was a verbal agreement between the same parties that advances should be made, if necessary, up to $5,000, secured by the contracts so assigned. Such verbal agreement was not one by which the terms of the written contract were sought to be varied, but, as the court below aptly said, was admissible in evidence "to show a separate agreement about *collateral* on the loans thereafter to be made." When Whittier presented his orders for acceptance, he was informed of the engagement of the bank to furnish further sums for the completion of the contracts. There was ample testimony upon this point, and it was not improperly admitted, as varying the terms of the conditional acceptance, because that writing itself could not be understood without an explanation of the equities involved. Mr. Pirtle, an officer of the bank, testified that in informing Mr. Whittier why the bank would not accept his orders, except subject to the prior repayment of money loaned the contractor: "We told him it was because of the money due from the Tamped Oil Roads Company to Mr. McCready and the Bank of Los Angeles, and that we didn't know how much money it would require to complete those streets; that we couldn't tell what amount of money the Tamped Oil Roads Company would have over and above the amount furnished to complete them. Consequently we couldn't put ourselves in the position of assuming something, or accepting something, unless we knew that the money would be coming in to pay it." We think, in view of this testimony, that Whittier and the defendant Bank of Los Angeles contemplated an acceptance applicable only to the equities which might exist at the completion of all the contracts. Therefore we cannot regard Whittier as the equitable owner of the unapplied moneys collected and held by the bank when he made the verbal contract of March 1, 1909, that the $2,600 advanced should be repaid from the first collections for the finished work on the streets. It was necessary to the preservation of the security of the bank, McCready, and appellant that the street work should be finished, and it was in view of their common interest that the written contract of March 1, 1909, was made.

[3] But appellant most emphatically insists that any verbal contract made at that time must have been merged in the written agreement (Civ. Code, § 1625), and that the verbal agreement, if made, was of no avail because it sought to alter the terms of a written contract. Section 1698, Civ. Code, and section 1856, Code Civ. Proc. This would undoubtedly be true, if the written contract dealt in any way with the matter of the recoupment of the bank and McCready for their outlay of $2,600; but it does not treat of that subject. It is in its essence merely an engagement on the part of Whittier to finish the work on two streets, and the promise of the other parties to pay him $2,600. He fulfilled his engagement, and they performed their promise. In support of his position, appellant cites such cases as Harrison v. McCormick, 89 Cal. 328, 26 Pac. 830, 23 Am. St. Rep. 469; Gardiner v. McDonogh, 147 Cal. 315, 81 Pac. 964; Germain Fruit Co. v. Armsby Co., 153 Cal. 586, 96 Pac. 319; Beall v. Fisher, 95 Cal. 568, 30 Pac. 773; McDonald v. Poole, 113 Cal. 438, 45 Pac. 702; and Stone v. Harris, 146 Cal. 555, 80 Pac. 711. The first three of these are all cases in which evidence was offered to show sale by sample of commodities, mentioned in written contracts, and this court held that such evidence was not admissible to vary the terms of written contracts. The fourth case was one in which a judgment was reversed, because the plaintiff had been permitted to testify to prior agreements flatly contradicting the terms of a deed which he had accepted from defendant. The fifth case was one in which the price of certain street work was fixed by written contract, and defendant sought to establish a different price by oral testimony. Stone v. Harris was a case in which it was held that "a clause of the contract, giving to the trustees power to act as may be directed by a majority of the owners in acreage, cannot be construed to empower such majority to authorize a lien for any work not incidental to the levee system described in the contract." Respondent contends that the verbal agreement proven in this case comes under the principle laid down in such cases as Savings Bank of So. Cal. v. Asbury, 117 Cal. 103, 48 Pac. 1083, in which it was said: "The rule that an agreement in writing supersedes all prior or contemporaneous oral negotiations or stipulations concerning its matter has no application to a collateral agreement, upon which the instrument is silent, and which does not purport to affect the terms of the instrument." See, also, Wolters v. King, 119 Cal. 173, 51 Pac. 35; Sivers v. Sivers, 97 Cal. 519, 32 Pac. 571; Guidery v. Green, 95 Cal. 635, 30 Pac. 786. We think that this is the correct view of the matter. The consent to the repayment of the $2,600 which had enabled Whittier to complete the work, and thus protect his own security and that of the bank and McCready, was a most natural collateral agreement, and one that did not need to be in writing. The default of their common debtor made it highly desirable for Whittier and the other interested parties to have the work on the streets finished. Plaintiff received $2,600 for the work actually done under the written contract, and accomplished the payment of his notes for more than $3,000 from the money collected on the Scott street work. What more natural than that the creditors whose additional advances made such work possible should desire that their contributions to the common cause should operate as a first lien on the moneys collected from the city? And what more natural than a collateral agreement, whereby Whittier should consent to such an arrangement, when the advancement by the bank and McCready placed him in a position to make valuable his contingent claims, which the default of the original contractor, unless remedied by prompt measures to complete the unfinished work, might have rendered entirely valueless? There was no error in permitting proof of the oral agreement.

What has been said about the repayment of the $2,600 applies in large measure to the notes aggregating $1,500. We have previously discussed plaintiff's knowledge of the fact that the assignment of all contracts for street work as of October 19, 1908, had been made to secure future as well as past advances, and we have shown that his equities were to depend upon and be determined at the time of a final settlement. Therefore the advances equal to the sum of $1,500, although made after the signing of the provisional acceptances, created liens upon the moneys obtained from the city and those liens were payable prior to his claims.

[4] Appellant contends that the judgment should have run also against the Home Savings Bank, but, although it was shown that the Home Savings Bank had taken over certain assets of the Bank of Los Angeles there was no showing that the contracts and collections involved in this suit were among such assigned matters. Nor was there any error in refusing to give judgment against S. A. McCready and A. W. McCready, her attorney in fact, even if it be conceded that the Bank of Los Angeles acted as their agent. A. W. McCready testified positively that he never saw one of Whittier's orders from the Tamped Oil Roads Company until

the morning of the trial, and doubtless the court believed him. Additionally it must be remembered that this was an action for moneys had and received, and according to the uncontradicted testimony the Bank of Los Angeles had collected all payments made by the city on contracts for street work. There was no evidence that either of the McCreadys had received any of these moneys. No further alleged errors require notice.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

161 Cal. 319

In re FITZGERALD'S ESTATE.

(L. A. 2,958.)

(Supreme Court of California. Nov. 9, 1911.)

1. Wills (§ 647*)—Construction—Restraints on Marriage.

A will which gives to testator's widow the residue of his estate for life, "except as hereinafter qualified," and on her death the remainder to his son absolutely, and which declares that in the event of the remarriage of the widow the estate shall be divided, and one-third shall go to the widow and two-thirds to the son absolutely, gives to the widow all the residue during widowhood, and is not invalid, as in restraint of marriage, within Civ. Code, § 710, providing that conditions imposing restraints on marriage, except on the marriage of a minor, are void, but not affecting limitations, where the intent is not to forbid marriage, but only to give the use until marriage.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1533–1538; Dec. Dig. § 647.*]

2. Executors and Administrators (§ 315*)—Distribution of Estate—Construction of Will—Conclusiveness.

Where the construction of a will is necessarily presented for decision on a petition for final distribution, a decision, construing the will, is conclusive on the beneficiaries.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1309; Dec. Dig. § 315.*]

Department 1. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Proceedings for the final distribution of the estate of Frank A. Fitzgerald. From a decree of final distribution, Edward B. Fitzgerald appeals. Reversed and remanded.

Thos. C. Ridgway, for appellant. Hass, Garrett & Dunnigan and Charles S. Burnell, for respondent.

ANGELLOTTI, J. This is an appeal from a decree of final distribution.

The deceased died testate, leaving him surviving his wife, Lillian A. Fitzgerald, and a son, Edward B. Fitzgerald, and leaving an estate, consisting of real and personal property, valued at about $13,000. His will, after providing for the payment of debts, expenses of last sickness and burial, and costs of administration, and the payment of a legacy of $500 to his son, Edward B., provided as follows:

"3rd. To my wife, Lillian A. Fitzgerald, I give, devise and bequeath the entire use of the rest, residue and remainder of my estate, real and personal and wheresoever situated, for the term of her natural life, except as hereinafter qualified, and upon her death the remainder of my estate shall go to and vest absolutely in my son, Edward B. Fitzgerald.

"4. In the event, however, that my said wife shall mary again, then I will and direct that the provisions made in paragraph three, shall immediately cease and terminate, and my estate be divided as follows: to my wife, one-third and to my son two-thirds thereof absolutely and in fee simple, and in such case, the five hundred dollar legacy to my son named in paragraph two shall be estimated as a part of my estate in making said division, and if previously paid shall be deducted from the share to be received by him.

"5th. In the event that my said son shall die before me leaving no issue, I give, devise and bequeath to my wife, Lillian A. Fitzgerald, all my estate, real and personal and wheresoever situated, absolutely and without condition after the provisions of paragraph one have been met and satisfied. However, should my wife come into the possession of my entire estate as herein provided, and not marry again, or having married again have no issue, it is my desire and request that she will dispose of what may remain of my estate at her death in favor of my brother James E. Fitzgerald or his children, but this request shall in no way limit or affect her rights or power of absolute disposition of said estate."

By the will, the wife was appointed executrix without bonds.

The will having been admitted to probate, the administration of the estate was proceeded with to the settlement of the final account and distribution of the residue of the estate, valued at something over $12,000; all charges of administration, debts, and the legacy to the son, having been paid. The contest on distribution was between the widow, who has not married again, and the son; the widow claiming that the fourth provision of the will is void, as being a prohibited condition in restraint of marriage, and that she was entitled to have distributed to her the whole residue of the estate for the term of her natural life, with the remainder over on her death to the son. The lower court adopted this view, and distributed the residue of the estate accordingly, viz., "to said Lillian A. Fitzgerald for the term of her natural life, she to have the entire use thereof during said term, with the remainder on her death to Edward B. Fitzgerald." This is an appeal by said Edward B. Fitzgerald from such decree.

[1] In this state, the rule in regard to con-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ditions imposing restraints upon marriage is to be found in our Civil Code; section 710 thereof providing as follows: "Conditions imposing restraints upon marriage, except upon the marriage of a minor, are void; but this does not affect limitations where the intent was not to forbid marriage, but only to give the use until marriage." The main contention of appellant is that, in the case at bar, taking all of the provisions of the will together, there was no intent to forbid marriage, but simply an intent to give the use of all of the property until marriage, and that the provisions of the will should be construed as giving merely the use of all the property until marriage, and not an estate upon condition subsequent.

Learned counsel for the widow admits that all the authorities compel the conclusion that a gift to a wife "during such time as she shall remain my widow," or "until her second marriage," without other words indicating a life estate, would be a valid disposition, both under the common law and under section 710, Civil Code, and that the estate thus given would terminate ipso facto upon the remarriage of the wife. It is admitted that in such a case there would be no taking of a larger estate, determinable upon condition subsequent, but simply a valid limitation. But it is urged that the will is so written that a life estate in the residue was first given, and that it was then sought to make this life estate subject to a condition subsequent, working a divestiture in the event of remarriage.

Taking all of the provisions of the will together, the general intention of the testator is very clear. There is not the slightest indication that there was any design on his part to deter his wife from contracting another marriage, or that he had any objection whatever to her so doing. All of the provisions are consistent only with the idea that he felt it was fair and necessary that she should have the use of all the residue of his estate for her support and maintenance so long as she remained his widow, but that if she married again, thus presumably obtaining other means of support, the son ought properly to receive his fair share of the property at once, and the residue should be at once divided between the wife and the son in such proportions as seemed equitable. If she never contracted another marriage, the use of all the residue would be necessary to her during the term of her natural life, and the only thing he could fairly do for the son was to give him the remainder upon her death. If she did marry, her right to the use of all the residue should at once cease, and she would take absolutely and in fee one-third of such residue, and the son should take in the same way the remaining two-thirds. If the son should die before the testator, leaving no issue, thus leaving the wife as the sole person as to whom obligation existed to make provision for, she was to take absolutely and without condition the whole estate after payment of debts, etc., even though, as was expressly recognized, she might marry again. This was clearly the intended scheme of the testator, a scheme absolutely fair, and to which, in view of section 710, Civil Code, there can be no legal objection. Practically the only question here is whether this clear intent has been expressed in such legal form that the courts may carry it into execution. Respondent would have us, in an endeavor to defeat this intention, construe the provisions of the will as showing that the testator has adopted a prohibited mode of accomplishing his purpose, viz., that he gave his wife an estate *for her natural life*, and then attempted to make this life estate subject to a condition subsequent against remarriage. We do not think that such a construction of the language is at all necessary or reasonable.

The third and fourth provisions of the will before us, which must be read together, may certainly be reasonably construed as giving the use of the residue to the wife only to the time of her marriage. What is said in the third provision as to the use for the term of her natural life is immediately followed therein by the words "except as hereinafter qualified," and the qualification is, "in the event, however, that my said wife shall marry again," then the "provisions made in paragraph three shall immediately cease and terminate." It is precisely as though he had written "for and during her natural life, unless she shall marry again, in which case this provision shall immediately cease, and my estate be divided as follows," etc., which was substantially the language considered in Mann v. Jackson, 84 Me. 400, 24 Atl. 886, 16 L. R. A. 707, 30 Am. St. Rep. 358. The court there, noting the recognized distinction between *conditions* in restraint of marriage annexed to testamentary dispositions, and restraint on marriage contained in the very terms of the *limitation* of the estate given, and the policy of the courts, when not restrained by compulsory rules, "to seek to discover the intention of the testator from the whole instrument, rather than from any particular form of words," had no difficulty in deciding that, in view of the clear intent of the testator, evidenced by all the provisions of the will, "if it is here necessary and proper to recognize and maintain the distinction between a limitation and condition subsequent, the language of this will should be held to constitute a valid limitation, and not an illegal condition." In Holbrook v. Bunker, 213 Pa. 93, 62 Atl. 368, 2 L. R. A. (N. S.) 545, 110 Am. St. Rep. 537, the gift was to a niece of the testatrix "during the term of her natural life, or so long as she remains unmarried," with a gift over "in case of her death or marriage." It is apparent that there is no substantial distinction between this language and the language used in the will before us. It was the view of the court that it was the intent of the testatrix, not to prohibit marriage, but simply to provide an income to the legatee so long as she was unmarried and presumably dependent on her own exertions for her maintenance. It was substantially said that it would be a reproach to the law that, of two donors intending to do exactly the same thing, one shall succeed, and the other fail as a violator of law, merely because one scrivener knew what he was about, and wrote "so long as the donee shall remain unmarried," and the other was ignorant or careless, and wrote "for life, if so long the donee remains unmarried." The words of the will were held appropriate to show an intention, not to prohibit or restrain marriage, but simply to provide for the use of the property by the donee so long as she remained unmarried, and the provision was upheld as a valid limitation. As we have seen, the plain intent of the testator here was not in any degree to restrain or even to discourage marriage by his widow, but simply to postpone any division of the residue of his estate between her and his son while she remained unmarried, and to give to her during such time the sole use thereof. The language that he has used, taking all the provisions of the will together, is appropriate to show and does show this intention, and we are satisfied that there is nothing in any of the particular words used that requires us to hold that there is any prohibited *condition* imposing a restraint upon marriage.

Estate of Alexander, 149 Cal. 146, 85 Pac. 308, relied on by respondent, is not in point. The will in that case, by reason of its own peculiar language, was construed as showing the intent to give the property to a daughter "on condition that she remains unmarried." It was said that the language used imported a condition, and no reason appeared why it should be given any other construction. In this regard, the provisions of the will differed materially from those of the will before us, and the construction there given does not assist here. Assuming that the will did give to the daughter, on condition that she remains unmarried, it was simply held that the condition of remaining unmarried was given full operation by referring the time of its performance to the death of the testator, and that the daughter, not having married at that time, took an absolute fee in the property, free of condition. The portion of the opinion quoted by respondent, reading as follows, viz., "But if it be said that the intent was that this language should constitute a condition subsequent, terminating her estate in fee, and vesting it in others on her marriage at any time, the condition would be void, as in restraint of marriage," is, of course, correct; but it has no bearing whatever on the questions presented by the case at bar.

[2] It is not to be doubted that the question here discussed was necessarily presented for decision on the petition for final distribution, or that any decision reached thereon will be conclusive as to the respective rights of the devisees and legatees. See Jewell v. Pierce, 120 Cal. 79, 52 Pac. 132.

It follows from what we have said that the residue of the estate of deceased should be distributed in accord with the third and fourth provisions of the will.

The decree appealed from is reversed, and the matter remanded for proceedings, not inconsistent with the views herein expressed.

We concur: SHAW, J.; SLOSS, J.

161 Cal. 329

THOMSON v. SUPERIOR COURT OF MENDOCINO COUNTY et al.

(S. F. 5,821.)

(Supreme Court of California. Nov. 9, 1911.)

JUSTICES OF THE PEACE (§ 155*)—APPEAL—"RENDITION OF JUDGMENT."

Within Code Civ. Proc. § 974, authorizing appeal from a justice within a certain time after the "rendition" of the judgment, judgment is not rendered till it is "entered," and mere entry of memorandum of the verdict is not enough; as, while section 891 provides that in case of trial by jury judgment must be entered by the justice "at once," in conformity with the verdict, section 893 provides that it must be entered substantially in the form required by section 667, and that "no judgment shall have effect for any purpose till so entered."

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 527; Dec. Dig. § 155.*

For other definitions, see Words and Phrases, vol. 7, pp. 6082-6084.]

In Bank. Certiorari on the petition of Henry T. Thomson, directed to the Superior Court of the County of Mendocino and J. Q. White, judge thereof. Writ dismissed.

Preston & Preston, for petitioner. McNab & Hirsch, for respondents.

MELVIN, J. A writ of certiorari was issued from this court, directed to the superior court of Mendocino county and the judge thereof, requiring the certification here of the proceedings in the case of Ed. Gibson v. Henry T. Thomson et al., appealed to the said superior court from the justice's court of Round Valley township, county of Mendocino. In his petition, Thomson prayed for a writ of certiorari and for mandate, to compel the setting of the appealed case for trial in the superior court.

The action in the justice's court was in claim and delivery. Trial was had before a jury, and a verdict in favor of the plaintiff was rendered on June 25, 1910. On the same day, the justice of the peace made an entry in his docket as follows: "June 25. Court called and a jury of twelve men sworn to try the case. After hearing the evidence they brought in a verdict for plaintiff for the return of the horse or $100.00 in lieu thereof, and costs of suit." On June 27th plaintiff served and filed his memorandum of costs. On June 30th defendant Thomson's attorneys prepared his notice of appeal to the superior court, and served it upon plaintiff. Thomson's attorneys also caused an undertaking on appeal in the sum of $300 to be prepared. About July 18th the notice of appeal was sent to the justice of the peace by the attorneys for Thomson, accompanied by a letter, in which he was requested to make sure that the judgment was entered as of June 25, 1910, and to file the notice of appeal before filing the bond. Similar directions were sent with the form of appeal bond to the defendant, who caused it to be signed by two sureties. It was then given to the justice for filing. The undertaking, however, was filed July 18, 1910, and the notice of appeal on July 20th, 19 days after service of said notice on the plaintiff. On the 15th of August, 1910, the justice of the peace entered in his docket a formal judgment.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

These proceedings were duly certified to the superior court, and respondent in that cause moved said court to dismiss the appeal upon the grounds that (1) it was premature, as no judgment had been entered on June 25, 1910, and no appeal had been taken within 30 days after the entry of judgment of August 15, 1910; and that (2) no undertaking on appeal had been filed with the justice of the peace. The motion was granted upon both grounds; the court basing the ruling as to the second ground upon the circumstance that the undertaking was filed before and not within 30 days after the filing of the notice of appeal. The superior court also denied appellant Thomson's motion to set the cause for trial. In the answer to the petition herein, counsel for respondent point out the fact that the undertaking on appeal, although it contains a form of verification, signed by both sureties, shows no signature to the jurat by the justice of the peace, or any other person empowered to administer and certify oaths.

The most important question for consideration is whether or not the entry of the verdict by the justice of the peace on June 25, 1910, was a sufficient compliance with the law's requirement that the judgment shall be entered. Section 893 of the Code of Civil Procedure provides that: "The judgment of a justice of the peace must be entered substantially in the form required in section 667, and where the defendant is subject to arrest and imprisonment thereon, the fact must be stated in the judgment. No judgment shall have effect for any purpose until so entered." The last sentence was added to the section in 1907. Respondent contends that by the addition of the final sentence the Legislature intended to place appeals from justices' courts upon the same footing as those taken from judgments of the superior court, and to make the section above quoted analogous to section 664 of the same Code. He insists, therefore, that an appeal taken from a judgment in a justice's court prior to the final entry of such judgment is premature, and must be dismissed; citing McHugh v. Adkins, 117 Cal. 228, 49 Pac. 2; Bell v. Staacke, 137 Cal. 307, 70 Pac. 171; Estate of More, 143 Cal. 493, 77 Pac. 407. In reply to the contention that the memorandum of the jury's verdict in the docket is practically an entry of the judgment, he insists that, since section 667 of the Code of Civil Procedure, to which reference is made by section 893 of the same Code, prescribes the form of a judgment, the form has become substance, citing Simmons v. McCarthy, 118 Cal. 624, 50 Pac. 761. Our attention is also called to the fact that the justice is required to enter in his docket separately "the verdict of the jury and when received," and "the judgment of the court specifying the costs included and the time when rendered." Subdivisions 8 and 9 of section 911, Code Civ. Proc.

Petitioner calls our attention to Lynch v. Kelly, 41 Cal. 233, and Montgomery v. Superior Court, 68 Cal. 407, 9 Pac. 720, as having settled the question here presented. But respondent insists that those decisions are not now in point, because they dealt with the law as it existed before the mandatory provision contained in the last sentence of section 893, Code of Civil Procedure, had become a part of that section. The former case was one in which there was an attempt to set aside a sale, made under an execution issued from a justice's court, on the ground that no formal entry of judgment had been made prior to the issuance of execution. Whether there could be an appeal from a judgment when no judgment had been entered was not considered. The case of Montgomery v. Superior Court, supra, was considered by the District Court of Appeal of the Third appellate district, in the recent case of June v. Superior Court, 116 Pac. 293. The court was considering a case exactly like the one before us in the particular that an attempted appeal from a judgment of a justice's court had been dismissed for want of jurisdiction, where the transcript of the justice's docket showed only an entry of the verdict of the jury. The court, by Mr. Presiding Justice Chipman said: "Section 974, Code of Civil Procedure, provides that: 'Any person dissatisfied with a judgment rendered in a civil action in a police or justice's court, may appeal therefrom to the superior court of the county, at any time within thirty days after the rendition of the judgment.' And the notice must state whether 'the appeal is taken from the whole or a part of the judgment.' Section 891, Code of Civil Procedure, reads: 'When a trial by a jury has been had, judgment must be entered by the justice at once, in conformity with the verdict.' And the judgment 'must be entered substantially in the form required in section six hundred and sixty-seven. * * * No judgment shall have effect for any purpose until so entered.' Section 893, Code Civ. Proc. It seems to us that the appeal was prematurely taken, and that the superior court did not acquire jurisdiction thereby. Montgomery v. Superior Court, 68 Cal. 407, 9 Pac. 720, is cited by petitioner in support of the claim that the verdict was a judgment, within the meaning of the statute. In that case the justice's docket contained the following entry: 'Jury fees paid by defendant and judgment entered for the defendant for costs of suit. Defendant's costs being $25, for witness and jury fees, and also the sum of $1.75 for constable fees, total $26.75. Plaintiff's costs being $17.' It further appears that the petitioner went to trial in the superior court, and, without objection to the regularity of any proceedings, defended the case on its merits. Said the court: 'Having thus taken the chances of obtaining a verdict in his favor, we think his objection now comes too late.' It was also held that the court had jurisdiction, because the justice's record showed 'that a judgment had been entered in conformity with the verdict, and appears to be in all respects regular and sufficient.' We do not think that the justice must formulate a judgment with that particularity required of judgments required to be entered in the superior court; but that he should make some entry in his docket, showing that he has rendered judgment on the verdict, we do think is essential to a substantial compliance with the statute. His duty to enter judgment is in a sense ministerial, and its performance could probably be enforced by mandate; but nevertheless the statute requires this of him. Until such entry is made, there is no judgment from which an appeal may be taken, and, if the appeal is taken before the justice enters judgment on the verdict, it confers no jurisdiction on the superior court." We see no escape from the conclusion reached in the above case.

Our attention has been called to the difference between section 939 of the Code of Civil Procedure and section 974 of the same Code; the one providing that an appeal from a judgment in a court of record may not be taken until after the *entry* of judgment, while the time for an appeal from a judgment in a justice's court begins to run upon its *rendition*. We think it is apparent from an examination of the section of our Code, relating to justices' courts, that a judgment therein is not "rendered" until it is "entered," or can legally be held to be "entered." There is no other way of "rendering" a judgment in such a court. See sections 891, 892, and 893, Code Civ. Proc. It is in this sense that the word should be held to be used in section 974, Code of Civil Procedure. Doubtless it is the justice's duty to enter the judgment promptly. Section 891, Code Civ. Proc. But, until he does so, there is no "rendition" of the judgment, in the sense used in section 974. If he refuse, he may be compelled to act.

Our conclusion upon the point discussed above makes it unnecessary to review the other questions presented by the record.

Let the writ be dismissed.

We concur: ANGELLOTTI, J.; LORIGAN, J.; SLOSS, J.; SHAW, J.; HENSHAW, J.

161 Cal. 295

LANG v. LILLEY & THURSTON CO. et al.

(S. F. 5,925.)

(Supreme Court of California. Nov. 7, 1911.)

APPEAL AND ERROR (§ 607*)—RECORD—MANNER OF PROCURING.

Code Civ. Proc. §§ 941a, 941b, 941c, enacted by St. 1907, p. 753, authorizing the taking of an appeal by the filing of a notice of appeal in the office of the clerk of the trial court, and sections 953a, 953b, 953c, enacted by St. 1907, p. 750, providing that when an appeal is taken a typewritten transcript may be made and filed, are independent, and where an appeal is taken under the first sections appellant may file a printed transcript and copies thereof as required by the rules of the Supreme Court, or he may file the typewritten transcript, or where he takes an appeal by serving and filing a notice of appeal and undertaking, as authorized by section 940, he may support it either by a transcript prepared and filed under sections 953a, 953b, 953c, or by a transcript printed and filed as directed by the rules of the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 607.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Joakim Lang, as administrator of Albert Lang, deceased, against the Lilley & Thurston Company and another. From a judgment for defendants, plaintiff appeals. Motion to dismiss appeal denied.

Costello & Costello, for appellant. Samuel Rosenheim and Bernard Silverstein, for respondents.

PER CURIAM. The respondents move to dismiss the appeal on the ground that no proper transcript on appeal was filed within the time allowed by the rules of this court. The appeal is from the judgment only.

The facts upon which the motion to dismiss is based are that the appeal was taken in the manner provided in sections 941a, 941b, and 941c of the Code of Civil Procedure;

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that the transcript is printed and filed in this court in accord with our rules; and that no notice was given to the clerk to prepare a transcript on appeal, and it was not prepared in the manner provided in sections 953a, 953b, and 953c of said Code.

The act of 1907, enacting sections 941a, 941b, and 941c as new sections of the Code of Civil Procedure (Stats. 1907, p. 753), provides that an appeal may be taken by the filing of a notice of appeal in the office of the clerk of the superior court. Under this mode of taking an appeal, no undertaking on appeal need be given, and the notice of appeal need not be served upon the adverse party.

The act of 1907, enacting sections 953a, 953b, and 953c as new sections of said Code (Stats. 1907, p. 750), provides that, when an appeal is taken, a typewritten transcript on appeal may be made up, as therein directed, and may be filed without printed copies.

These two statutes are entirely independent of each other. If an appeal is taken under sections 941a, 941b, and 941c, the appellant may follow it up by filing a printed transcript and copies thereof, as required by the rules of the Supreme Court, or, at his option, by filing the typewritten transcript authorized by sections 953a, 953b, and 953c. Conversely, if he takes his appeal as provided in section 940, Code of Civil Procedure, by serving and filing a notice of appeal and undertaking on appeal, he may support such appeal either by a transcript prepared and filed under sections 953a, 953b, and 953c, or by a transcript printed and filed as was customary previous to the enactment of those sections and as directed by the rules of this court.

The consequence is that the motion of the respondents is not well taken. The court has jurisdiction of the appeal by the filing of a notice either under section 940 or under sections 941a, etc., and that jurisdiction is not ousted by the method of preparing or filing the transcript. It may be gotten up and filed under the old method or under the new method, as the appellant may choose.

The motion is denied.

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161 Cal. 334

ERGO v. MERCED FALLS GAS & ELECTRIC CO. (Sac. 1,751.)

(Supreme Court of California. Nov. 9, 1911.)

1. Master and Servant (§ 236*)—Injury to Servant—Contributory Negligence.

A servant who momentarily forgets a known danger, merely because he fails to exercise his memory, and where nothing has happened to confuse or distract him, is guilty of contributory negligence, precluding a recovery for injuries received in consequence thereof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 681; Dec. Dig. § 236.*]

2. Master and Servant (§ 236*)—Injury to Servant—Contributory Negligence.

Where a servant knew that electric wires of his master were dangerous, and that for that reason he deemed it necessary to avoid them, and that his coming in contact with them was not due to ignorance of the danger, but due to his forgetfulness at the moment of doing a particular work in the line of his service, he was, as a matter of law, guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 681; Dec. Dig. § 236.*]

3. Trial (§ 295*)—Instructions—Construction.

A part of an instruction, when attacked as declaring an erroneous statement of law, cannot be taken from its context, nor separated from the other instructions given; but it must be construed with reference to the entire instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703–717; Dec. Dig. § 295.*]

In Bank. Appeal from Superior Court, Merced County; L. W. Fulkerth, Judge.

Action by D. J. Ergo against the Merced Falls Gas & Electric Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

F. G. Ostrander and C. H. Wilson, for appellant. F. W. Henderson, for respondent.

PER CURIAM. The defendant has appealed from the judgment below, and also from an order denying a new trial.

Plaintiff sued to recover damages caused by an electric shock received by him while he was in the service of the defendant. The basis of his complaint is that he was directed by defendant to work in a place where he would be in close proximity to the defendant's wires, charged with a high power and dangerous electric current, and that defendant negligently failed to inform him that the electricity was then turned on to the wires, or of the dangers therefrom; that he did not know the current was on, and was ignorant of the dangers thereof and of the means of avoiding shocks therefrom; and that, while working in that place as directed, he received a severe shock of electricity from said wires, causing the damage sued for.

The defendant denied that it had directed the plaintiff to work in the dangerous place alleged, and alleged that it gave the plaintiff directions to avoid the wires in question, and instructed him in regard to the dangers from the electricity carried by them; and that the accident was caused by his failing to observe due care with respect thereto, while in proximity to the wires. Inasmuch as we have concluded that the latter defense is established by the plaintiff's own testimony, we shall not refer to the place in which he was at work further than is necessary to elucidate his testimony.

The defendant is supplying electricity to the city of Merced and its inhabitants by electricity from a generating plant at Merced Falls, on the Merced river. It is carried on three wires to a transformer house in Merced, whence it is distributed to the consumers. The accident occurred at the transformer house, which was then in course of construction. Plaintiff was working for defendant as a plumber's helper, putting water pipes in said transformer house to connect with perforated cooling pipes on the roof thereof. The house had three roofs, but we are concerned with only two, which we shall call the main roof and the upper roof. The main roof covers the entire house. The upper roof covers only eight feet in width of the main roof, four feet on each side of the comb thereof, and is nearly five feet above the main roof, with walls extending from its eaves down to the main roof, both at the ends and sides. The cooling pipes were situated on the upper roof, one on each side of the crest. The plaintiff and a plumber named Bone were laying pipes to connect the water main with these cooling pipes. The three power wires, from one of which plaintiff received the shock, extend from a pole near the south end of the house into the space between the two roofs, and were there fastened to three insulators, 15 inches apart, on a cross arm, from which they were carried to the transformers. As plaintiff understood and undertook to execute the directions of the defendant with respect to the manner of attaching these connecting pipes, it was necessary to run the pipe into the space between these two roofs, and there, by means of an elbow, continue it by a so-called standpipe, about five feet long, through the roof to a connection with the cooling pipes. It was while he was engaged in attaching this standpipe to the elbow below, after it had been handed to him by Bone, who was on the upper roof above, through a hole which Bone had made in the roof for that purpose, that the plaintiff received the injury. On the north end of the house, there were other wires passing from the house, for the distribution of the current.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

In answer to special interrogatories, the jury found that the plaintiff believed that the wires at the point where he was then engaged were free from electric current and harmless, and that he had not been warned of the danger which might result from coming in contact with said wires sufficiently to enable him to appreciate the extent of the danger. It also found specially that he had not been warned to be careful of said wires. In view of the evidence, this finding must have been intended to mean that he had not been warned to be careful with respect to the wires entering the south end of the house. The evidence showed without conflict that he had been warned with regard to the wires at the north end.

In regard to the warning given to him by the defendant, plaintiff's testimony was as follows: One Parker, defendant's foreman in charge of a gang of men laying water mains, directed Bone and the plaintiff how they should lay the pipes. In doing so, he first placed a ladder at the north end of the house, going up the ladder to the top of the roof; plaintiff following next up the ladder, and Bone coming last. The wires passing out of the north end of the house came within about 18 inches of the ladder. As they ascended the ladder, Parker said, "Look out for the wires." These wires were then in plain sight, and no others were visible from that point. This was the only warning that was given to the plaintiff. Parker, it is true, said that he told Bone and Ergo how to lay the pipes, and directed them "to keep away from all wires, as they were dangerous." In view of the verdict in favor of the plaintiff, we must regard the plaintiff's testimony on this subject as correct, so far as it is inconsistent with that of Parker. It may be conceded that this warning would not have been sufficient to a person who was himself ignorant of the characteristics or dangers of electricity when carried on such wires. It appears, however, from the whole of the plaintiff's testimony that he was not so ignorant as to be unaware of this danger, although he endeavored to impress the jury with the fact that he was. The pleadings admit that at that time he was 23 years of age.

His testimony in chief on this point was in effect as follows: At the time he went into the space between the roofs to attach the standpipe, he did not know that there was a current of electricity passing over the wires at that end of the building, and did not think that there was. He did not know what the wires were. He knew they had nothing but common wire. He did not know that there were any electric wires, or anything about the wires, or that there were wires conducting the electricity from the plant of the defendant to the transformer. He had never had any experience in electrical work, and knew nothing about the handling of electrical wires.

His testimony on cross-examination was as follows: When 12 years of age he went to work as cashboy in a big Chicago department store, which was lighted by electricity. The city of Chicago was also lighted by electricity at that time. He knew that electricity furnished light, but did not know it caused the light. He had never heard that, and had never paid any attention to it. He had lived six months in Alameda, which city was lighted by electricity, and had electric cars running. He had ridden on them often, and had seen the motormen stop and start the cars, but had never asked any questions about it, and did not know how they were propelled. He had seen them climb the hills in San Francisco, and had thought it singular that they could do it without horses, but made no inquiry, and knew not how it was done, nor what the power was. The city of Merced was lighted with electricity, and he had lived there four or five years immediately prior to the accident. He had seen pumps working in Merced with wires connecting with them, but did not make any inquiry about them. He was absolutely ignorant of what is meant by a current of electricity, or a live wire, and he did not know that electric wires carried a force of electricity or power that was used for power and lights. When he was cautioned to look out for the wires, he understood that it was dangerous to come in contact with them, and that he must keep away from them. When Parker showed him how to lay the pipe at the south end of the building, where the injury occurred, he gave no warning to be careful of the wires. When he went in between the two roofs to attach the standpipe, he saw the three wires leading in there, and was careful to avoid them. Being asked "Why?" he said, "In case there was electricity in them, and in case there was not," and added that if there was he would avoid the wire, but that he did not know that it would be dangerous if he came in contact with it, nor whether the caution given applied to the wires at the south end or not. At the moment he was attaching the standpipe to the elbow, he did not pay any attention how close he was to the nearest wire. He was then busy getting the pipe together, and wanted to be quick, because he and Bone had been told that they were slow, and that they were to hurry the work. This, he supposed, caused him to forget everything about the wires at the moment of adjusting the pipe, although he had thought of them a moment before. He saw the wires above him after he got in between the roofs, but when Bone passed the piece of pipe through the hole in the roof down to him he took hold of it, and then the wires passed out of his mind entirely. He attempted to insert the pipe into the elbow, received the electric shock, and was rendered unconscious. The jury found that the piece of standpipe, in order to extend from the roof above to the elbow, must be passed within 7 inches of one or more of the wires.

[1, 2] It is obvious from this testimony that the defendant was aware of the fact that the wires at the south end of the transformer house were dangerous, and that for that reason he deemed it necessary to avoid them, and that his coming in contact with them was not due to ignorance of the danger, but to his forgetfulness thereof at the moment of attaching the pipe. The case is not like Giraudi v. Electric Imp. Co., 107 Cal. 125, 40 Pac. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114, and similar cases, where it is said that a momentary failure to recollect something which had been observed some time in the past, when there is no reason or occasion to take note of it, does not, as matter of law, constitute negligence, but may or may not be negligence in fact according to the circumstances, and that in such a case it is for the jury to consider whether or not it was negligence. There was nothing unusual or unexpected in the work the plaintiff was then doing. The complaint that they were slow and the order to hurry up was made to them in the afternoon of the previous day. There was no emergency or unexpected event at the moment of attaching the pipe to confuse or agitate him; no sudden necessity for haste or hurry in that particular operation, or at that moment, to distract his attention from the wires. He had them in mind the moment before, and avoided them. It is negligence for one thus to remember and avoid a known danger in one moment, and forget it the next, when nothing has happened to confuse or distract him, or cause such forgetfulness, except his own failure to exercise his memory. The case is not one of the exceptional kind, in which such forgetfulness may not be incompatible with reasonable care. Brett v. Frank, 153 Cal. 272, 94 Pac. 1051. It follows therefore that the injury the plaintiff received was caused in part at least by his own contributory negligence. Such being the case, he cannot recover from the defendant the damages caused thereby.

[3] The defendant claims that the court erred in instructing the jury as to what constitutes a preponderance of the evidence. A part of the instruction complained of is as follows: "If the weight of all the evidence in the case tending to prove the fact is of greater weight than all the evidence tending to disprove the fact, then the fact is said to be proven by a preponderance of the evidence." This passage taken alone is erroneous. It is obvious that the evidence tending to prove a fact might be so slight that it would fail to satisfy the jury of the existence of the fact, and yet it might be of greater weight than other evidence introduced, which would tend to disprove the fact. In such case the fact could not be said to be proven, either by a preponderance of the evidence or at all. But this passage cannot be thus taken from the context, nor separated from the other instructions given. It was contained in an instruction pointing out to the jury the difference between the proof, beyond a reasonable doubt, that was necessary to justify a conviction in a criminal case, and the proof by a preponderance of the evidence, necessary in a civil case. In instruction 10, given at the request of the defendant, the court charged that: "The rules applicable to a case of this character cannot be given you in a single sentence, and that there must necessarily be many exceptions and modifications to many of the rules of law that I give to you. For that reason, you must consider this charge as a whole, and so apply it as a whole to all the evidence in this case. You are not at liberty to judge the evidence by some single rule that you may pick out from this charge, and which seems to meet with your approval, but you must judge the evidence by all of the rules, with their exceptions and modifications, as I give them to you in this charge." Other instructions declare that all the facts necessary to establish the plaintiff's case must be proven by a pre-

ponderance of the evidence. Instruction 31, given at the request of the defendant, was in part as follows: "The burden of proving carelessness or negligence rests on the plaintiff, and in this case, before plaintiff is entitled to your verdict, he must produce a preponderance of the evidence; that is to say, show to a moral certainty, or, in other words, introduce that degree of proof that produces conviction in an unprejudiced mind, that the defendant was guilty of carelessness or negligence directly causing the accident and injury complained of. * * * All that is required of defendant is that it produce evidence enough to offset the effect of plaintiff's evidence, and if, at the end of the case, the plaintiff has not shown by a preponderance of evidence that the defendant was guilty of carelessness or negligence directly causing the accident or injury complained of, or if the evidence is equally balanced, or if you are satisfied from the evidence that the accident was due to the carelessness or negligence of the plaintiff, or that by the exercise of ordinary care plaintiff could have guarded against or prevented the same, then I instruct you that your verdict in this case must be in favor of the defendant." In view of these latter instructions, we cannot say that the passage from the instruction first quoted would have been sufficiently injurious of itself to have justified the reversal of the order denying a new trial. But for the reasons heretofore given the motion should have been granted.

The judgment and order are reversed.

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17 Cal. App. 209

MARRE et al. v. UNION OIL CO. OF CALIFORNIA et al. (Civ. 895.)

(District Court of Appeal, Second District, California. Oct. 2, 1911. Rehearing Denied Nov. 1, 1911. Denied by Supreme Court Dec. 1, 1911.)

1. Injunction (§ 135*)—Remedy in Damages—Denial.

Where an owner of land granted defendant the right to lay pipe lines for carrying oil and telephone and telegraph lines, to be used in connection with the operation of such pipe lines, and defendant was not insolvent, it was not an abuse of discretion to refuse a preliminary injunction restraining the laying of the pipe lines, on the ground that they were to be used to carry water, and not petroleum, where in the affidavits of defendant it was stated that the pipe line would be used to transport oil and its products, and other fluids defendant might require in the conduct of its business.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 135.*]

2. Appeal and Error (§ 954*)—Discretion of Trial Court—Injunctions.

The issuance of a preliminary injunction rests in the discretion of the trial court, and will not be interfered with in the absence of an abuse of such discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3818-3821; Dec. Dig. § 954.*]

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by Gaspar O. Marre, individually and as administrator with the will annexed of the estate of Luigi Marre, and another, against the Union Oil Company of California and another. From an order vacating a temporary restraining order, plaintiffs appeal. Affirmed.

S. V. Wright, for appellants. Paul M. Gregg, for respondents.

JAMES, J. [1] Plaintiffs brought this action for the purpose of securing an injunction to prevent defendants from laying a pipe line along and across a certain strip of land in the county of San Luis Obispo for use in the conveyance of water. Upon the filing of a verified complaint an order was issued to defendants requiring them to appear before the court, and show cause why an injunction pendente lite should not be granted. A temporary restraining order was made to prevent the doing of the acts alleged as being threatened to be done on the part of defendants. The matter came on to be heard, the plaintiffs resting their application upon an amended complaint filed at the time of the hearing on the order to show cause. Dedefendant resisted the application for a temporary injunction, and filed in evidence two affidavits and two certain deeds, whereupon the court denied said application and vacated the temporary restraining order theretofore made. From this order the plaintiffs have appealed.

It appears without dispute by the amended complaint of plaintiffs, and the affidavits submitted on the part of defendants, that the strip of land along which the pipe line was threatened to be constructed was included within a certain right of way acquired for railroad purposes in 1883 by the Pacific Coast Railway Company, and over which said company was then operating a line of railroad. The fee title to this land was admittedly in the estate of Luigi Marre, deceased, represented by the plaintiff Gaspar O. Marre as administrator thereof. In January, 1906, plaintiff Gaspar O. Marre as administrator, after due proceedings had authorizing him so to do, deeded to the defendant corporation certain lands, said deed including within its terms a grant of a right of way to defendant across and along land which included the right of way theretofore granted to the Pacific Coast Railway Company. This latter grant authorized defendant to "lay pipe lines for the carrying of petroleum oil and its by-products, and telephone and telegraph lines to be used in connection with the operation and maintenance of said pipe lines." over and along the property just mentioned. The contention of plaintiffs is that they were entitled to a temporary injunction because it was not denied on the part of defendant that the use to which the pipe line about to be constructed by it was to be put was to have water conveyed through the same and not petroleum oil or any of its by-products. It seems very clear to us from the recitals in the deed of conveyance by which the right of way for pipe lines was acquired by defendant that the uses for which the way was granted did not include the use of a pipe line for the conveyance of water. However, in one of the affidavits submitted on the part of defendant, the following statement appears: "That for the purpose of transporting oil and its products, and for the purpose of transporting such other fluids as it may require in the proper conduct of its business and have the right to transport by means of pipe lines, said defendant is now engaged in constructing a four-inch pipe line from Port San Luis to its said lands at Avila, which said pipe line is to be constructed of standard wrought iron capable of standing high pressure, and is adapted to and capable of being used for the transportation of any and all fluid substances." With this affidavit before it, the trial court then had evidence that a part at least of the uses to which the pipe line was to be put were those which could properly be claimed as the right of defendant under the terms of the conveyance made to it. It may be said that there was no sufficient denial of the fact asserted by plaintiffs, that among other uses the defendant proposed to have water conveyed through said pipe line. The relief asked for in the action included an injunction to restrain the laying of the pipe, as well as the transportation of water therethrough. Upon the evidence before it the court was justified in concluding that there was insufficient ground to entitle plaintiffs to an injunction to prevent the laying of the pipe. While it may be admitted that, if the facts as shown to the court had constituted the whole of the evidence considered upon a final trial of the action, a sufficient showing would then be made out to entitle plaintiffs to an injunction to prevent water from being conveyed through the pipe line constructed in the manner proposed by defendant. Still it cannot be said that in denying the temporary writ the trial court abused the discretion committed to it. It does not appear that defendant is insolvent or could not respond to a claim for any damages which might be caused to plaintiffs by the commission of any of the acts complained of pending trial of the action, nor that any judgment which the court might finally make in favor of the plaintiffs would be rendered ineffectual because of the failure of the court to issue a temporary injunction.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[2] It is uniformly held that the matter of the issuance of a preliminary injunction is one resting in the sound discretion of the court, and that an appellate court will not interfere with the action of the trial judge in such a case, except where a palpable abuse of discretion is shown. Patterson v. Board of Supervisors, 50 Cal. 344; Efford v. South Pacific C. R. R. Co., 52 Cal. 277; White v. Nunan, 60 Cal. 406; Bigelow v. City of Los Angeles, 85 Cal. 614, 24 Pac. 778; Marks v. Weinstock, Lubin & Co., 121 Cal. 53, 53 Pac. 362.

The order is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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17 Cal. App. 203

REEG v. McARTHUR et al. (Civ. 999.)

(District Court of Appeal, Second District, California. Oct. 2, 1911.)

1. GUARANTY (§ 4*)—CONTRACTS—LIABILITY INCURRED.

A contract for an exchange of lands signed by defendant and codefendant required defendant to execute a note as a guaranty that the other party would realize the amount of a note out of certain personalty. *Held*, that any liability against codefendant concerning the note is limited to liability upon defendant's failure to execute the note, and that codefendant is not a guarantor of the payment thereof.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 3–6; Dec. Dig. § 4.*]

2. COURTS (§ 169*) — JURISDICTION — AMOUNT IN CONTROVERSY.

Where a complaint contains a count not stating a cause of action, and the remaining counts demand an aggregate sum of less than $300, the superior court has no jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 413–436; Dec. Dig. § 169.*]

3. PLEADING (§ 238*)—AMENDMENT—RIGHT TO AMEND.

Leave to amend a complaint is properly refused where it is clear that by no amendment could a sufficient cause of action be stated within the court's jurisdiction.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 238.*]

Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by George Reeg against Mrs. L. M. McArthur and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Hanson, Hackler & Heath, for appellant.
M. E. C. Munday, for respondents.

JAMES, J. [1] This action was brought by plaintiff to recover certain sums of money from the defendants; separate causes of action being set forth in four different counts in the amended complaint. These alleged causes of action were founded upon an agreement entered into between plaintiff and defendants, whereby certain real property in the state of Minnesota belonging to C. W. McArthur was agreed to be exchanged for certain real property belonging to one Mary K. Reeg, which was located in the county of Los Angeles. The plaintiff, George Reeg, prosecuted this action as the assignee of the said Mary K. Reeg. A demurrer to the amended complaint interposed on behalf of defendant Mrs. L. M. McArthur was sustained by the court without leave to amend, and judgment followed accordingly. From this judgment plaintiff appeals.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The agreement for the exchange of the real property is attached to the amended complaint as an exhibit, and recites the conditions which were to affect the transaction. Among other things, it is provided that the title to the land of C. W. McArthur was to be conveyed clear, except that a certain mortgage of $3,000 was to be assumed by Mary K. Reeg, and the following condition was then inserted in the agreement: "Said C. W. McArthur to execute a note for $500 payable on or before 1 yr. after date. Said note is to be given as a guarantee that she (meaning Mary K. Reeg) will receive $500 out of person property such as hay, grain, horse and buggy and amt. of rent still due from tenant, all of which is now on the 1st above des. piece of property." The agreement was signed by C. W. McArthur, the latter also affixing the name of L. M. McArthur thereto, which we must assume was done with authority of the latter. The first cause of action set out in the complaint refers to the matter of price obtained for the personal property, and it is there alleged that $40 only was all that Mary K. Reeg received upon a sale of said personal property, leaving a balance of $460 which it was alleged was due from defendants on that account. In the cause of action referred to it is alleged that the defendant C. W. McArthur executed the $500 note in accordance with the terms of the agreement. If the defendant Mrs. L. M. McArthur had any liability imposed upon her with respect to this promissory note, it was only a liability which might accrue upon the failure of C. W. McArthur to execute the note which he had agreed to execute. Under none of the conditions stated in the writing, can it be said that Mrs. L. M. McArthur became a guarantor of the payment of the note of C. W. McArthur. The amended complaint, therefore, considering the first count thereof alone, stated no cause of action against defendant L. M. McArthur, and the demurrer thereto was properly sustained by the court.

[2] In the other three counts of the amended complaint, plaintiff made claim for certain moneys alleged to be due as interest on a mortgage, unpaid taxes, etc. The aggregate money demand of said causes of action did not amount to the sum of $300, and therefore the superior court had no jurisdiction to entertain them. By the demurrer interposed by defendant L. M. McArthur the ground of want of jurisdiction was assigned as an objection; and with the first cause of action eliminated from consideration, as it must be for the reasons we have stated, the demurrer was properly sustained on the latter ground also.

[3] There was no error in the order made by the court denying plaintiff leave to amend, for the reason that it manifestly appeared that by no amendment could a sufficient cause of action be stated against Mrs. L. M. McArthur of which the superior court had jurisdiction.

The judgment is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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17 Cal. App. 205

SOUTHERN CALIFORNIA MUSIC CO. v. SKINNER. (Civ. 963.)

(District Court of Appeal, Second District, California. Oct. 2, 1911.)

SALES (§ 479*)—CONDITIONAL SALE—ACTION—PLEADING—COMPLAINT.

In an action to recover a money judgment, the complaint alleged that defendant in 1909 purchased a piano from plaintiff, executing his note and an agreement in payment therefor. The note was due in four years, and the agreement provided that defendant should pay in installments of $8 per month and that on default in any installment plaintiff might rescind the contract, and if such monthly payment was unpaid for more than 60 days the plaintiff might declare the whole sum due. The complaint further alleged that the defendant had defaulted and that plaintiff had declared the balance of the sum due. *Held*, that the complaint did not state a cause of action upon the note, for it was not due for four years, and no facts were alleged under which it might be declared due prior to the date provided, and it did not state a cause of action on the agreement because there was no allegation that defendant had been in default for 60 days.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1436; Dec. Dig. § 479.*]

Appeal from Superior Court, Orange County; Frank F. Oster, Judge.

Action by the Southern California Music Company against M. W. Skinner. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

F. C. Spencer, for appellant. George Clark, for respondent.

SHAW, J. Action to recover a money judgment. The complaint alleges a sale by plaintiff to defendant of a piano for the sum of $405; that on July 15, 1909, defendant executed and delivered to plaintiff his promissory note and agreement in payment therefor, a copy of which, it is alleged, is attached to the complaint; that no part of said sum of $405, other than the sum of $25, has been paid; that defendant has defaulted in his payments as provided in the agreement, and plaintiff has declared the balance of said sum due, no part of which balance has been paid. It is further alleged that by the terms of the note defendant agreed that should suit be brought to enforce the payment thereof 10 per cent. thereof should be added to any judgment rendered thereon as attorney's fees in said action. Following the complaint, as appears from the record, is a promissory note as follows: "380.-00. Los Angeles, Cal., July 15, 1909. Forty-eight months after date, for value received, I promise to pay to the order of Southern California Music Co. at their office in Los Angeles, California, three hundred and eighty dollars in lawful money of the United States, with interest at the rate of six per cent. per annum until paid. Should suit be brought to enforce the payment of this note it is agreed that 10 per cent. be added for attorney's fees, [Signed] M. W. Skinner." Following this, as shown by the record, is an agreement signed by defendant, by the terms of which he agreed to pay plaintiff the sum of $405 for the piano in the following manner, to wit: $25 cash on delivery of the instrument, and the balance in installments of $8 per month, payable on the 15th day of each month. It is further provided that, in case defendant fails to pay either of the monthly installments when due, plaintiff may rescind the contract and take possession of the piano, or, if such monthly payment remains due and unpaid for a period of 60 days, plaintiff may declare the whole sum still unpaid under the contract due and payable. Defendant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and also upon the ground that the same was uncertain, in that it could not be determined therefrom whether plaintiff's cause of action was based upon the promissory note, or upon the alleged agreement, or upon both. The demurrer was submitted to the court without argument and overruled, and upon the trial of the case the court gave plaintiff judgment for the sum of $380 and interest thereon, together with $38 attorney's fees, in accordance with the provision of the promissory note. Defendant appeals from this judgment.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

We think the demurrer should have been sustained upon both grounds. Not only is the complaint uncertain, as alleged in the demurrer, but, however it may be regarded, it clearly fails to state a cause of action. The suit was instituted some six months after the date of the note, but the note by its terms was not due until four years after the date thereof. The agreement contains no reference whatever to the note, and the complaint is silent as to any allegation of fact under which it might be declared due prior to the date when by its terms it was made payable. Hence no facts are alleged which could entitle plaintiff to a judgment upon the promissory note.

The complaint alleges "that defendant has defaulted in his payments as in said contract provided, and plaintiff has declared the balance of the said sum now due." It was no doubt the intention of plaintiff to allege facts which under the terms of the contract gave it the right to declare the whole sum due; but the agreement contains no provision under which the whole amount could be so declared merely because defendant had made default. The provision of the contract is that "if payments to be made under this contract shall be due and unpaid for a period of 60 days the plaintiff may at its option declare the balance still unpaid under this contract due and payable." To constitute a cause of action for a breach of the contract, assuming that such right exists, the complaint should not only allege that defendant has made default in the payment of one or more of the installments, but that such default has continued for the period of 60 days. It does not appear from the complaint that any installment, the payment of which was required under the terms of the contract, had been due and unpaid for such period.

For the reasons given, the judgment is reversed, and the trial court instructed to make an order sustaining defendant's demurrer.

We concur: ALLEN, P. J.; JAMES, J.

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17 Cal. App. 178

BARBREE et al. v. KINGSBURY, Register of State Land Office. (Civ. 869.)

(District Court of Appeal, Third District, California. Sept. 29, 1911. Rehearing Denied by Supreme Court Nov. 27, 1911.)

PUBLIC LANDS (§ 144*)—PATENTS—VALIDITY OF APPLICATION—AMOUNT APPLIED FOR.

Pol. Code, § 3495, provides that one desiring to purchase a tract of school lands, not less than the smallest legal subdivision mentioned in a certain section, must make affidavit whether the land is suitable for cultivation, and, if not, that applicant has not entered any part of such lands which, together with that now sought to be entered, exceeds 640 acres; and further provides that land unsuitable for cultivation may be sold in quantities not exceeding 640 acres to any one person. More than 25 years ago, petitioner's predecessor applied in good faith for school land; his affidavit being true, except that it called for an excess of 2.24 acres more than 640 acres. The price was paid in full in 1909. *Held*, that the "rule of approximation," requiring the acreage covered by the application to conform as nearly as practicable to the maximum prescribed by the statute, and permitting the claim, where the excess over the statutory amount is less than the deficiency would be, should a subdivision be excluded, should, under the circumstances, be applied, so that the excess in acreage covered by the application and affidavit would not render the application void, so as to prevent the issuance of a certificate for a patent.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 144.*]

Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

Petition by W. R. Barbree and another against W. S. Kingsbury, as Register of the State Land Office, for a writ of mandate. From an order denying the petition, petitioners appeal. Reversed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Wallace M. Pence, for appellants. U. S. Webb, Atty. Gen., and Malcolm C. Glenn, for respondent.

BURNETT, J. This is an appeal from an order denying an application for a writ of mandate to require respondent, pursuant to section 3519 of the Political Code, to issue the usual certificate to the Governor for the issuance of a patent for certain school lands. Petitioners claim the right to the patent, as the successors in interest to one Alfred Warren, the original applicant for said lands. On January 6, 1886, Warren filed his application or affidavit to purchase the lands therein described, and the controversy here grows out of the following averments in the said affidavit: "That said land is not suitable for cultivation. That he had not entered any portion of any lands mentioned in section 3,494 of the Political Code (to wit, the unsold portion of the 500,000 acres granted to the state for school purposes, the sixteenth and thirty-sixth sections, and the lands selected in lieu thereof), which, together with that now sought to be purchased, exceeds 642.24 acres. * * * That the township within which said land is situate was and had been surveyed and sectionized by the United States prior to the date upon which said affidavit was made or filed in said land office, and that said section 16 lies in one body in the form a square, and contains, according to said survey of the United States, 642 $^{24}/_{100}$ acres, and had no legal subdivision of said section 16 contains less than 40 acres or more than 42 acres."

Section 3495 of the Political Code prescribes the method for the purchase of state school lands, and provides that "any person desiring to purchase any portion not less than the smallest legal subdivision of any of the lands mentioned in section thirty-four hundred and ninety-four, situated in any township which has been surveyed by the United States must make an affidavit" containing certain averments, among them, "whether the land is or is not suitable for cultivation," and if the land is not suitable for cultivation the affidavit must state "that the applicant has not entered any portion of such lands, which together with that now sought to be entered, exceeds six hundred and forty acres." The section further provides that, "Lands unsuitable for cultivation may be sold in quantities not exceeding *six hundred and forty* acres to any one person."

No question is raised that Warren acted in good faith, that his affidavit was true in every respect, and that it was in proper form, except that it called for an excess of 2.24 acres over the quantity of land that the statute provides can be sold to one person. It is the contention of the respondent that only one construction is possible of said section of the Political Code, and that contention places the limit of purchase at 640 acres, which cannot be exceeded in any case. The logical conclusion of the contention would seem to be that Warren's application was and is nugatory and void, since it did not contain one of the important and essential elements required by the Code. It would follow that no patent could be legally issued to him or to his successors for any part of said land.

In Hildebrand v. Stewart, 41 Cal. 387, it is held that: "When the law, under which public lands are sold, requires certain acts to be performed as a prerequisite to the right to purchase, the courts cannot dispense with the performance of those acts by legalizing an entry made without complying with them." To the same effect are Woods v. Sawtelle, 46 Cal. 391; Botsford v. Howell, 52 Cal. 158; Millidge v. Hyde, 67 Cal. 5, 6 Pac. 852; and McKenzie v. Brandon, 71 Cal. 209, 12 Pac. 428.

The Hildebrand Case involved a contest between two claimants to the same land, arising before the Surveyor General, and transferred to the district court for adjudication, and it was held by the Supreme Court that the application to purchase by defendant was invalid and ineffectual to vest in him any right to the land by reason of the absence of the notice to the occupant or claimant of the house and corral then located upon said land, as required by the act under which defendant's attempted location was made.

In Woods v. Sawtelle, supra, at the time defendant made his application to purchase the land, plaintiff was in possession thereof, and he had been for more than three years. The defendant's application was approved by the Surveyor General, and a certificate of purchase was issued to him, and plaintiff's application made subsequently was rejected. The statute provided that if there was an adverse occupant for more than 60 days at the time an application to purchase was made the applicant must so state. There was an omission in that respect in defendant's said application, and the Supreme Court held that, by reason of his application being in proper form, plaintiff, who was the prior occupant, but the subsequent applicant, had the better right to make the purchase.

The contest in the Botsford Case, supra, was decided by the lower court in favor of plaintiff, but it was reversed by the Supreme Court, on the ground that the facts required by the statute must be stated in the application directly and positively; whereas plaintiff had stated them in the alternative form.

In Millidge v. Hyde, it was held that the demurrer to the complaint was properly sustained for the reason that plaintiff's application failed to state, as required by the statute, that: "There is no valid claim to such land other than that of the applicant; that he has not entered any land in part satisfaction of the unsold portion of the 500,000 acre grant, or of the grant in lieu of the sixteenth or thirty-sixth sections, which together with that now sought to be purchased exceeds 320 acres."

In McKenzie v. Brandon, supra, it was held that plaintiff stated in his affidavit what was not true, when he declared that there was no actual possession of the lands adverse to him, and it was decided that he had no claim to the title. These cases all involved contesting applicants, and it was rightly determined that the claimant complying with the requirements of the statute should be preferred to the one who was remiss.

It is undoubtedly true, also, as asserted by respondent, that "it has not been the policy of the state to sell large tracts of land, but rather, on the other hand, has it been the policy to encourage settlers to live on state lands, and to sell lands in small tracts." It is equally true, however, that the state should not assume the attitude of a wrongdoer, nor should the letter of the statute be applied in favor of injustice, where it is possible, by a liberal spirit of interpretation, to reach a righteous conclusion. The facts here, it may be said, are peculiar and persuasive in favor of the claim of petitioners. The application to purchase was made more than 25 years ago; the requisite portion of the purchase price was then paid, and for all these years the interest on the balance has been regularly tendered and accepted, and finally, on October 25, 1909, the balance of the purchase price was paid. The good faith of the transaction has not been questioned; there is no contesting applicant; no one has been wronged, and the excess of the land over 640 acres is so trifling, and of such little value, as to be scarcely worth considering.

When the application was made, and when it was approved by the Surveyor General, the agent of the state, and when he issued the certificate of purchase, it was probably considered by the purchaser and the seller that, under the peculiar circumstances, the "rule of approximation" should apply. This rule requires the acreage to conform, as nearly as practicable, to the maximum amount prescribed by the statute, but permits the claim, where the excess over the statutory amount is less than the deficiency would be, should a subdivision be excluded.

It is contended by appellants that the rule was adopted by the Land Department of the United States at an early date, and has been followed since. In re H. P. Sayles, 2 Land Dec. Dept. Int. 88, and other cases cited. It is pointed out that section 2304 of the Revised Statutes (U. S. Comp. St. 1901, p. 1413), relative to homesteads for soldiers and sailors, provides that "not exceeding 160 acres" shall be selected, but the rule of approximation is applied to that section (In re Dotson, 13 Land Dec. Dept. Int. p. 275); furthermore, a special act, relative to Nebraska lands, limits the amount of land for one individual to 640 acres, but the said rule is applied to this also. Circular 34, Land Dec. Dept. Int. 546. It is therefore argued that: "This rule of approximation was well known at the time of the amendment to section 3495, supra, and it must be presumed that the legislators were familiar with it, and that it was a matter of common knowledge at the time of the passage of the amendment in 1885, and that therefore the amendment was enacted with the intention that it would be interpreted according to the existing decisions of the department. U. S. v. Union Pac. R. R. Co., 91 U. S. 72 [23 L. Ed. 224]."

While not desiring to hold that the Surveyor General should be governed by this rule in all cases, nor even that he should give it effect at all in approving original applications for purchase, considering the equities involved herein, the small quantity of the excess over the statutory maximum, and the conduct of the state's officers through all these years, we think that justice requires the application of the rule here.

It is not necessary either to hold that the doctrine of equitable estoppel, growing out of the conduct of its officers, binds the state, as it does individuals under similar circumstances; but it must be apparent that justice and good conscience, which, Professor Pomeroy says, are the foundation of said doctrine, should not be laid out of view in interpreting the statute. If the contention here were between individuals, no court would hesitate to grant the petition, and we can see no reason why the said statute may not be construed in harmony with those equitable principles that are admittedly the basis of our jurisprudence, and which are recognized as controlling by all upright men.

The desire of respondent to require a strict observance of the statute is, of course, commendable, and if this were an application to purchase a different situation would be presented; but, in view of the facts already related, we think the patent should issue. The judgment is therefore reversed.

We concur: CHIPMAN, P. J.; HART, J.

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17 Cal. App. 184

In re DE VRIES' ESTATE. (Civ. 894.)

(District Court of Appeal, Third District, California. Sept. 29, 1911.)

1. WILLS (§ 634*)—ESTATE DEVISED—"VESTED" REMAINDER—"CONTINGENT."

The second clause of a will provided: "I give, devise, and bequeath all the property of which I may die seised and possessed * * * to my beloved wife for her natural life, the remainder thereof to my sons hereinafter named in proportions, for the time and upon the conditions hereinafter expressed." The fourth clause provided that, upon the termination of the wife's life estate, "I give and devise unto my son M. all those certain lots. * * * If my son M. should precede in death his wife and leave him no lawful issue surviving, and should such death of my son M. occur before the property herein devised and bequeathed to him vests in him, then, all the interests herein devised and bequeathed to said M. shall pass to and vest in" his wife absolutely. Other provisions showed that testator clearly understood the legal significance of words of present devise unqualified by other language. Civ. Code, § 694, provides that a future interest is vested when there is a person in being who would have a right to immediate possession upon the ceasing of the precedent interest. Section 695 provided that a future interest is contingent while the person in whom or the event upon which it is limited to take effect remains uncertain; and section 1341 provides that devises and bequests are presumed to vest at testator's death. *Held*, that son M. took a vested remainder in the estate devised to him immediately upon testator's death.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488–1510; Dec. Dig. § 634.*]

For other definitions, see Words and Phrases, vol. 2, p. 1498; vol. 8, pp. 7302–7309, 7827.]

2. WILLS (§ 634*)—ESTATE DEVISED—VESTED REMAINDER.

The intention of testator should control in determining whether a future interest devised is vested or contingent.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 634.*]

3. WILLS (§ 634*) — CONSTRUCTION — ESTATE DEVISED—VESTED REMAINDER.

In view of Civ. Code, § 1317, and the following sections, relating to the interpretation of wills, in determining whether a future interest is vested or contingent, testator's intention thereon must be gathered from the language of the will construed in view of established rules of construction.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488–1510; Dec. Dig. § 634.*]

4. WILLS (§ 634*)—ESTATE DEVISED—VESTED REMAINDER.

The test of whether a future estate devised is vested is whether there exists in an ascertained person a present fixed right of future enjoyment of the estate limited, which will take effect in possession immediately on the determination of the precedent estate, irrespective of any collateral event.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488–1510; Dec. Dig. § 634.*]

5. WILLS (§ 629*) — CONSTRUCTION — VESTED INTERESTS.

While testator's wishes will be effectuated, if possible, the law prefers to consider future estates as vested rather than contingent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1461, 1462; Dec. Dig. § 629.*]

6. WILLS (§ 629*)—ESTATE DEVISED—VESTED INTEREST.

The use of words of present gift in a will is construed as creating a vested interest, in the absence of other controlling circumstances.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 629.*]

7. WILLS (§ 634*)—ESTATE DEVISED—VESTED REMAINDER.

A provision that "upon the termination of said life estate I give, devise and bequeath all those certain lots," etc., to testator's son, in the absence of other provision or conditions, gave such son a vested remainder in the lots.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488–1510; Dec. Dig. § 634.*]

Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

In the matter of the estate of William H. De Vries, deceased. From an order denying a petition for a decree of partial distribution, Marion De Vries appeals. Reversed.

Marion De Vries, in pro. per. Nutter & Orr, for respondent.

HART, J. The single question submitted on this appeal, which is prosecuted from an order or decree denying the petition of the appellant for a decree of partial distribution of the estate of William H. De Vries, deceased, is whether the remainder to said appellant, provided for by the fourth clause of the last will and testament of said deceased, is vested or contingent. The court below, two of the judges thereof presiding at the hearing and concurring in the conclusion therein reached, held the remainder so devised to the appellant, Marion De Vries, to be contingent. The decision of the question presented here must obviously rest on the intention of the testator, and, in turn, such intention must be gathered from an interpretation of the language of the last will and testament of the testator.

The language of said testament particularly pertinent to this inquiry reads:

"Second. I give, devise and bequeath all the property of which I may die seised and possessed, both real and personal, to my beloved wife, Mary Jane De Vries, for her natural life, *the remainder thereof to my sons hereinafter named* in proportions for the time and upon the conditions hereinafter expressed: * * *

"Fourth. Upon the termination of the life estate hereby created in my wife, Mary Jane De Vries, I give and devise unto my son, Marion De Vries, all those certain lots, pieces and parcels of land, situate. * * *

"If my son, Marion De Vries, should precede in death his wife, Minnie L. De Vries, and leave him no lawful issue surviving, and should such death of my son, Marion De Vries, occur before the property herein devised and bequeathed to him *vests in him*, then, all the interests herein and hereby devised and bequeathed to said Marion De Vries shall pass to and vest in and become the property of said Minnie L. De Vries, my son, Marion's wife, absolutely and forever."

The contention of the appellant is that, under the terms of said will, that portion of the estate so devised to him vested in him, by virtue of the provisions of section 694 of the Civil Code, immediately upon the death of the testator. Reproduced in the transcript on appeal is the written opinion of the learned trial judges, in which they set forth their reasons for the conclusion reached by them adversely to the contention of appellant, and from said opinion we gather that their position is planted principally on their interpretation of the language of the clause of the testament devising to appellant out of the life estate a certain interest in remainder. The argument appears to be that the words,

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"*Upon the termination of the life estate hereby created in my wife, Mary Jane De Vries*, I give and devise to my son, Marion De Vries, all those certain lands," etc., clearly imply an intention on the part of the testator to fix "the time when said estate is to vest not only in interest but also in possession" as at the termination of the life estate. In other words, it is held by the court below that by use of the words "*upon* the termination of the life estate" the testator intended to say that the interest in remainder to Marion De Vries should not *vest* until *after* the determination of said life estate, and this construction of the testament, in so far as it affects the devise to the said Marion, is sustained, so the reasoning proceeds, by the provision for the wife of said Marion in the event that the latter should precede in death the former, leaving "him no lawful issue surviving."

[1] We are unable to assent to the construction thus given the instrument in question and the conclusion arrived at by the court below therefrom.

It is, of course, to be conceded that great difficulty often arises in determining whether a vested or contingent remainder was intended by the language of an instrument whose manifest purpose is to carve out of the same estate two or more separate and distinct interests—the one the right to the possession of which is to be enjoyed in præsenti and the others in futuro. Indeed, it is manifestly a much more simple task to formulate, as the law writers and the Legislature have done, a general distinction between vested and contingent future interests than to apply, in many instances, a distinction to concrete cases.

[2, 3] The general definitions of vested and contingent remainders, as given by the law writers and our Code, are sufficiently clear and explicit, yet, after all, the real point of decision in all cases where the question is whether a future interest created by devise or otherwise is vested or contingent is as to the intention of the testator or grantor in that regard, and such intention, as before stated and as is obviously true, must, in cases where construction is necessary, be gathered from the language of the instrument viewed by the light of established and accepted canons of construction. Section 1317 et seq., Civil Code.

In the case at bar, however, we have, upon a careful scrutiny of the whole testament by the aid of the rules to which we have referred and the reflected light of the adjudicated cases, found much less difficulty in reaching a conclusion as to the intention of the testator with regard to the fourth clause of his will than a mere glance at the instrument seemed to indicate.

But, before proceeding to an examination of the instrument itself, we may, with propriety, state a few general rules which apply to inquiries of the nature of the one presented here. "A future interest is vested," says our Civil Code, § 694, "when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property, upon the ceasing of the intermediate or precedent interest," and, continues the same Code, "a future interest is contingent, whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain." Section 695.

[4] In the case of the Estate of Washburn, 11 Cal. App. 735, 741, 106 Pac. 415, 418, this court, through Chipman, P. J., approves the definition of a vested remainder as it is given in 24 Am. & Eng. Ency. of Law (2d Ed.) p. 389, as follows: "The true criterion of a vested remainder is the existence in an ascertained person of a present fixed right of future enjoyment of the estate limited in remainder, which right will take effect in possession immediately on the determination of the precedent estate, irrespective of any collateral event, provided the estate in remainder does not determine before the precedent estate." In Haward et al. v. Peavey, 128 Ill. 430, 21 N. E. 503, 15 Am. St. Rep. 120, the subject of remainders is thus spoken of: "A remainder is said to be vested when a present interest passes to a party, to be enjoyed in the future, so that the estate is invariably fixed in a determinate person after the particular estate terminates, while a contingent remainder is one limited to take effect, either to a dubious and uncertain person, or upon a dubious and uncertain event. 2 Blackstone's Commentaries, 168. * * * But it does not necessarily follow that every estate in remainder which is subject to a contingency or condition is a contingent remainder. The condition may be precedent or subsequent. If the former, the remainder cannot vest until that which is contingent has happened, and thereby become certain. If the latter, the estate vests immediately, subject to be defeated by the happening of the condition" —citing cases. "It is," says Kent, 4 Commentaries, 202–206, "the uncertainty of the right of enjoyment, and not the uncertainty of its actual enjoyment, that renders the remainder contingent." The foregoing formulas, as before stated, are, of course, clear and easy of apprehension, but the important and often the difficult question then arises whether a present fixed right of future enjoyment of the estate limited in remainder exists in "an ascertained person."

[5] While it will always seek to effectuate the wishes of the testator, "the law prefers to consider future estates as vested." Estate of Washburn, supra. As is said in Farnum v. Farnum, 53 Conn. 278, 2 Atl. 327; "That the courts will incline in doubtful cases to construe a devise or legacy as vested rather than contingent is a familiar and well-settled rule. In some instances courts seem to have gone so far as to say that they will if possible construe it as vested. It is

enough for our present purpose to say that we ought to give this will that construction if its language will fairly admit of it." After reviewing the decisions of the courts of many jurisdictions, 24 Am. & Eng. Ency. of Law (2d Ed.) p. 392, says: "The courts have always regarded contingent estates with disfavor, and from the earliest times have inclined towards that construction which holds a remainder vested rather than that which considers it contingent, when the question is doubtful. It has even been said that, if there is the least doubt, advantage is to be taken of the circumstance occasioning that doubt to hold that the remainder is vested, and not contingent." In Williams v. Williams, 73 Cal. 99, 14 Pac. 394, our Supreme Court says: "The law favors the vesting of interests, and every interest will be presumed to vest, unless a contrary intention is clearly manifested." And, lastly upon this proposition, section 1341 of our Civil Code provides that "testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death." We have discovered no language anywhere in the testament before us that is inconsistent with the view that by the devise to Marion De Vries the testator intended to create in the former a vested future interest.

It will first be noted that the second clause of the testament under present consideration reads: "I *give, devise and bequeath* all the property of which I may die seised and possessed, both real and personal to my beloved wife, Mary Jane De Vries, for her natural life, *the remainder thereof to my sons hereinafter named,*" etc. It is declared by the learned trial judges in their written opinion that, if the foregoing "were the only provision of the will relating to the disposition of the testator's property, the question would be free from doubt." It is, of course, to be conceded that, if the devises subsequently made by the testator are inconsistent with the language of the second clause of the testament just quoted, such devises must prevail. In other words, while the language of the second clause of the will clearly indicates an intention to create vested remainders over to the sons, yet, if the specific devises in remainder to the sons subsequently created out of the property from which the life estate is carved are made subject to such contingencies as to the right of enjoyment as to clearly disclose an intention to create contingent remainders, then the devises so made would, of course, control the general language of the second clause of the testament, and would therefore prevail. On the other hand, if we find no inconsistency between the general language of the second clause and the language in which the specific devises are declared, or if the language by which the specific devises are created is so ambiguous as to make it uncertain whether therein and thereby the testator intended to create vested or contingent future interests, and there are no other circumstances arising from the testament itself to compel a contrary view, then the general language of the second clause of the testament to which we have referred becomes of signal and, indeed, controlling importance as an aid in the ascertainment of the intention of the testator with regard to the time of the vesting of the right of enjoyment of such future interests. But, apart from any consideration of the general language of the instrument, we think that, as before declared, from the language of the fourth clause itself, and through no strained or unnatural construction thereof, no serious difficulty need confront the court in reaching the conclusion that the intention of the testator as therein and thereby expressed was to create in his son, Marion, a vested remainder.

It will be observed that the fourth clause of the testament is divided into two paragraphs: The first involving the devise to Marion; the second, to the latter's wife. It will further be observed that the first paragraph uses words of present devise—that is, the language of the testator is: "I *give* and *bequeath,*" etc. Thus far there could not arise any question but that the testator intended by the use of those words the *vesting* in Marion De Vries a *present fixed right.* But, as we have seen, the contention is that the language immediately preceding the quoted words, "Upon the termination of the life estate hereby created in my wife, Mary Jane De Vries," refers the vesting of the right to the time of the death of the life tenant or the termination by her death of the life estate, and that, therefore, the effect of said language is not only the postponement of the time of the *actual* enjoyment, but also of the time of the vesting of the *right* of enjoyment of the future interest thus created. But we think that where, as here, words of devise refer to the present or are in the present tense, the words, "upon the termination of the life estate" or "after" such termination, relate to the time of the possession or actual enjoyment of the interest so devised, and not to the time at which such interest shall vest or become in the donee a fixed right. It will not for a moment be questioned that words of present devise, such as are used here, are inconsistent with language which may be construed to postpone the immediate *vesting* of such right, and, as suggested, if the language immediately preceding the words of present devise in the fourth clause of the testament here may be held to be inconsistent with the present vesting of the interest, then at least a serious doubt arises as to what the testator actually intended should be the effect in legal contemplation of the devise to Marion. Therefore, whether we may hold that the words of present devise as employed by the testator themselves irresistibly import an intention to create a vested remainder, or the language of the fourth clause, as a whole, is so uncertain and ambiguous as to leave in serious doubt what the testator's specific intention in that respect was, in either case, under the uniformly accepted rules of construction, the conclusion must be the same. But manifestly, if the construction contended for by the respondent and sustained by the court below be sound, the language, "I devise and bequeath," or "give and devise," is controlled entirely by the words immediately preceding it. We can perceive no reason for such construction, and, indeed, we are of the opinion, as before declared, that, when we consider the language of the clause in question in connection with other parts of the testament or with what appears clearly enough to us to be the general scheme of the testator, such construction would fall far short of discovering the intention of the deceased with respect to the devise to Marion. But we are not without eminently respectable authority for the foregoing views.

[6] The general rule as to the employment of words of present gift or devise, in immediate connection with the use of the prepositions "upon," "after," and "at," expressive of the time at which the intermediate estate must terminate, in instruments disposing of property, is laid down by 30 Am. & Eng. Ency. of Law (2d Ed.) p. 768, as follows: "The use of words of present gift, or language which has the same import or effect, is expressly recognized as operating, in the absence of other controlling circumstances, to create a vested interest in the beneficiary." Many cases may be found where that rule has been applied to a state of facts strikingly similar to the circumstances of the present case. We shall here notice a few of those cases.

In the Matter of Elliott, 27 Misc. Rep. 258, 58 N. Y. Supp. 603, the testator gave to his widow, during her life or until remarriage, his real and his residuary personal estate. Upon her death or remarriage the executors were directed by a codicil to sell and convey the realty, convert the personalty into money, and out of the proceeds pay a son $1,500 and to one Alphrona Town, $800, "which said amounts," so the testament read, "I do hereby give and bequeath unto them to be paid only as aforesaid." Alphrona Town died during the lifetime of the widow. The contention was that the bequest to Alphrona Town lapsed by reason of her death during the lifetime of the testator's widow. The referee sustained that contention, holding that said bequest was contingent, and that it could only become vested or effective by the legatee's surviving the happening of the death or remarriage of the widow. Reversing the findings of the referee, the surrogate court said: "His (the referee's) decision is principally based upon the circumstance that the testator directed the conversion of the real estate at a future time and the payment of the legacy from the proceeds." The surrogate then refers to a number of cases by the light of which the referee construed the testament, and proceeds: "The rule declaring that, where the gift consists only in a direction to divide or pay at a future time, the vesting as well as the time of payment is postponed, which is referred to in the cases above cited, and which doubtless acquires greater pertinency and significance from the direction for conversion contained in the wills considered in some of them, has been repeatedly stated to be not an inflexible or arbitrary rule, but one readily yielding to the intention of the testator, and sometimes evidence of a very slight character has been resorted to by the courts, and taken as expressive or indicative of such intention. [Citing cases.] Almost invariably accompanying the declaration of the rule mentioned is found the statement of another rule or principle similarly formulated for the purpose of aiding in discovering the intention of the testator, and that is that where there is a direct or immediate gift, the subject of which cannot come into possession or enjoyment of the legatee until some future time, the gift is, nevertheless, to be regarded as indefeasibly vested. This latter rule seems to me to more fitly accord with the intention of the testator in the present case, and I think it should control its disposition. Words of present gift are here clearly used. The testator says: 'I do hereby give and bequeath.' The use of such language, or language of the same import, or effect, is expressly or impliedly recognized by the authorities as effective, in the absence of other controlling circumstances, to create a vested interest or estate in the beneficiary." Citing Matter of Young, 145 N. Y. 535, 40 N. E. 226; Delaney v. McCormack, 88 N. Y. 174; Smith v. Edwards, 88 N. Y. 92; Shipman v. Rollins, 98 N. Y. 311; Goebel v. Wolf, 113 N. Y. 405, 21 N. E. 388, 10 Am. St. Rep. 464; Matter of Baer, 147 N. Y. 354, 41 N. E. 702; Delafeld v. Shipman, 103 N. Y. 468, 9 N. E. 184; Miller v. Gilbert, 144 N. Y. 68, 38 N. E. 979; Ross v. Roberts, 2 Hun (N. Y.) 90; affirmed, 63 N. Y. 652; Matter of Mahan, 98 N. Y. 372; Geisse v. Bunce, 23 App. Div. 292, 48 N. Y. Supp. 249; Warner v. Durant, 76 N. Y. 136; Loder v. Hatfield, 71 N. Y. 99; Wells v. Seeley, 47 Hun (N. Y.) 109; Matter of Gardner, 140 N. Y. 122, 35 N. E. 439.

In the Matter of Conger, 81 App. Div. 493, 80 N. Y. Supp. 933, the will giving a life interest to the testator's wife and daughter provided that, "*after* the death of my said wife and daughter, I give, devise and bequeath unto," etc. Construing said will and interpreting the language quoted for the purpose of discovering whether it was the intention of the testator that the remainder so created should operate to vest the right or title to such future interest in the remainderman upon the former's death, the court says: "If the testator had said, 'I give, devise and bequeath unto the legatees named certain shares of stock, such bequests to take effect in enjoyment after the death of my life tenants,' there could be no question about the meaning or validity of the clause. We think it requires no particular straining to hold that when he said, 'after the death' of said life tenants, 'I give, devise and bequeath' unto the same persons, he meant the same thing, namely, a present, immediate bequest and gift of the property, subject only to delay in payment and enjoyment until after the death of those who had a prior right to the enjoyment as life tenants. The *vesting* of title was to *take effect immediately;* the actual division and delivery of the certificates of stock was to occur in the future."

In Farnam v. Farnam, 53 Conn. 261, 2 Atl. 325, 5 Atl. 682, a testamentary trust was created, by the terms of which certain sums were to be paid by the trustees annually to the widow of the testator and to his children, and "at the decease of the last survivor of my said children, if my said wife shall not then be living, but if living, then upon her death, this trust shall cease; and I give, devise and bequeath all the estate which shall then be held in trust under this will to my grandchildren who shall then be living, to be equally divided among them per capita and not per stirpes, and to their heirs forever." It is then provided that if any grandchild of the testator shall have died, leaving a child or children surviving at the expiration of said trust, such child or children shall take the share that "his, her or their parent would have been entitled to if living," etc. The attack upon the testament was upon the ground that the fourth and fifth clauses (the latter the one just referred to) were inoperative for the reason that they were in violation of the Connecticut statute against perpetuities. The main question thereupon arising was whether the estate in the grandchildren was a vested or contingent remainder. The court held that the interest so created was a vested remainder, saying: "The words, 'I give, devise and bequeath' import a present interest unless other provisions in the will clearly manifest a different intention."

In the Matter of Seaman, 147 N. Y. 69, 41 N. E. 401, the sixth and seventh articles of the testament read as follows: "All the rest, residue and remainder of my estate, real and personal, I give, devise and bequeath to my executors, hereinafter named, in trust to apply and pay over the income of one equal undivided half part thereof to my said adopted daughter and niece, Elizabeth Seaman, during her natural life, and *upon her decease I give, devise and bequeath* said equal undivided one-half part of my estate so held in trust for my said adopted daughter and niece to the children of my nephew, George A. Seaman, living at the time of her death, share and share alike. Seventh. I direct and order my said executors hereinafter named to apply and pay over the income of the other equal undivided half part of my estate so held in trust by them to my said adopted son and nephew, George A. Seaman, during his natural life, and *upon his decease, I give, devise and bequeath* the said equal undivided half of my estate, so held in trust for my said adopted son and nephew, to the children of my said nephew, George A. Seaman, living at the time of his death, share and share alike." The New York Court of Appeals held that the words, "I give, devise and bequeath," as thus used, were words of present gift and denoted a vested interest at the death of the testator, and, differentiating the case before it from other cases cited, among other things said: "Here there are words of present gift, for the phrase 'upon her decease,' like the expression 'from and after,' does not prevent the legacy from vesting"—citing Nelson v. Russell, 135 N. Y. 137, 31 N. E. 1008.

"In applying the rule which favors the construction of remainders as vested," it is said, in the second edition of 24 Am. & Eng. Ency. of Law, p. 395, "a distinction has been made between certain words as importing time and contingency respectively. Accordingly, the adverbs, 'when,' 'then,' 'after,' 'until,' 'from,' etc., in a devise of a remainder after a precedent estate determinable on an event which must necessarily happen, are construed to relate merely to the time of the enjoyment of the estate, and not to the time of the vesting in interest. Words denoting contingency, on the other hand, are 'if,' 'in the event,' and the like." See Matter of Watts, 68 App. Div. 357, 74 N. Y. Supp. 75; Hersee v. Simpson, 154 N. Y. 496, 48 N. E. 890; McArthur v. Scott, 113 U. S. 380, 5 Sup. Ct. 652, 28 L. Ed. 1015; Cropley v. Cooper, 19 Wall. 167, 22 L. Ed. 109—in each of which the rule of construction contended for by appellant here is applied. See, also, Estate of Cavarly, 119 Cal. 406, 51 Pac. 629; Dunn v. Schell, 122 Cal. 627, 55 Pac. 595; Estate of Fair, 132 Cal. 546, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70; Estate of Campbell, 149 Cal. 717, 87 Pac. 573.

But, as we have seen, the conclusion of the court below, it is argued, is supported by the construction which respondent places upon the language of the second paragraph of the fourth clause, wherein and whereby the testator, for the benefit of the wife of Marion, guards against a contingency that might happen before the vesting in Marion of the interest devised to him. We are unable to see wherein said second paragraph or the contingent provision therein made for Marion's wife exercises any influence upon or in any way limits or qualifies the interest devised to Marion. Indeed, we are of opinion that a careful examination of the language of said paragraph will disclose to the mind considerations which negative rather than sustain the conclusion to which the learned trial judges were persuaded as to the intention of the testator with respect to the devise to Marion. Said second paragraph of the fourth clause of the testament, it will be remembered, reads: "If my son, Marion De Vries, should precede in death his wife, Minnie L. De Vries, and leave him no lawful issue surviving, and should such death of my son, Marion De Vries, occur before the property herein *devised* and *bequeathed* to him vests in him, then all the interest herein and hereby *devised* and *bequeathed* to said Marion De Vries shall pass to and vest in and become the property of said Minnie L. De Vries, my son, Marion's wife, absolutely and forever."

It seems clear to our minds that the fourth clause of the testament, read together, means this: That the testator intended to and did devise to Marion De Vries a present interest in remainder in the property described in said clause; that, counting upon the certainty of death, but the uncertainty as to the time thereof, and therefore the possible contingency of Marion preceding his wife in death, he desired and intended that in the event that that contingency happened before the remainder to Marion vested in him—that is, before the death of the testator—then the estate so limited to Marion should go to the latter's wife. In other words, the testator devised to Marion a vested future interest and to his wife a contingent future interest in the same property. We think, as previously suggested, that this construction is fully sustained by these considerations deducible from the second paragraph itself: (1) Assuming, as is the contention, that the interest to Marion was not intended to vest until the determination of the life estate, if Marion should precede in death his wife, leaving lawful issue, before the termination of the life estate, the result in that case would not only be that Minnie L. De Vries would and could take nothing under the contingent devise to her upon the death of the life tenant, but that devise of the testament would absolutely fail and the interest devised necessarily be remitted to administration, for it will be noted that there is no provision as to whom the property devised to Marion should go in the event Marion died, leaving issue, prior to the death of his wife and before the remainder to him became a vested interest. We cannot persuade ourselves, in view of the evident care with which the whole testament was prepared and executed, disclosing a clear design to thus specifically dispose of all interests in his property, that the testator would have so arranged his disposal of one part of his estate, of which undoubtedly he sought to make specific disposal, as to admit of a possible lapse thereof. We are of the opinion, rather, that the testator, having intended Marion's remainder should vest upon his (testator's) death, must have further had in mind that, in case Marion leaving lawful issue should precede both his wife and the testator in death, the latter would still have the opportunity and ability to make such disposition of the interest he intended for Marion as would accord with his (testator's) wishes with respect to Minnie L. De Vries and such issue. In any event, considering the fact that the testator displayed an unquestioned and unquestionable wish to provide for Minnie L. De Vries, in the event of the happening of the contingency upon which she was to take, we think it would be the more reasonable view to hold that he did not intend that any circumstances should arise, in the testamentary disposition of his estate, whereby it could happen that the interest which is the subject of the devise to Marion De Vries should go undisposed of by his last will.

The second proposition plainly deducible from the second paragraph of the fourth clause and which, we think, clearly confirms the position that the devise to Marion should operate as a vested remainder, arises from the language itself of said second paragraph. Therein, as we have seen, the testator provides that, upon the happening of the condition upon which Minnie L. De Vries shall take, "then all the interest herein and hereby devised and bequeathed to said Marion De Vries shall pass to and vest in and become the property of said Minnie L. De Vries," etc. Thus it will be noted that the words of action—"devise" and "bequeath," as used in the preceding paragraph of said clause—are used in the second paragraph in the past tense; that is, as denoting action already taken. In other words, to paraphrase the fourth clause in its entirety, the testator has therein declared: "I devise and bequeath to Marion De Vries the property herein described, the possession, however, to take effect on the determination of the estate for life in said property to my wife, Mary J. De Vries. But should my son, Marion, die, leaving no lawful issue, before the death of his wife, Minnie L. De Vries, and prior to the vesting in him of the estate or interest so devised to him, then the property which I have *already* devised and bequeathed to said Marion shall pass to and vest in and become the property of said Minnie L. De Vries," etc. In short, it appears reasonably clear to our minds that by the use of the language in the second paragraph "then all the interest herein and hereby *devised* and *bequeathed* to said Marion De Vries," etc., the testator intended to emphasize his intention as clearly implied from the employment of words of present devise in the first paragraph that the *right* of enjoyment of the interest devised to Marion should take effect or vest upon and coincidently with the beginning of the life estate, or in other words, at the death of the testator.

That the testator had a clear conception of the legal significance of words of present devise, unqualified by other language or expressions, is indubitably shown, it appears to us, by the language of the devise to his son, Lee De Vries. Therein he likewise uses words of present devise, but qualifies the same with, "To have and to hold the same (the property) for and during all his natural life only, and thereafter to *vest* as hereinafter stated, or to be taken by him absolutely, dependent upon the following *events* and *conditions*." Then follows a provision that should Lee De Vries "die before I die, and leave him lawful issue surviving, then and upon the termination of the life estate herein created in my wife, if such lawful issue shall *survive my said wife*, then the said described real property hereby devised to my said son, Lee De Vries, shall *vest absolutely* in fee simple in such lawful issue of my said son, Lee De Vries." It is then provided that if the wife of Lee De Vries die before him, and Lee De Vries should "*survive me and my wife, then and in that event, and upon the termination of the life estate hereby created in my wife*, all of the said real property hereby devised to my son, said Lee De Vries, shall *absolutely vest* in my son, said Lee De Vries, unaffected by any life estate therein." It will be noticed that the initial language of the devise to Lee De Vries, like the devise to Marion, contains words of present devise; but the testator later qualifies or limits the effect of those words by annexing to said devise certain conditions upon which the interest therein created is to vest. Indeed, by express language the testator suspends the vesting of the fee in the interest devised to Lee De Vries, for he specifically provides as a condition upon which such interest to Lee shall vest that the latter must survive, not only the testator, but the life tenant. It will likewise be noticed that in providing for an interest in the issue of Lee De Vries, the testator postpones, by express words, the vesting of said interest in such issue until the termination of the life estate; that is, the provision is that the issue of Lee must survive the life tenant before the interest so devised shall vest in them. It will further be observed that in all the instances of the postponement of the vesting of the interest devised to Lee De Vries apt words of suspension, such as "then," "then and thereupon," "then and in that event," immediately vest," and "absolutely vest" are used as indicative of an intention to suspend the vesting.

From the foregoing considerations, it is very manifest, we think, that the testator, in preparing and executing the testament before us, fully appreciated the necessity for the use of express language by which to make clear and unquestionable his intention to postpone or suspend the vesting until the determination of the life estate in those instances where words of present devise are used but where he did not intend the creation of vested interests. It is, therefore, very plain to our minds that the testator employed words of present gift in the devise to Marion advisedly and with the express purpose of creating the nature of the interest, as to the time of the vesting of the right thereto, which those words naturally import; that, had he intended that the interest so devised should constitute a contingent remainder or vest only at the conclusion of the life estate by the death of the life tenant, he would then, as in the case of the devise to Lee, have so declared in express language or by words so clear and apposite as to have left no room for doubt upon that proposition.

[7] It may be remarked that it is extrajudicially declared in the brief of appellant that it was held by the court below that the provision of the testator's will for his son, William G. De Vries, vests his remainder in him on the death of the testator. In other words, the court below, as we understand counsel for appellant, has construed the devise to William G. to create a vested future interest. The devise to said son reads: "Unto my son, William Garland De Vries, upon the termination of said life estate, I give, devise and bequeath all those certain lots," etc. There is no other provision, conditional or otherwise, contained in the testament with respect to the interest thus devised to William G. De Vries, and clearly the court was right in holding that the interest so devised was a vested remainder. And, with the exception of the contingent provision for Marion's wife, there is, in practical effect, no ground of distinction between the devise to Marion and the devise to William G. The only difference, as will readily be observed, consists in the transposition of the words with which the two interests are devised. Manifestly, therefore, if the devise to William G. creates a vested interest, it must be true that the devise to Marion creates a like interest, unless it may be held that the contingent provision for Marion's wife exercises some such influence on or control of the language in which the devise to Marion is expressed as to make the interest so devised a contingent remainder, and this we have shown cannot reasonably be held to be the effect of that provision. While this part of the discussion is merely argumentum ad hominem, we notice the proposition that calls it forth because we have, after a careful examination of the principal question presented here, been curious yet unable to perceive the method of reasoning by which the learned court below has discerned the slightest distinction between the devise to Marion and that to William G. De Vries.

But we have pursued the discussion sufficiently. As stated, the only contingency whatever that we have been able to find in the fourth clause of the testament relates solely to the provision for Minnie L. De Vries. As to the devise to Marion, we find here "the existence in an *ascertained person* of a *present fixed right*" of future enjoyment. In other words, we can here "point to a person who, if the life estate should cease, would eo instante et ipso facto have an immediate right of possession," and this, as the Court of Appeals of New York says, in Moore v. Littel, 41 N. Y. 80, "is a vested remainder, and, by necessary consequence, all the contingencies which may operate to defeat the right of possession are to operate, and only to operate, as conditions subsequent."

We are satisfied for the reasons herein given that the testator intended a vested interest in his son, Marion De Vries, and the order or decree appealed from is, therefore, reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

161 Cal. 345

In re BONDS OF SOUTH SAN JOAQUIN IRR. DIST. (Sac. 1,939.)

(Supreme Court of California. Nov. 15, 1911.)

1. Waters and Water Courses (§ 216*)—Irrigation Districts — Organization — Statutes—Constitutional Law.

The irrigation act of 1897 (St. 1897, p. 254), authorizing the creation of irrigation districts, is not unconstitutional, because section 1 authorizes a majority of the holders of title of lands, according to the equalized county assessment roll for the year last preceding, to propose organization, on the theory that the apparent owners by the assessment roll may not be the present owners, since the Legislature could provide for the formation of districts without giving property owners any voice.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 216.*]

2. Statutes (§ 64*)—Partial Invalidity.

The validity of the irrigation act of 1897 (St. 1897, p. 254) providing for the organization of irrigation districts, etc., is not impaired as a whole through unconstitutionality of its provision for an appeal to the superior court from a determination of the board of supervisors.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58–66; Dec. Dig. § 64.*]

3. Waters and Water Courses (§ 216*)—Irrigation Districts — Bonds—Constitutional Law.

Irrigation Act 1897 (St. 1897, p. 265) § 34, is not unconstitutional for authorizing those appearing as owners upon the equalized assessment roll to petition for an election on the question of incurring indebtedness; the question being decided by a vote of the electors.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 216.*]

4. Constitutional Law (§ 63*)—Irrigation Districts — Statutes — Constitutional Law.

The irrigation act of 1897 (St. 1897, p. 254) is not unconstitutional for delegating powers to and imposing duties upon certain county officers in connection with the assessment and collection of taxes for irrigation districts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 108–114; Dec. Dig. § 63.*]

5. Statutes (§ 123*)—Title—Conformity of Subject-Matter.

Irrigation Act 1897 (St. 1897, pp. 276, 277) §§ 68–72, providing for proceedings to test the validity of irrigation district assessments, is not invalid, under Const. art. 4, § 24, as being foreign to the title of the act, "An act to provide for the organization and government of irrigation districts and to provide for the acquisition or construction thereby of works for the irrigation of lands embraced within such districts, and also to provide for the distribution of water for irrigation purposes."

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 176–183; Dec. Dig. § 123.*]

In Bank. Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Proceeding to determine the validity of bonds of the South San Joaquin Irrigation District. Upon appeal from the judgment. Affirmed.

Clary & Louttit, for appellant. L. L. Dennett and Nutter & Orr, for respondent.

HENSHAW, J. This is a proceeding brought to determine the validity of bonds of the South San Joaquin Irrigation District, a proceeding authorized by the irrigation act of 1897. Stats. 1897, p. 254.

Upon this appeal it is urged:

[1] 1. That the law under which the district was created is itself unconstitutional and void. The contention herein is based on section 1 of the act, namely, that: "A majority in number of the holders of title or evidence of title of lands * * * such holders of title or evidence of title representing a majority in value of said lands according to the equalized county assessment roll or rolls for the year last preceding, may propose the organization of an irrigation district;" and, further: "Said equalized assessment roll or rolls shall be sufficient evidence of title for the purposes of this act." From this language appellant argues that the apparent owners by the last equalized assessment roll may not be the present owners of the land at the time of the formation of the district, with the result that persons who are not landowners may petition for the formation of such a district, and subject the land of the true owners to the burdens of an assessment without those owners having a voice in the matter. But if this were all true it would not render unconstitutional the section under consideration. The Legislature, having the unquestioned power to provide for the formation of such districts, might do so without giving the property own-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ers any voice in the matter at all, and may, without question, do so, by authorizing the presentation of a petition, signed by a majority of those who, upon the last equalized assessment roll, appear as owners of the property. In re Madera Irrigation District, 92 Cal. 320, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106; People v. Sacramento Drainage District, 155 Cal. 373, 103 Pac. 207. If between the time of the making of the last equalized assessment roll and the time of the petition for the formation of the district, any of these lands shall have changed hands, the new owners will be charged with knowledge that they purchase under conditions where those who appear to be owners by the assessment roll could petition for the formation of the district. Such a burden upon the land would, in its nature, not be dissimilar to the lien of taxes which follows land in the hands of the new purchasers after the first Monday in March of each year. In the latter case the new purchaser may protect himself in the payment of his taxes by arrangement with the seller. He may in the instance here before us likewise protect himself by a similar arrangement with the seller; in brief, by the seller's agreement not to sign such a petition.

[2] 2. The fact that the provision of the irrigation law of 1897 for an appeal to the superior court from the determination of the board of supervisors has been declared unconstitutional (Chinn v. Superior Court, 156 Cal. 478, 105 Pac. 580) does not destroy the act as a whole. The act would have been valid without such provision. The general machinery of the law provides ample protection to the landowner, and every reasonable opportunity to correct specific abuses (Inglin v. Hoppin, 156 Cal. 483, 105 Pac. 582), so that the act can well stand as an entire and complete scheme after the elimination of the provision touching appeal.

[3] 3. What has been said under the first head disposes of the objection to section 34 of the act; that objection being that it authorizes those appearing as owners upon the equalized assessment roll to petition the trustees of the district to submit to the qualified electors the question of whether or not the indebtedness shall be incurred. It is to be noted that the indebtedness is not imposed upon the district, excepting by a vote of the electors themselves; and that the provisions of section 34 go only to the method of invoking the action of the trustees for the calling of an election for this purpose.

[4] 4. No weight can be accorded to the contention that, because the act delegates powers to or imposes duties upon certain of the county officers in connection with the assessment and collection of taxes of the district, it is therefore unconstitutional. The argument is fully met and conclusively answered in Nevada Bank of San Francisco v. Board of Supervisors of Kern County, 5 Cal. App. 638, 91 Pac. 122.

[5] 5. The title is as follows: "An act to provide for the organization and government of irrigation districts, and to provide for the acquisition or construction thereby of works for the irrigation of the lands embraced within such districts, and, also, to provide for the distribution of water for irrigation purposes." The body of the act (sections 68 to 72) contains provisions for the institution and prosecution by the district of the proceeding here brought to test the validity of an assessment. It is contended that these provisions are so foreign to the title of the act as to be void. Const., art. 4, § 24. To this view we cannot agree. It will be found repeatedly declared in our decisions that the purpose of the constitutional provision is, not to destroy legislation germane to the general object declared in the title, but to protect against the passage of clauses and provisions foreign to the title, subject, and purpose of an act—deceptive legislation, adroitly introduced and hidden in the body of the act. People v. Sacramento Drainage District, supra; People v. Linda Vista Irrigation District, 128 Cal. 477, 61 Pac. 86; Law v. San Francisco, 144 Cal. 388, 77 Pac. 1014. The matter of the proceeding to test the legality of the assessments and bond issues of a district under this broad and reasonable view comes clearly within the scope of the general purposes of the irrigation act. Anderson v. Grand Valley Irrigation District, 35 Colo. 525, 85 Pac. 313.

The judgment appealed from is therefore affirmed.

We concur: SHAW, J.; LORIGAN, J.; MELVIN, J.; ANGELLOTTI, J.; SLOSS, J

Ex parte McCANDLESS. (Cr. 222.)

(District Court of Appeal, Second District, California. Oct. 6, 1911.)

Parent and Child (§ 17*)—Duty of Parent to Support.

While it is the duty of a parent to support a child of tender years, yet he cannot be imprisoned for a failure to obey an order of court directing the support of such child, unless it is shown that he has the ability to comply with the order.

[Ed. Note.—For other cases, see Parent and Child, Dec. Dig. § 17.*]

Petition by William Joseph McCandless for a writ of habeas corpus. Petitioner discharged.

A. W. Sorenson, for petitioner.

PER CURIAM. Petitioner, as shown by the return, is in the custody of the sheriff by virtue of a commitment issued on account of petitioner's failure to make certain monthly payments by the superior court directed for the support and maintenance of his minor children. It nowhere appears in the record, nor in any order or judgment of the superior court in connection with the proceedings, that petitioner has the ability to pay the sum ordered. While it is the duty of a parent to support children of tender years, that he be imprisoned on account of the failure to obey an order of the court in connection therewith, it must affirmatively appear that he has the ability to comply with the order of the court. In re Cowden, 139 Cal. 244, 73 Pac. 156; Ex parte Cohen, 6 Cal. 319; Ex parte Rowe, 7 Cal. 175; Ex parte Silvia, 123 Cal. 293, 55 Pac. 988, 69 Am. St. Rep. 58.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Petitioner discharged.

BARNHART v. CONLEY et al. (Civ. 1,031.)

(District Court of Appeal, Second District, California. Oct. 11, 1911.)

APPEAL AND ERROR (§ 773*)—DISMISSAL—FAILURE TO FILE BRIEFS.

Supreme Court rule 2, subd. 4 (78 Pac. vii), provides that the points and authorities must be filed within 30 days after the filing of the transcript. Appellant filed no points or authorities within 30 days after the transcript was filed, nor until after a motion to dismiss for failure to file briefs had been served, and no stipulation or order of court extending the time appeared. *Held*, that appellee was entitled to have the appeal dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 773.*]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Rose L. Barnhart against O. C. Conley and another. Judgment for plaintiff, and defendants appeal. Plaintiff's motion to dismiss appeal granted.

V. T. Watkins and Watkins & Blodget, for appellants. Gray, Barker, Bowen, Allen, Van Dyke & Jutten and N. A. Bailie, for respondent.

PER CURIAM. The transcript in this case was filed April 1, 1911. Appellants filed no points or authorities until after June 9, 1911, at which time a motion to dismiss the appeal on account of failure to file such points and authorities was duly served and filed. Thereafter, on June 26, 1911, appellants filed their opening brief. The affidavit in opposition to respondent's motion is insufficient to justify the court in refusing to grant the motion. Rule 2, subd. 4 (78 Pac. vii), of the Supreme Court, provides that the points and authorities must be filed within 30 days after the filing of the transcript, and, in the absence of stipulation, 20 days additional time may be granted by the court; good cause being shown therefor. No stipulation extending time or order of court in that regard appears. The rule above quoted, requiring the points and authorities on behalf of the respective parties to be filed within a specified time after the filing of the transcript, confers rights which may be enforced by litigants. McCabe v. Healey, 139 Cal. 32, 72 Pac. 359. Respondent, therefore, possesses the right to have this appeal dismissed. The determination of such right being controlled by the facts existing at the time the notice of motion was given, the subsequent filing of points and authorities had no effect to restrict such right.

The motion to dismiss the appeal must be granted, and it is accordingly ordered.

MULLER v. SWANTON et al. (Civ. 534.)

(District Court of Appeal, First District, California. Oct. 13, 1911. Rehearing Denied Nov. 11, 1911.)

INSURANCE (§ 88*)—AUTHORITY OF AGENT.

Where defendant executed a note for a life insurance premium to a soliciting agent under a private agreement that defendant should not be called on to pay the same, and, the note having been transferred to the insurance company and payment demanded, defendant, after explaining the facts to defendant's general state agent, was informed by him that the company would look to the soliciting agent for settlement, and would give defendant no further trouble in the matter, the insurance company was not bound by such agreement; the same being beyond the local manager's authority and without consideration.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 88.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Joseph Muller against F. W. Swanton and others. Judgment for defendant Swanton, and plaintiff appeals. Reversed.

Page, McCutchen & Knight, for appellant. Wm. T. Jeter, for respondent.

KERRIGAN, J. This is an appeal by the plaintiff from a judgment in favor of defendant F. W. Swanton, and from an order denying plaintiff's motion for a new trial. A former judgment in the same action in favor of said defendant was reversed by the Supreme Court. Muller v. Swanton et al., 140 Cal. 249, 73 Pac. 994. The action is on a promissory note for $1,222 which was executed by the defendant to W. B. Fonville and indorsed by Fonville to the New York Life Insurance Company, and by it, in turn, indorsed to the plaintiff merely for the purpose of collection. The answer does not deny the due execution of the note, nor that it was indorsed to the insurance company prior to maturity, but sets forth that there was no consideration for the note; that it was obtained by fraud; that the insurance company gave no consideration for the note, and took it with notice of the circumstances under which it was made.

The facts are these: W. B. Fonville was

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

sent to this state by the home office of the New York Life Insurance Company to solicit insurance independently of the local office, of which the general manager was one A. G. Hawes. In carrying out this object, Fonville called on the defendant in Santa Cruz with a view to writing a policy of insurance on defendant's life or the life of some member of his family, and represented to defendant that, if he could do so, it would be a lead to others to apply for insurance in the company represented by him, as defendant's family was well known in that part of the state. He also told defendant that, if he succeeded in writing a named amount of large insurance, he would be installed in the position occupied by Hawes as the Pacific Coast representative of the insurance company, a position carrying a salary of $20,000 a year. After much solicitation on the part of Fonville, Swanton finally consented to allow him to write a policy insuring the life of defendant's father for $10,000, with the understanding that the note given by the defendant to Fonville for the premium would not have to be paid. In accordance with this arrangement Fonville procured the issuance of the policy by the insurance company, and the defendant made and delivered his promissory note for $1,222, the amount of the premium, and Fonville gave defendant a written agreement that one-half of the premium should be returned, and represented to him that, when the other half became due, he (Fonville) would be the Pacific Coast agent of the company, and out of his salary could well afford to pay it, and would do so. When the note fell due the company caused it to be presented for payment, whereupon the defendant called on Hawes and explained the circumstances under which the note was made; and, according to Swanton's testimony (which however, is disputed by Hawes), the latter said that Swanton need give himself no further trouble about the matter, that he would take it up with Fonville, and would look to him for a settlement.

The Supreme Court on the former appeal discussed at length the insufficiency of the evidence to support the finding in favor of defendant, and the court there held that the issuance of the policy was a sufficient consideration for the indorsement of the note by Fonville, and that there was no evidence showing that the insurance company took the note with the knowledge of the circumstances under which the defendant executed it, and that, therefore, those circumstances did not constitute a defense to an action on the note by the company or its assignee.

[1] The defendant urges very strongly a point not made previously. He argues that even if the note were valid, and the defenses of fraud and want of consideration unavailing, nevertheless the insurance company and its assignee are estopped from enforcing the payment of the note by reason of what took place between him and A. G. Hawes when he called on Hawes, and explained the circumstances of the transaction with Fonville. This argument is founded upon a finding of the court which reads that Hawes "then and there assured the said defendant F. W. Swanton that it would be all right, and that he, acting for said company, would take the matter up with said Fonville, and would look to him, Fonville, for a settlement, and would give said defendant, F. W. Swanton, no further trouble in the matter." There was considerable delay after the conversation between the defendant and Hawes, during which the defendant possibly could have proceeded against Fonville, and, while the point does not lack plausibility, it has some serious defects which it will not be necessary to note, for the late Mr. Justice McFarland in the former opinion anticipated this point, and effectually disposed of it in this language: "The finding (which is based upon conflicting and very slight evidence) that, after the note was due and its payment demanded, the managing agent at San Francisco told respondent for the company that he would look to Fonville for a settlement, and would give respondent no further trouble about the matter, is immaterial; for, in the first place, he had no authority to bind the company by such a promise, and, in the second place, the promise was without any consideration."

The evidence on the second trial was in no material particular different from that given on the former trial. There is nothing new in the case, and the views expressed by the Supreme Court upon the former appeal must control, and we perceive no reason why the trial court did not give effect to those views by permitting plaintiff to recover on the note.

For the foregoing reasons the judgment and order are reversed.

We concur: LENNON, P. J.; HALL, J.

POOLE v. GRAND CIRCLE, WOMEN OF WOODCRAFT. (Civ. 1,009.)

(District Court of Appeal, Second District California. Oct. 6, 1911.)

APPEAL AND ERROR (§ 800*)—DISMISSAL—FAILURE TO FILE JUDGMENT ROLL.

After plaintiff's motion to dismiss the appeal for failure to transmit a copy of the judgment roll, appellant, within seven days of notice of motion and before the hearing thereof, filed such judgment roll. *Held*, that under Supreme Court Rule 15 (78 Pac. x) the motion would be considered as an objection to the transcript, answered by filing of the transcript, and hence would be denied.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 800.*]

Action by John R. Poole against the Grand Circle, Women of Woodcraft. Judgment for plaintiff, and defendant appeals. Plaintiff's motion to dismiss defendant's appeal denied.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

John H. Foley, for appellant. Charles S. Burnell, for respondent.

PER CURIAM. Motion to dismiss appeal. The only reason suggested in support of said motion is the failure of appellant, before the filing of said motion, to cause to be transmitted to this court a copy of the judgment roll. It does appear that within seven days after service of notice of motion, and before the hearing thereof, appellant caused a transcript embracing such judgment roll to be filed. All that is essential to a review of the action of the superior court is now before this court. Under rule 15 (78 Pac. x) of the Supreme Court, respondent's motion may be considered as an objection to the transcript, affecting appellant's right to be heard, and the same was answered by filing the transcript embracing the judgment roll. "The object of the above-mentioned rule is to enable the appellant to remedy any defect or omission of the transcript for the purpose of enabling him to present his appeal upon the merits, and is to be liberally construed for that purpose." Warren v. Hopkins, 110 Cal. 509, 42 Pac. 987.

Motion to dismiss appeal denied.

BLUMER v. MAYHEW. (Civ. 996.)

(District Court of Appeal, Second District, California. Oct. 6, 1911. Rehearing Denied by Supreme Court Dec. 5, 1911.)

1. PLEADING (§ 236*)—JUDGMENT (§ 344*)—APPEAL AND ERROR (§§ 959, 982*)—DECISIONS REVIEWABLE—DISCRETIONARY RULINGS—RELIEF FROM DEFAULT.

Under Code Civ. Proc. § 473, which provides that the court may allow amendments, relieve from a judgment, etc., for mistake, surprise, or excusable neglect, the making of an order refusing relief is within the discretion of the trial court, and will not be interfered with on appeal, unless the discretion is clearly abused.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601; Dec. Dig. § 236;* Judgment, Cent. Dig. § 673; Dec. Dig. § 344;* Appeal and Error, Cent. Dig. §§ 3825–3833, 3877–3879; Dec. Dig. §§ 959, 982.*]

2. EXCEPTIONS, BILL OF (§ 43*)—AUTHENTICATION OF RECORD—DISCRETION OF COURT.

Where a court refuses to authenticate a record presented for appeal from an order refusing to set aside a default, because not filed within the statutory limit, and the failure to file is caused by the ignorance of the party's attorney of the time given, it cannot be said to be an abuse of the discretion given by Code Civ. Proc. § 473.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 43.*]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Fred L. Blumer against Felix Mayhew. From an order denying relief under the Code of Civil Procedure, § 473, defendant appeals. Affirmed.

Frank S. Adams, for appellant. Valentine & Newby, for respondent.

SHAW, J. This is an appeal from an order of court, denying defendant's motion for relief under the provisions of section 473, Code of Civil Procedure.

On November 29, 1909, defendant's motion for a new trial and to have vacated and set aside a judgment theretofore rendered herein was denied. More than 60 days thereafter, and in the absence of any stipulation or order extending the time, he presented to the court what he termed a "Record on Appeal," consisting of copies of certain papers which he deemed necessary to constitute such record, together with a copy of the reporter's transcript of the testimony used at the hearing of the motion for a new trial, and, upon notice to plaintiff, applied to the court to have the same authenticated. Upon objection being made by plaintiff, the court refused to authenticate the papers, upon the grounds that the same were not presented within the time required by law. Thereupon defendant applied to the court to be relieved from his default, upon the grounds that the same was due to mistake, inadvertence, and excusable neglect. His application was denied by the court, and from this order he has appealed.

In his affidavit in support of the motion, defendant's attorney states that he had been instructed by his client to take an appeal from the order denying his motion for a new trial; that affiant had never before undertaken to prosecute such an appeal to the Supreme Court, and was unaware that the matters in support of such motion should be authenticated in a bill of exceptions, as provided in section 650 of the Code of Civil Procedure; that about 10 days after the date of the order of court, denying defendant's motion for a new trial, affiant was informed that under the decisions of the Supreme Court of this state the papers used upon such appeal should be embodied in a bill of exceptions, and the same authenticated by the trial judge, and thereupon he made an investigation of such decisions, and came to the conclusion that the Supreme Court based their opinions upon the ground that *all* of the records used in the court below had not been transferred to them, for which reason alone he concluded the court so decided said cases; that it would have been impossible to prepare the record within the time required by law; and that affiant did obtain an extension of 30 days time within which to file the record in the Supreme Court of California; he still being of the opinion at the time that no bill of exceptions was necessary.

[1] The making of an order granting or denying relief, when applied for by one who seeks to bring himself within the provisions of section 473, Code of Civil Procedure, is a matter purely within the discretion of the

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

trial court, and in reviewing such orders this court should refuse to interfere, unless it clearly appears there has been a plain abuse of such discretion. O'Brien v. Leach, 139 Cal. 222, 72 Pac. 1004, 96 Am. St. Rep. 105; Vinson v. Los Angeles Pac. R. R. Co., 147 Cal. 479, 82 Pac. 53. The courts have suggested by way of advice to the trial judges that all doubts as to the propriety of their rulings upon such applications should be resolved in favor of the moving party (Watson v. San Francisco & Humboldt B. R. R. Co., 41 Cal. 17; Miller v. Carr, 116 Cal. 381, 48 Pac. 324, 58 Am. St. Rep. 180), for the reason that such action tends to bring about a decision upon the merits. Notwithstanding this fact, however, the rule which prohibits interference, save and except in case of an abuse of discretion, has never been relaxed. Ingrim v. Epperson, 137 Cal. 370, 70 Pac. 165.

[2] In this case, upon the showing made in support of the application, it cannot be said that the court failed to exercise a proper discretion. Indeed, had the ruling been otherwise, noninterference by this court would have strained the rule, respect for which, as stated, prohibits the vacation of such order when it tends to give a hearing upon the merits of the case. The statutory provisions with reference to the procedure to be had and taken upon appeals from orders denying motions for new trial are of such long standing, so fully set forth in the Code of Civil Procedure, and have been so frequently passed upon and construed by the courts of this state "that ignorance of the time within which a statement or bill of exceptions must be prepared and served cannot be deemed the result of mistake or surprise or inadvertence, and the neglect to prepare and serve it within the time prescribed by the Code is not excusable." Ingrim v. Epperson, supra.

The order appealed from is affirmed.

We concur: ALLEN, P. J.; JAMES, J.

FRENCH v. ATLAS MILLING CO.

(Civ. 1,003.)

(District Court of Appeal, Second District, California. Oct. 6, 1911.)

1. APPEAL AND ERROR (§ 232*)—RESERVATION OF GROUNDS—EVIDENCE—GENERAL OBJECTION.

Where a writing offered in evidence is material, as tending to prove the question in issue, and the only objection thereto on the trial was that it was incompetent, irrelevant, and immaterial, it cannot be objected on appeal that it was not signed by the party by whom it was purported to be executed, but by his attorneys, who were not shown to have been authorized to sign it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1351, 1368, 1430, 1431; Dec. Dig. § 232.*]

2. SALES (§ 359*)—EVIDENCE—WEIGHT AND SUFFICIENCY.

Evidence of the gross sum paid for handling all the hay on a particular ranch, including the hauling, weighing, and expenses and salary of a solicitor and collector, was not sufficient to establish the cost of loading on the cars a portion thereof; one-half of the expense of which defendant agreed to pay.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 359.*]

Appeal from Superior Court, Los Angeles County; Benjamin F. Bledsoe, Judge.

Action by Dr. J. Rollin French against the Atlas Mining Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Hester, Merrill & Craig, for appellant. McKelvey & Sorenson, for respondent.

SHAW, J. Action to recover the contract price for 150 tons of hay alleged to have been delivered to defendant by Frank E. Kemp, plaintiff's assignor, pursuant to the terms of a contract for the sale and delivery thereof. The number of tons of hay delivered under the terms of the contract, as found by the court, was 141⅔ tons, for which, less a sum already paid on account of the purchase price thereof, it gave plaintiff the judgment from which defendant prosecutes this appeal.

Appellant insists the judgment should be reversed for the reason that the finding of the court fixing the number of tons of hay delivered is not supported by the evidence. There is no merit in this contention. Not only did the direct testimony of Kemp, the assignor of plaintiff, tend to prove the fact found by the court, but there was introduced in evidence a writing which purported to be executed by defendant, which, when considered with other evidence, is ample to support the finding.

[1] Appellant, however, insists that the court erred in permitting this writing to be admitted in evidence, for the reason that it was not in fact signed by defendant, but by its attorneys, who were not shown to have been authorized to act for it. When offered in evidence, no objection was made to its introduction upon such ground; the sole contention then being that the instrument was incompetent, irrelevant, and immaterial. If defendant had desired the exclusion of the instrument upon the ground now for the first time urged, it should have made its objection based upon such ground at the time of the trial, when opportunity would have been afforded plaintiff to meet the same. Not having done so, it will not now be permitted to urge an objection not made at the time of the trial, when the writing was offered in evidence. That the evidence was material is shown by the fact that it tended to prove the question in dispute, viz., the number of tons of hay delivered to appellant by plaintiff's assignor. It appears that Kemp, the assignor

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of plaintiff, and one Hewitt, were copartners in the ownership of a lot of hay grown upon the ranch of W. K. Fogg, who was entitled to one-third of the crop as rental. After the hay had been harvested, these parties, by a writing, apportioned the tonnage of hay according to their respective interest; it being agreed that Fogg, the landlord, owned and was entitled to 224 tons, and that plaintiff's assignor, Kemp, owned and was entitled to 160 tons of said hay, and that Hewitt was entitled to the remainder thereof. Appellant had theretofore, in an action brought against Hewitt, caused the hay to be attached, and after the levy of the attachment, and the making of the agreement between said parties apportioning the tonnage of hay as aforesaid, appellant by the writing offered in evidence agreed and stipulated to dismiss and cause the levy of the attachment to be dismissed as to the 160 tons of hay so attached and claimed by Kemp, and agreed that he should remove said 160 tons of hay from the field, and at or about the same time, by a written contract made with Kemp, purchased said hay from Kemp upon the basis and agreement that his interest therein consisted of 150 tons, more or less, scale weight; it being understood that it was all of the hay contained in said field so belonging to Kemp, less 10 tons thereof, elsewhere sold. The agreement between Hewitt and Kemp that the latter was entitled to 160 tons of hay was thus approved and assented to by appellant, who, with full knowledge of all the facts, succeeded to the interest of Hewitt by purchase at a sale under execution.

[2] The contract made with Kemp for the purchase of his hay contained a provision to the effect that he would share equally with defendant the expense of loading the 224 tons of hay belonging to W. K. Fogg on the cars at Buena Park, and defendant in its answer alleged that it had paid on account of such expense and pursuant to the terms of the contract, the sum of $157.50, one-half of which sum it was claimed was chargeable to Kemp. The court found this allegation to be untrue. We cannot say that the court erred in so doing, for the reason that, while the evidence shows that the hay was loaded upon the cars, it fails to show the amount paid by defendant for the labor performed in doing the work. There was testimony tending to establish the gross sum paid for handling all of the hay received by defendant from that particular ranch, which included hauling, weighing, and the expenses and salary of a solicitor and collector. It cannot be determined from the evidence adduced what portion of the amount so paid should be applied to the cost of loading the hay belonging to W. K. Fogg.

The judgment is affirmed.

We concur: ALLEN, P. J.; JAMES, J.

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ROBINSON v. AMERICAN FISH & OYSTER CO. (Civ. 856.)

(District Court of Appeal, Third District, California. Oct. 5, 1911. Rehearing Denied by Supreme Court Dec. 4, 1911.)

1. Appeal and Error (§ 1002*)—Verdict—Conclusiveness.

In an action to charge a principal with the acts of his agent, the evidence of the agent's authority being conflicting, the question was for the jury, by whose finding the appellate court is bound.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. § 1002.*]

2. Principal and Agent (§ 123*)—Powers of Agent—Evidence.

In an action to charge a principal with the contract of his agent, evidence *held* to warrant a finding, under Civ. Code, § 2300, providing that an agency is ostensible when the principal intentionally or by want of ordinary care causes a third person to believe another his agent, that the agent was possessed of the ostensible power to make the contract.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 420–429; Dec. Dig. § 123.*]

3. Principal and Agent (§ 116*)—Power of Agent—Apparent Powers.

Secret instructions will not lessen the apparent powers of an agent which have been exercised by him without objection by the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 377, 377½; Dec. Dig. § 116.*]

4. Principal and Agent (§ 147*)—Powers of Agent—Special Agency.

Where an agency is known to be special, or the circumstances connected with it are such as should put a party dealing with the agent on inquiry, one dealing with the agent is bound to inquire into the nature and extent of the authority conferred, and to deal with the agent accordingly.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 528–533; Dec. Dig. § 147.*]

5. Sales (§ 187*)—Action for Price.

In an action to recover for fish sold and delivered, where the quantity of fish sold and received and the price were definitely fixed, interest was properly allowed to the plaintiff, either as compensation for the use of his money, as provided for by Civ. Code, § 1917, or as damages for the wrongful withholding of it, as provided for by section 3287.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 187.*]

6. Sales (§ 355*)—Action for Price—Pleading—Issues.

In an action for the purchase price of fish sold, where the defendant did not plead the defense that the fish were in a nonmerchantable condition when received, proof of that defense could not be made.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 355.*]

Appeal from Superior Court, Humboldt County; George D. Murray, Judge.

Action by Ellis Robinson against the American Fish & Oyster Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Webster & Webster (T. H. Selvage and J. J. Cairns, of counsel), for appellant. Otto C. Gregor and Kenneth Newett, Jr., for respondent.

HART, J. Plaintiff instituted this action for the purpose of recovering the sum of $815.60, with interest from October 23, 1909, said sum representing, it is alleged, the purchase price of fish sold and delivered by plaintiff and his assignors to the appellant. J. P. Meng, who was made a party defendant, was not served with summons, and the appellant was, therefore, alone proceeded against. Section 414, Code Civ. Proc. The cause was tried by jury, and a verdict returned awarding plaintiff the total sum declared upon, with interest at the rate of 7 per cent. per annum from the 23d day of October, 1909, the date of the delivery of the fish to appellant, and judgment was entered in favor of plaintiff in accordance with the terms of said verdict. The appeal here is by the defendant, American Fish & Oyster Company, from the judgment so entered, the record being brought here by the method authorized by sections 953a, 953b, and 953c of the Code of Civil Procedure. The complaint contains 17 counts, of which 16 represent an equal number of distinct claims of persons and firms for fish sold and delivered to appellant and which claims were, it is alleged, assigned to plaintiff. The seventeenth count is for fish sold and delivered to appellant by plaintiff himself. The complaint is verified. The answer specifically denies, seriatim, the allegations of the several counts of the complaint.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is charged that the court erred in its rulings as to certain evidence and misdirected the jury in matters of law; that the evidence is insufficient to justify and sustain a verdict awarding to plaintiff any sum whatsoever as against appellant; that it was error to allow interest on the amount returned by the jury in favor of plaintiff and against the appellant.

Of the foregoing assignments the first in importance is that involved in the claim that the evidence does not support the verdict, and to this we will first give attention. The particular contention in this regard is that the evidence shows that the fish delivered by plaintiff to appellant were the "first run of fish" (that is, fish caught on the first night of the season of 1909), and that the agreement was that fish so taken should be delivered to appellant on consignment (that is, upon the understanding that they were so delivered to appellant to be sold by it in San Francisco), and, after deducting a commission for selling said fish, the appellant was to return the balance to plaintiff, and that therefore "the plaintiff could only expect to receive what such fish brought in the market in San Francisco, to which point such fish had been shipped." While there is a conflict in the evidence as to the circumstances by which plaintiff and his assignors were employed to furnish fish to the appellant, there is, nevertheless, in our opinion, sufficient evidence to support the verdict.

1. The facts, as established to the evident satisfaction of the jury, are: The appellant is, as the complaint alleges, a corporation engaged in the business of packing and selling fish, with headquarters in the city of San Francisco. One J. A. Junta had for several years acted as its agent for the purpose of catching, buying, and shipping to it in San Francisco fish taken from Eel river, in Humboldt county. One J. P. Meng had also been for several years engaged in like business on Eel river, representing other San Francisco wholesale fish dealers. Either late in the year 1908 or at the beginning of the year 1909, Junta had a conversation with Meng in which he proposed to employ the latter to buy fish during the season of 1909 for him (Junta) or, more properly, for the appellant. Meng finally agreed to work for Junta upon the understanding that he would be paid for his services at the rate of half a cent per pound of fish so handled by him. The services of Meng were to and did consist in buying fish from a number of fishermen plying their occupations as such on Eel river, packing such fish in boxes and shipping them to appellant in San Francisco in the name of Junta. Meng was authorized by Junta to agree to pay the fishermen from whom he procured fish the price which would be paid during that season "down the river"—that is, whatever price those engaged in the fishery business at the mouth of the river fixed as the ruling price for fish taken from Eel river that year. Junta stated to Meng that he thought the price so paid would not be less than two cents per pound, and Meng so stated to the fishermen whose fish he engaged to purchase. (It was shown that the price per pound paid to fishermen for fish by those engaged in the business of buying fish "at the mouth of the river" during the season of 1909 was two cents.)

In brief, the testimony of Meng discloses that Junta, acting for and in behalf of appellant, employed him to buy all the fish that he could during the season of 1909 on the terms above set forth, and that, in pursuance of that arrangement, he (Meng) purchased, under special agreement with plaintiff and his assignors, the fish referred to in the complaint. Meng further testified, in direct contradiction to Junta, that the latter never at any time suggested or even intimated that the fish taken from the first night's run and purchased by him (Meng) should be shipped on consignment, and that the proposition as to shipping on consignment he never heard of until after this action was instituted. Indeed, Meng testified that, after a controversy arose between him and the appellant over the payment for the fish he had bought under his arrangement with Junta, he and the fishermen (plaintiff's assignors) held a meeting, at which Junta was present, for the purpose of discussing the situation, and that Junta then declared that the fishermen were entitled to be paid by the appellant; that Junta on that occasion said absolutely nothing about any agreement that the first run of fish should be shipped on consignment or be sold by the appellant on commission.

It was shown that a "camp" (from which term we understand is meant a structure of some sort), bearing the name of the appellant, was established and maintained by Junta on Eel river, and there he carried on the business of catching and buying fish for the appellant during the years 1907, 1908, and 1909. Junta himself testified that, during the years 1907 and 1908, he had employed men at the "camp" catching fish and that he also bought fish for the appellant from other fishermen than those who were employed by him; that he paid for the fish so purchased with money he received from the appellant.

[1] But the appellant erects its entire argument against the sufficiency of the evidence to support the verdict upon the testimony of Junta. It is claimed that his testimony clearly and unmistakably shows that he had no authority to purchase outright fish taken on the first night of the season, and was so expressly instructed by appellant; that Junta communicated to Meng, when making the agreement with the latter, the fact of having received such instructions from his principal and expressly declared

to Meng that he was not authorized to purchase, nor would he receive, the first night's run of fish, except upon the understanding that such fish should be shipped and delivered to appellant on consignment or subject to be sold by appellant upon commission; that the fish described in the complaint were from or consisted of the first night's catch. But upon the question whether he made such statement to Meng there is, as seen, a sharp conflict in the evidence, Meng having, as we have before shown, testified that Junta never at any time stated to him that the fish purchased by him from the first night's run should be shipped on consignment or that appellant had instructed him (Junta) not to purchase fish caught the first night, or that the latter was without authority to contract for the purchase of fish taken from the river on the first night. Of course, it was for the jury to determine the truth of that as well as all other matters of fact as to which a conflict arose in the testimony, and its verdict constituted an implied finding, by which this court is bound, that the agreement as described by Meng was the agreement that was made between the parties.

[2] And we think, as the plaintiff contends, that the jury were clearly warranted in finding, from all the facts and circumstances revealed to their minds by the evidence, that Junta did negotiate the agreement with Meng to the making of which the latter testified, and that Junta was at the least possessed of ostensible power to make such agreement. Section 2300, Civ. Code. That section provides that "an agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another his agent who is really not employed by him."

There is, as is clear from what has thus far appeared, no dispute about the employment of Junta as an agent of appellant with authority to procure fish for the corporation from Eel river, but the contention is, as seen, that if Junta made the agreement to which Meng testified, then the former exceeded his authority as such agent in that transaction. But even if it be true in point of fact that Junta thus transcended his authority, the conduct of the appellant, as disclosed by the evidence and as found by the jury, very clearly tended to lead Meng, the plaintiff and the latter's assignors into the belief that Junta was acting within the legitimate sphere of his employment when he entered into the agreement with Meng. The last named and the fishermen with whom he had business in pursuance with the agreement with Junta had been engaged for years in fishing for a livelihood in Eel river and selling their fish, either directly or indirectly, to wholesalers, some of whom had their principal places of business in San Francisco, and they knew that Junta was, during the years 1907 and 1908, the representative of appellant, especially appointed and authorized to procure fish for it either by catching or purchasing the same. There had been nothing in his conduct as agent of appellant or in the conduct of the latter with regard to his agency indicating that he was without authority to buy fish from the first night's run. In short, from the whole record, the jury were justified in inferring that appellant had either clothed Junta with unrestricted authority as its agent to make contracts with the fishermen engaged in taking fish from Eel river for the purchase of their fish whensoever the same might be taken or caught or that its conduct or silence as to his authority was such as to clearly imply that he was possessed of plenary power to do so.

That appellant knew that Junta purchased fish from the fishermen is not disputed, and if it were, the fact nevertheless would irresistibly follow from the admitted fact that the latter paid for such purchases with money furnished him by appellant. It is equally clear, from all the circumstances, that appellant knew that Junta held himself out, while at the "camp" on Eel river, as the purchaser of fish for appellant, having no "strings" attached or annexed to his authority as such purchasing agent, and yet, if his authority as such agent was in fact limited in any measure, the appellant, then, either willfully or negligently, or, as our Code puts it, "by want of ordinary care," permitted Junta to proceed, ad libitum with the purchasing of fish or the making of agreements to purchase them from the fishermen, regardless of the time at which such fish were taken from the river.

[3] The law will not, of course, permit a principal to escape the liability which it attaches to him by reason of such circumstances as are present here upon the plea that the agent has violated or transcended some limitation that he has secretly or without the knowledge of those with whom his agent as such is to deal placed upon the latter's authority as such agent, and in this case it will imply from the conduct of appellant authority in Junta to make the agreement into which the jury found that he entered with Meng. As is said by all the law writers and all the cases, the rule is that "quiescence is tantamount to acquiescence," and forbids the principal denying an authority which his own conduct has invited those with whom he was dealing to assume. See Clark on Contracts, p. 717, and cases cited in the footnote. So, it may be true—indeed, assumed—that appellant did limit the authority of Junta in the respects specified by the latter, and yet the former, under the circumstances as disclosed here, and according to the implied findings of the jury, is still bound by his acts and estopped by its own conduct from denying his authority to go as far as he did. "Where the special character of the agency is not known, and the principal has clothed the

agent with apparent powers, strangers, in dealing with the agent, may assume that such apparent powers are possessed. The principal cannot, by private communications with his agent, limit the authority which he allows the agent to assume." Clark on Contracts, p. 734, and cases cited.

[4] It is true that the general rule is that "if an agency is known and is special, or if the circumstances connected with it are such as should put a party dealing with the agent on inquiry, it becomes the duty of the person so dealing with the agent to inquire into the nature and extent of the authority conferred by the principal, and to deal with the agent accordingly." Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Clark on Contracts, p. 734. But, in the case at bar, as we have seen, there was apparently no occasion for inquiry as to the extent or scope of the authority of Junta, for there was nothing in his acts or his conduct or in those of appellant that warranted inquiry by those with whom he was dealing into the extent of his authority. There appeared, in other words, no extraneous circumstances in connection with Junta's agency that would suggest any question as to any restriction on the extent or scope thereof. To the contrary, there were, as we have shown, circumstances of a very significant character tending to disclose that he was not limited in any degree in his authority to purchase fish caught *at any time* in Eel river from whomsoever he pleased.

[5] 2. There is no merit in the contention that the plaintiff was not entitled to interest on the several pleaded claims from the 23d day of October, 1910—the day on which the fish mentioned in the complaint were sold and delivered to appellant. The quantity of fish sold to and received by appellant and the price to be paid therefor were definitely fixed and known to appellant. It was not necessary, in other words, to resort to evidence in court or to an accounting or by an accord between the parties to establish the amount due. To the contrary, the amount was susceptible of ascertainment by simple computation. Cox v. McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164, and cases therein cited; Easterbrook v. Farquharson, 110 Cal. 311, 317, 42 Pac. 811; Courtney v. Standard Box Co., 117 Pac. 778. Indeed, there seems to have been no dispute as to the quantity of fish delivered to appellant by Meng, and while there was some controversy involving the price per pound which Junta agreed to pay therefor—that is, whether the price agreed upon was a cent and a half or two cents per pound—still the total amount due at either price was capable of ready ascertainment by mere computation and, therefore, required no accounting to reach the precise sum due. As is said in Courtney v. Standard Box Co., supra, so it is true here: "Whether interest has been allowed upon the theory that compensation is thus awarded plaintiff for the use of his money, past due (section 1917, Civ. Code), or as damages for defendant's (appellant's) wrongful withholding of said money from plaintiff (section 3287, Civ. Code), in either case the allowance was perfectly proper."

The case of Heald v. Hendy, 89 Cal. 632, 27 Pac. 67, cited by appellant as an authority against the allowance of interest in the present case, is not in point. There the action was for a recovery upon certain running accounts, the precise amounts of which could not be ascertained except by an examination of said accounts and evidence as to their correctness.

[6] 3. The offer of appellant to show the condition of the fish referred to in the complaint when they reached San Francisco was properly rejected. The appellant tendered no issue upon that proposition. As seen, it merely denied the indebtedness upon the several claims pleaded by plaintiff. To have permitted proof that the fish were in a bad or nonmerchantable condition when they were received in San Francisco would have been to allow proof of a special defense not pleaded or set up. It is only elementary to say that a special defense, to be available, must be pleaded, and that evidence in support of such a defense where the same is not specially pleaded would be clearly inadmissible, and where admitted under such circumstances against the objection of plaintiff would be erroneous, and, if such defense were sustained, prejudicial.

4. After a careful reading of the court's charge, we have discovered nothing therein to warrant appellant's criticism thereof. The court, in its instructions, seems to have correctly covered all the important and vital points at issue.

The judgment should be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

(15 Cal. App. 589)

CARPENTER v. SIBLEY et al. (Civ. 799.)

(District Court of Appeal, Third District, California. March 15, 1911. Rehearing Denied by Supreme Court May 13, 1911.)

1. APPEAL AND ERROR (§ 675*)—REVIEW—DENIAL OF CHANGE OF VENUE.

The denial of a motion for a change of venue, based on the ground that plaintiff cannot have a fair and impartial trial before said or any jury, cannot be reviewed, the material averments of plaintiff's affidavit, containing all the evidence in support of the motion, being denied by the counter affidavits, and the voir dire examination of the jurors not being in the transcript.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2875; Dec. Dig. § 675.*]

2. MALICIOUS PROSECUTION (§ 20*)—PROBABLE CAUSE—BELIEF IN GUILT OF ACCUSED—GROUNDS.

To constitute probable cause for a prosecution, which will bar an action for malicious prosecution, one must have had, in addition to a belief that the facts amounted to the offense charged, only such knowledge or information, including information obtained through the ordinary and generally recognized channels of communication, as would superinduce in the mind of an ingenuous and unprejudiced person of ordinary capacity a reasonable belief of guilt of the charge.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 26, 27; Dec. Dig. § 20.*]

3. MALICIOUS PROSECUTION (§ 64*)—PROBABLE CAUSE—EVIDENCE.

Evidence on an action for malicious prosecution, the prosecution having been for subornation of perjury, *held* to warrant a finding of probable cause.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 151–153; Dec. Dig. § 64.*]

4. APPEAL AND ERROR (§ 909*)—RECORD—PRESUMPTION.

The record on appeal by plaintiff in an action for malicious prosecution not showing all the evidence that was presented to the grand jury and used on the trial of the indictment, it would be presumed that there was a sufficient showing to constitute probable cause.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3675; Dec. Dig. § 909.*]

5. MALICIOUS PROSECUTION (§ 56*)—PROBABLE CAUSE—BURDEN OF PROOF.

Plaintiff in an action for malicious prosecution has the burden of proof as to probable cause.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 112–116; Dec. Dig. § 56.*]

6. GRAND JURY (§ 41*)—FINDING BY GRAND JURY—COLLATERAL ATTACK.

The action of a grand juror cannot, in a collateral proceeding, as an action for malicious prosecution, be impeached by his testimony that he did not intend to find any such indictment.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 86, 87; Dec. Dig. § 41.*]

7. MALICIOUS PROSECUTION (§ 59*)—PROBABLE CAUSE—EVIDENCE.

Evidence that a grand juror did not intend to find the indictment has no relation to the question of probable cause for the prosecution by others.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 125–137; Dec. Dig. § 59.*]

8. EVIDENCE (§ 314*)—HEARSAY.

The question to a witness, "After refreshing your memory from that exhibit, who offered S. these inducements so to testify?" is objectionable as calling for hearsay; witness not claiming to know who offered the inducements.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 314.*]

9. MALICIOUS PROSECUTION (§ 59*)—PROBABLE CAUSE—EVIDENCE.

A., the county attorney, sued for malicious prosecution, because of prosecuting plaintiff for inducing S. to commit perjury on the trial of E., having been put on the stand by plaintiff and interrogated as to his reasons for the course he pursued, a statement purporting to have been made in jail by S., which was evidence that he at the trial of E. did commit perjury, and which was part of the information which came to A., as county attorney, and on which he acted, was admissible on the question of probable cause, though he did not ask the questions, or hear the answers contained in the statement, or see it signed, but on his cross-examination only stated that he knew the signature to be that of S., and that the statement was the one he referred to in his direct examination.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 125–137; Dec. Dig. § 59.*]

10. MALICIOUS PROSECUTION (§ 59*)—"PROBABLE CAUSE"—EVIDENCE.

Probable cause, depending not on the actual state of the case, but on honest and reasonable belief, being necessarily the product, in part, of hearsay declarations, the prosecuting attorney, being called on in an action for malicious prosecution to justify his course, may give the sources of his information, and relate in detail not only the facts of his personal knowledge, but those communicated by others (citing 6 Words and Phrases, 5618–5620; vol. 8, p. 7765).

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 125–137; Dec. Dig. § 59.*]

11. WITNESSES (§ 275*)—CROSS-EXAMINATION.

A., the district attorney, sued by C. for malicious prosecution for having prosecuted C. for inducing S. to commit perjury at the trial of E., having been put on the stand by plaintiff, and asked if he had not been sued by plaintiff for slander based on his statement at the trial of E., the purpose thereof being to show malice on his part, could on cross-examination, to rebut such inference and show his good faith, state just what he then said.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 924, 926, 967–975; Dec. Dig. § 275.*]

12. WITNESSES (§ 275*)—CROSS-EXAMINATION OF PARTY.

A district attorney sued for malicious prosecution of C., for subornation of perjury, may on cross-examination testify to all the information imparted to him as district attorney on which he acted, he having been called as a witness for plaintiff, and on his examination in chief a part only of the information having been called for, and one informant, an alleged thief and perjurer, having been singled out, and the matter left so that it might appear that this was the only warrant for defendant's action.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 924, 926, 967–975; Dec. Dig. § 275.*]

13. WITNESSES (§ 275*)—CROSS-EXAMINATION.

A., sued for malicious prosecution of C. for inducing S. to commit perjury, having, as a witness for plaintiff, been asked whether he agreed not to prosecute S., if S. would give his evidence in certain cases, could, on cross-examination to show his good faith in the transaction, explain fully what occurred between him and S. as to the promise of immunity.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 924, 926, 967–975; Dec. Dig. § 275.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

14. MALICIOUS PROSECUTION (§ 59*)—PROBABLE CAUSE—EVIDENCE.

That one at the time of trial of the action against him for malicious prosecution knows that one of the statements on which he acted in bringing the prosecution was false in many particulars does not affect the question of probable cause.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 125–137; Dec. Dig. § 59.*]

15. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR.

One is not harmed by the sustaining of objection to his question; the witness having subsequently testified fully as to the matter.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195–4206; Dec. Dig. § 1058.*]

16. EVIDENCE (§ 471*)—CONCLUSION.

The question asking witness to state whether or not he saw plaintiff suborn a witness at a trial is objectionable as calling for a conclusion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149–2185; Dec. Dig. § 471.*]

17. TRIAL (§ 97*)—STRIKING TESTIMONY—INVITED ERROR.

Plaintiff in an action against a district attorney for malicious prosecution, having asked defendant if he had courted an investigation in court of the charge that he had attempted to secure money from plaintiff, on condition and promise that the indictment against plaintiff be dismissed, cannot complain of the answer as scandalous and libelous, which, while somewhat discursive and argumentative, amounted to no more than a negative, with his reasons for not courting the investigation, failure of plaintiff to make his charges sufficiently definite.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 97.*]

18. APPEAL AND ERROR (§ 928*)—RECORD—PRESUMPTION.

The record not purporting to contain all the instructions given, refusal of requested instructions may be presumed to have been justified by instructions given.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3749–3754; Dec. Dig. § 928.*]

19. APPEAL AND ERROR (§ 1029*)—HARMLESS ERROR—PARTY NOT ENTITLED TO SUCCEED.

Plaintiff in an action for malicious prosecution is not harmed by any error in rulings on evidence, and in giving and refusing instructions the uncontradicted facts warranting a direction for defendants, on the ground that there was probable cause for prosecution.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4035, 4036; Dec. Dig. § 1029.*]

20. MALICIOUS PROSECUTION (§ 24*)—PROBABLE CAUSE—EVIDENCE—CONVICTION.

One's conviction on a prosecution, though reversed on appeal, is conclusive of probable cause, in the absence of evidence of conviction having been obtained by fraud.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 49–55; Dec. Dig. § 24.*]

Appeal from Superior Court, San Joaquin County; F. H. Smith, Judge.

Action by A. H. Carpenter against W. F. Sibley and others. Judgment for defendants. Plaintiff appeals. Affirmed.

See, also, 153 Cal. 215, 94 Pac. 879, 15 L. R. A. (N. S.) 1143, 126 Am. St. Rep. 77.

A. H. Carpenter, for appellant. Nicol & Orr, G. F. McNoble, Louttit & Louttit, and A. H. Ashley, for respondents.

BURNETT, J. The defendant W. F. Sibley was the sheriff, the defendant A. H. Ashley the district attorney, and the defendant George F. McNoble the assistant district attorney, of San Joaquin county during all the times mentioned in the complaint. The Fidelity & Deposit Company of Maryland was the surety on the official bond of said Sibley, and John N. Stennett, the other defendant, was, it is alleged in the complaint, "a thief and perjurer who bartered his testimony to other defendants herein for immunity from crime."

Among the allegations against these defendants is that "they corruptly, maliciously, and without probable or any cause prosecuted plaintiff before the grand jury and before a trial jury in the superior court and on appeal before the Supreme Court for the crime of subornation of perjury, and whereby they obtained a judgment of conviction against plaintiff by means of fraud, coercion, and by false and perjured testimony." Plaintiff was convicted and sentenced to the penitentiary for five years, but the judgment was reversed by the Supreme Court. 136 Cal. 391, 68 Pac. 1027. The said criminal action was thereupon dismissed by the district attorney, but after the defendant therein had suffered confinement in the county jail for a period of 261 days. The trial herein was before a jury and a general verdict was rendered in favor of defendants. The appeal is from the judgment and the order denying a motion for a change of venue.

[1] It is apparent that we cannot disturb this latter order. The only evidence in support of the motion is found in the affidavit of plaintiff wherein he sets out that "he has reason to believe and does believe that he cannot have a fair and impartial trial of said action in said county before said or any jury" for certain reasons, which he enumerates. The material facts therein averred are all denied in the counter affidavits of the sheriff, the district attorney, and assistant district attorney, and these defendants are positive in the opinion that there was nothing to prevent the plaintiff from having a fair trial. The voir dire examination of the jurors is not included in the transcript, and hence we cannot hold, in view of the action of the court below upon conflicting affidavits, that a single citizen liable for jury

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

duty in the county was disqualified to give plaintiff a fair and impartial trial.

Many points are made by appellant for a reversal of the judgment. Those that we consider of sufficient importance to merit consideration we proceed to notice.

[2] In the first place, it is insisted that no evidence was produced that plaintiff committed the crime charged against him, and therefore it must be held that he was prosecuted without probable cause. The gravamen of the perjury charge in the indictment is that at the trial in the justice court of Stockton township of the charge of petit larceny against one Arthur Ennis J. H. Stennett falsely testified "in substance and to the effect that he, the said J. H. Stennett, did not at any time on the night of January 8, A. D. 1901, or on the morning of January 9, 1901, or at all, see one Arthur Ennis on the premises of the said J. H. Stennett, near Lodi, in San Joaquin county, and the particular charge in said indictment against plaintiff herein was that the "said A. H. Carpenter, at and in said San Joaquin county, California, on or about the 23d day of January, A. D. 1901, did feloniously, willfully and corruptly, knowing the testimony so given by the said J. H. Stennett as aforesaid, would be, and was knowingly, willfully and corruptly false as aforesaid, and well knowing that the said J. H. Stennett well knew that the said statement that he, the said J. H. Stennett, was about to make and did make under oath, in the manner and form aforesaid, was knowingly, willfully and corruptly false, suborn, incite, and procure the said J. H. Stennett, being so sworn as aforesaid, to feloniously, knowingly, willfully, and corruptly and falsely testify as aforesaid."

Plaintiff's contention is that the only evidence that he committed the offense is found in the answers to three leading and suggestive questions asked of the said John H. Stennett, as follows: "Q. I will ask you whether he asked you then and there that afternoon whether or not you ever saw the defendant Ennis at any time out to your premises on the 8th day of January or the morning of the 9th of January, or at all? A. Yes, sir. Q. What did you answer to that? A. No, sir. Q. I will ask you whether or not at any time previous to the time that you—that question was asked you and that answer given by you—whether Carpenter had even talked over with you that that was to be your answer to that question? A. Yes, sir." It is further contended that, since the relation of attorney and client existed at the time mentioned between the said Carpenter and Stennett, "the act of 'talking over' the said testimony was in no sense a crime, but a professional duty on the part of plaintiff as such attorney." There is no question as to the rule. It is well stated in Harkrader v. Moore, 44 Cal. 151, as follows: "The gravamen of the action is that the defendant instituted the proceedings without probable cause—that is, without having at the time such knowledge or information as would superinduce in the mind of an ingenuous and unprejudiced person of ordinary capacity a reasonable belief that the plaintiff was guilty of the charge. The defense must be that he did believe and had reasonable grounds to believe that the accusation he made was well founded. 'Probable cause does not depend on the actual state of the case, in point of fact, but upon the honest and reasonable belief of the party prosecuting. It must appear that the defendant knew of the existence of these facts which tended to show reasonable and probable cause, because without knowing them he could not act upon them; and also that he believed the facts amounted to the offense which he charged, because otherwise he will have made them the pretext for prosecution without even entertaining the opinion that he had a right to prosecute.' 2 Greenleaf, Ev. 455."

[3] Of course, it is apparent that the term "knowledge," as used in the foregoing quotation, is not confined to personal observation, but it includes that and also information obtained through the ordinary and generally recognized channels of communication. With this view of the requirement of the rule "of probable cause," if the evidence quoted by appellant were all that was submitted to the grand jury, we could hardly escape the conclusion that the district attorney had failed to justify his prosecution, but an examination of the whole record places the matter in an entirely different light. Mr. Ashley was put upon the stand by appellant and interrogated as to his reasons for the course he (Ashley) pursued. From his lengthy statement we select the following significant facts: On January 21st the case of People v. Davis came on for trial. Carpenter telephoned Ashley that, if the Stennetts were absent, he (Carpenter), who represented Davis as well as Ennis and the Stennetts, would consent to a continuance. Carpenter was placed upon the stand and stated that, after Stennett was acquitted a day or two before, he, Carpenter, went from the justice court to his office, but, as a matter of fact, the district attorney learned that Carpenter had gone to the Roosevelt lodging house on Main street, and while he was there a note was taken out to the Stennetts over the back fence down to the Standard lodging house, advising them to get out of town, to go down the Santa Fé Railroad track and take the train and get out that way. The statements of the Stennetts were taken very carefully, and corroborating evidence was obtained that they had visited Mr. Carpenter at his office and had seen him on the street at such times as they mentioned. Before the trial of the Ennis Case the district attorney had received from the sheriff a written statement made by Stennett in the county jail, on January

11, 1901, in which he declared that Ennis and Davis were at his house at the time in dispute, that they came there to borrow his "rig," and said they were going to Sargent's to get some pork, and they came back between half past 2 and 3 in the morning with a hog in the wagon. In said statement was given a minute account of what occurred. At the trial of Ennis Mr. Ashley heard the witness Stennett testify that he did not see Ennis at his home on the night in question. After court was adjourned, the district attorney asked the sheriff to arrest Stennett for perjury, and, in reply to Mr. Carpenter's statement that it was a bulldozing scheme, Mr. Ashley said it was a serious matter, so serious that Mr. Carpenter's connection with it would have to be investigated and laid before the grand jury, and that Carpenter would have an opportunity himself to be heard. Immediately after the trial of Stennett, Mr. Wall, a deputy sheriff, told Mr. Ashley to hurry and get a subpœna, as he had seen Carpenter beckon Stennett to go. The constable, James Grant, reported that he had gone to Carpenter's office and could get no information as to Stennett's whereabouts. Subsequently Mrs. Stennett stated to Mr. Ashley that Mr. Carpenter was in the room in the Roosevelt lodging house, and, at his suggestion, a note was written to Mr. Stennett to get out of town. Mr. Stennett and Mrs. Stennett stated that they had gone to Mr. Carpenter's place and had seen him. He said that he would have to see the statement that Stennett had made to the sheriff, that he was sorry that Stennett had made the statement, and finally made an appointment for the next day in his office. Then in the office Mr. Carpenter endeavored to ascertain whether the statement was sworn to, said it could not be sworn to because the sheriff could not administer an oath, and he did not need to identify Ennis as being at his place at Lodi, did not need to identify Ennis, who was then to be tried. Mr. Stennett said that he asked Mr. Carpenter if there was any danger of perjury, and Carpenter had told him no, and that he must not be surprised if Carpenter went after him rough on cross-examination, and that he must watch Carpenter, keep his eye on him in reference to his testimony, watch his objections, and he would maybe get a line as to how he would answer. He said further that in talking to Mr. Carpenter he would go on to say that Ennis was present when Carpenter asked him who was there, repeating that Ennis was there because of the fact, and that Mr. Carpenter would say, "You must not say that; that it would convict Ennis." The district attorney also described the peculiar conduct of Stennett while testifying at the trial of Ennis, stating that, when the witness was asked an important question, he "would wait for you (Carpenter) to object, and he seemed to gather from your objection something in line with his answer. I could not at all times be between you and the witness, and, when I got between you, the witness was confused and seemed to be at sea, and I would get more answers from him in accordance with the statement he made to the sheriff," etc. No appellate court could say that the district attorney had no legal right to believe from the foregoing and other circumstances detailed that plaintiff was guilty of the crime of subornation of perjury, and that it was his duty to prosecute him for said offense. The district attorney is necessarily vested with considerable discretion, in such matters. If there is substantial ground for his belief, and it is so held by the trial court, the finding manifestly cannot be successfully assailed on appeal. Mr. Ashley declared as a witness that "from what had come to his knowledge as district attorney, from the statements of all these parties and from his observation of the talk and actions of Mr. Carpenter, that he did not have the shadow of a doubt that plaintiff had committed the crime of subornation of perjury."

[4] The record does not show clearly all the evidence that was presented to the grand jury or that was used on the trial, but it does appear that there was a sufficient showing to constitute the basis for "probable cause." Even if this were not so, in the condition of the record, we should have to presume that the indictment and the trial were warranted, assuming that for insufficiency of the evidence therefor the district attorney could be held liable for damages in an action for malicious prosecution. We have devoted attention to the case only as it affects the defendant, Ashley, for the reason that it is very clear from the record that there was no conspiracy shown, and the acts of the other defendants were really dependent upon and subordinate to the conduct of the district attorney and in line with their plain duty as public officials without any malice whatever against the plaintiff. It is hardly necessary to add that the plaintiff may have been entirely innocent of the charge against him—and we desire to intimate nothing to the contrary—but it is nevertheless true, as a matter of law, that there was probable cause for his prosecution. In Booraem v. Potter Hotel Co., 154 Cal. 102, 97 Pac. 66, it is said the conduct of plaintiff throughout the transaction, which was the basis for his arrest, "was that of an honorable and upright man, and there was nothing in his conduct to have excited suspicion," yet, by reason of a mistake made by a Los Angeles bank in dishonoring a check, it was held that probable cause was shown for the prosecution, notwithstanding that prosecution was afterwards proved to be absolutely unwarranted.

Appellant claims that "the same testimony and facts that were before the trial jury were before the grand jury, and the only evidence before the trial jury was to the effect that plaintiff talked over the evidence with his client, and the only witness that testified to the charge was the thief and perjurer Stennett." But he is not borne out by his references to the transcript. No witness attempted to produce all the testimony that was heard by either body. The fault of appellant is in pointing out a portion of that testimony which is reproduced and assuming, contrary to the record, that nothing else was presented. One of the grand jurors called by plaintiff illustrates the fallacy of this position in the declaration that: "I can't call to memory the different witnesses and the different parts they took in that testimony. The testimony was proven to the satisfaction of the grand jury that you did suborn Stennett." He also testified that he "remembered from the evidence that the persons who testified that Mr. Carpenter committed subornation of perjury were present and heard or saw the suborning." J. A. Plummer, also, who was plaintiff's attorney on the criminal charge, testified that there was a large number of witnesses at the trial who testified to many circumstances bearing upon the charge and that he did not pretend to give all the testimony, even of Mr. or Mrs. Stennett.

[5] Appellant is equally inaccurate in his assertion that the record shows that no effort was made to prove that Stennett swore falsely when he testified that he did not see Ennis at his place. Appellant ignores the rule imposing upon him the burden of proving the want of probable cause. Respondents could rest upon the presumption that they acted in good faith and for sufficient reason, but in addition, as we have already seen, Mr. Ashley had information which justified him in the belief that said testimony was false, and it appears, at least inferentially, that there was such evidence put before the grand and also the trial jury.

[6, 7] The ruling of the court was manifestly correct in sustaining an objection to the following question asked of one of the grand jurors: "You did not intend to find any such indictment against A. H. Carpenter then?" No citation of authorities is needed for the proposition that a grand juror cannot, in a collateral proceeding, impeach in this manner his official action in finding an indictment. Besides, it is clear that it could have no relation to the question of probable cause for the prosecution or conspiracy on the part of defendants.

[8] Referring to the transcript of the testimony taken at his trial, plaintiff asked the said witness, J. A. Plummer, this question: "After refreshing your memory from that exhibit, can you tell now who offered Mrs. Stennett these inducements to so testify?" The objection was made that the writing itself was the best evidence of what the testimony was. The court so ruled. It is clear that the witness did not claim to know who offered said inducements, and hence the form of the question was objectionable as calling for hearsay testimony. But, if it was sought to show what the testimony concerning said inducements was at the trial, it is difficult to understand why plaintiff should have objected to the writing when the witness had just stated that the writing was substantially correct.

[9] Appellant claims that "it was error for the court to receive in evidence the alleged statement of John H. Stennett, which purported to have been made at the county jail on January 11, 1901. The witness did not see the hog thief sign the statement, and did not ask the questions, nor hear the answers thereto. He had no personal knowledge of the correctness of that statement." But Mr. Ashley had stated that he knew the signature to be that of Stennett, and that it was the statement to which he referred in his direct examination. It was evidence that Stennett at the trial of Ennis had committed perjury, and was a part of the information which came to Ashley as district attorney, and upon which he acted, and was clearly admissible upon the question of probable cause.

[10] "Probable cause," depending, as it does, not upon the actual state of the case, but upon the honest and reasonable belief of the party prosecuting, must necessarily be the product, in part at least, of hearsay declarations, and much of the information as to the crime and party committing it would naturally be imparted to the district attorney alone prior to the actual prosecution. Called upon to justify his course in instituting the investigation before the grand jury and in bringing plaintiff to trial on the indictment, it was entirely proper for Mr. Ashley to give the sources of his information and to relate in detail the facts of his own personal knowledge and those communicated by others in order that the court might determine whether his activity against the plaintiff rested upon an honest and reasonable belief as to guilt and was inspired by a sense of duty and right or was the product of a wanton and malicious purpose to injure plaintiff or to accomplish some object which he knew to be wrong and against sound public policy. Fox v. Smith, 25 R. I. 255, 55 Atl. 698; 6 Words and Phrases, 5620–5627, vol. 8, p. 7765. Indeed, the recital of his reasons for the prosecution was invited by the plaintiff, who asked Mr. Ashley for the sources of his information, and "where and when he learned that the offense of subornation of perjury had been committed."

[11] It was entirely proper for the court to allow the witness Ashley to answer the question: "Did you at that time say anything to Mr. Carpenter with reference to investigating his case, and if the facts coming to your knowledge justified it in your judgment as district attorney of laying it before the grand jury?" The question re-

lated to the trial of Ennis, and was proper cross-examination. The witness had been asked by plaintiff if the former had not been sued by the latter for slander based upon the statements made by Ashley at the time. The purpose of the direct examination in that respect was obviously to show malice on the part of the witness. To rebut the inference and to show his good faith he clearly had the right on cross-examination to state just what was said.

[12] The court committed no error in overruling plaintiff's objection to the question asked of Mr. Ashley on cross-examination: "Will you please state fully all the information imparted to you as district attorney upon which you acted and upon which you brought to the attention of the grand jury, the charge against A. H. Carpenter of subornation of perjury?" On examination in chief a part of the information had been called for, and one informant, an alleged thief and perjurer, had been singled out and the matter left so that it might appear that this was the only warrant for the district attorney's action. The door was thereby opened for a complete revelation of the sources and extent of his information.

[13] It was entirely proper for Mr. Ashley, on cross-examination, to explain fully what occurred between him and the witness Stennett as to the promise of immunity from prosecution made by the former to the latter in order to show the good faith of the district attorney in the transaction. Besides, he substantially covered the ground in the direct examination when, in reply to the question: "Did you agree not to prosecute him for any charges of perjury and for his hog stealing if he would give his evidence in certain cases?" he answered: "I agreed if—on the—after the 24th of March, after consultation with Judge Budd—that I would not prosecute him for these charges of perjury, provided he would tell the truth and furnish me with all the circumstances and details and corroborating matters which would show at every time the matters and things involved in their truthful light; and to the best of my knowledge he did so."

[14, 15] Appellant complains that the court sustained an objection to the following question asked by him of Mr. Ashley on redirect examination: "This statement that has been offered in evidence and that has been read in evidence, of Jack Stennett, was false in many particulars?" The question was objectionable on the ground that the statement had been received in evidence simply for the purpose of showing the information which came to the district attorney. It would not affect the question of probable cause if the district attorney knew at the time of the present trial that said statement was false in many particulars. As a matter of fact, however, the witness testified afterwards without objection that at the time the statement was made he "was satisfied that portions of it were false and portions were true." Appellant, therefore, had the full advantage of any material inquiry as to the verity of the statement.

[16] Plaintiff asked witness Parker, the justice of the peace who presided at the trial of Ennis, the following question: "Now will you state to the jury whether or not you saw me suborn the witness Stennett while the trial was going on there in your presence, and in the presence of the jury and spectators?" The court properly sustained an objection that it called for a conclusion, and not facts and occurrences. The witness was permitted to answer every proper question that was submitted to him.

[17] Mr. Ashley was asked by plaintiff this question: "You have not courted an investigation in this court upon that subject, have you?" referring to a charge that the said Ashley had attempted to secure $1,000 from Carpenter upon condition and promise that the indictment against the latter be dismissed. The witness answered: "Because you never have put a paper in this court in my judgment stating facts upon which any proceeding could be had against you for your statements. You state your facts in such a way it does not give the court jurisdiction, and it does not give the party any recourse against you. You put into your papers a number of allegations of such a character that they cannot be answered for their indefiniteness and there is no way to meet them." The answer is somewhat discursive and argumentative. It amounts no more, however, than to a negative with his reasons for not courting the investigation. Appellant claims that this and some subsequent answers were "scandalous and libelous," but it may be said that, considering the character of the questions propounded, it hardly behooves appellant to complain.

[18] Some 30 instructions, covering 25 pages of the transcript, were requested by plaintiff and refused. In reply to appellant's complaint, for the court's action, it would be sufficient to say that the record does not purport to contain all the instructions given. We should have to indulge, therefore, the presumption, if necessary, that the jury were fully instructed by the court. But, assuming that the full charge is contained in the transcript, it is apparent that the jury were instructed upon all questions that were necessary for their enlightenment.

[19] Finally, it may be said in answer to all the criticism of the rulings of the court during the trial and of its action in giving and refusing instructions, that, if any error was committed, the error was without prejudice for the reason that the only conclusion warranted by the evidence is that there was probable cause for the prosecution of appellant, and, furthermore, upon certain uncontradicted facts to which Mr. Ashley and oth-

ers testified, the court would have been authorized to instruct the jury to render a verdict for defendants for the reason that there was sufficient ground for said prosecution. There was some contradiction of the truth of some of the statements made to Ashley, but no contradiction of the fact that he was so informed, and there is nothing in the record to justify the conclusion that he did not act in good faith.

[20] There is no evidence in the record of any fraud on the part of the defendants or any of them. Hence, under the rule, the conviction of appellant was sufficient evidence of probable cause for his prosecution. It is stated in Holliday v. Holliday, 123 Cal. 32, 55 Pac. 704, that, "without reviewing the cases cited, we deem it enough to say that, while there is some apparent conflict in the decisions, the prevailing rule is that when a person is charged before a competent court having jurisdiction of the matter, and is tried and found guilty, the judgment rendered, unless it is shown to have been obtained by means of fraud, is conclusive evidence of probable cause for making the charge, even though it is afterward held to be unauthorized and reversed on appeal. Crescent Live Stock Co. v. Butchers' Union, 120 U. S. 141 [7 Sup. Ct. 472, 30 L. Ed. 614]." In the latter case it is said: "The rule is founded on deeper grounds of public policy in vindication of the dignity and authority of judicial tribunals constituted for the purpose of administering justice according to law and in order that their judgments and decrees may be invested with that force and sanctity which shall be a shield and protection to all parties and persons in privity with them."

[21] Again, the gravamen of the charge against defendants is that they "did for the purpose of injuring the plaintiff in his social and business relations and of exposing him to public hatred, ridicule, and contempt, wrongfully, unlawfully, maliciously, and feloniously conspire, combine, confederate, and agree together to falsely charge and accuse plaintiff of the crime of subornation of perjury and also to convict and punish him for the aforesaid felony and in pursuance thereof, at divers times during the aforesaid period, the above-named conspirators unlawfully procured false evidence to be given before the grand jury," etc. There was no evidence worthy of the name that the defendants did conspire together for such purpose or for any purpose, nor is there any evidence that in "pursuance" of any conspiracy or at all they "procured false evidence to be given before the grand jury." There was, therefore, an entire failure to prove the material allegations of the complaint, and the jury might properly have been so instructed.

We have examined the record with care, but we are satisfied with the conclusion of the lower court. The judgment and order are therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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17 Cal. App. 235

EXCHANGE NAT. BANK v. ROSS.

(Civ. 951.)

(District Court of Appeal, Second District, California. Oct. 13, 1911.)

1. Estoppel (§ 118*)—Evidence—Findings.

Evidence *held* insufficient to sustain a finding that plaintiff bank had acquiesced in the sale of certain real estate and the completion of the transaction, so as to be estopped to assert a liability against defendant on notes previously pledged to it for a part of the purchase price of the property by defendant's vendor.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 306, 308; Dec. Dig. § 118.*]

2. Bills and Notes (§ 427*)—Pledged Notes—Rights of Pledgee.

Defendant purchased certain real estate from S., paying part of the price and agreeing to pay the balance, evidenced by notes for $300, payable at intervals of 6 months, S. agreeing to convey a clear title to the property, which at the time of the contract was incumbered by mortgage for $2,000. S. assigned defendant's notes to plaintiff bank as security for an indebtedness, but, before defendant had notice thereof, he contracted to convey the property to K., pursuant to which agreement certain money was deposited in escrow in a savings bank. Before the transaction was consummated, defendant was notified of the pledge. Notwithstanding such notice, the property was sold to K. and the money received used to satisfy the outstanding mortgage, plaintiff receiving nothing. *Held*, that plaintiff bank never having consented to such settlement, it constituted no satisfaction of defendant's notes pledged to it.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1233–1244; Dec. Dig. § 427.*]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Exchange National Bank against J. A. Ross. Judgment for defendant, and plaintiff appeals. Reversed.

Roland G. Swaffield, for appellant. Simpson Moody & Simpson, and J. H. Merriam, for respondent.

JAMES, J. Action brought upon five promissory notes, each being for the sum of $300, executed by defendant and made payable to S. A. Sanderson or order. These notes were negotiable in form, but were given to represent a certain indebtedness arising upon a contract for the purchase of real property. On June 28, 1906, defendant and S. A. Sanderson entered into a written contract whereby Sanderson agreed to sell and defendant to buy portions of two lots of land in the city of Long Beach. The contract provided that the defendant should pay a total sum of $2,250 for the property, and that he was to receive a clear title thereto. The promissory notes were given as evidence of the partial payments to become due under the contract, it being provided in the latter instrument that the sum of $300 should be paid by defendant Ross upon the execution of the contract, and the further sums of $300 every six months thereafter, except that the final payment of $150 was to be made three months after the last installment of $300 became due. On April 26, 1907, Sanderson assigned the contract, together with the promissory notes incident thereto, to the plaintiff bank as collateral security for the payment of a large indebtedness then owing by him to said plaintiff. At the time the contract referred to was made, the real property which was the subject thereof was incumbered by a mortgage given prior thereto by Sanderson to secure an indebtedness of $2,000 owing to one Mary M. Shaw. At the time the assignment of the contract was made by Sanderson to plaintiff, defendant Ross had paid all of the money then required to be paid by him, to wit, the initial payment of $300 and the payment of the further sum of $300 which had fallen due on December 28, 1906. Before defendant had notice that Sanderson had assigned the contract and notes to the plaintiff, he had entered into some agreement whereby it was contemplated that one Kirsher should be given title to the real property agreed to be conveyed by Sanderson to defendant. Certain money which was to be used in the consummation of the latter deal was deposited with the escrow clerk of the Citizens' Savings Bank of Long Beach, but before this transaction was finally consummated defendant Ross received notice that the plaintiff bank held the contract and notes which he had theretofore executed in favor of Sanderson. Notwithstanding this notice, a sale of the property was made to Kirsher, the money received being used to satisfy the mortgage indebtedness then outstanding to Mrs. Shaw, and the plaintiff bank received nothing. The latter commenced this action on July 2, 1909, at which time the several notes for $300 each, falling due, respectively, on June 28, 1907, December 28, 1907, June 28, 1908, December 28, 1908, and June 28, 1909, had all matured. The trial court found in favor of the defendant and entered a judgment accordingly, from which judgment, and from an order denying its motion for a new trial, the plaintiff has appealed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] The appeal may be determined by an examination of the questions presented by appellant touching the sufficiency of the evidence to sustain the findings of the trial court. Among other facts determined, the trial court made the following finding: "That after the placing of said money in escrow with said Citizens' Savings Bank by said defendant and said Kirsher as aforesaid, the plaintiff having knowledge of the deposit of said money in escrow as aforesaid, consented to and urged the carrying out of said escrow." This finding was made evidently with the view entertained by the trial judge that, while defendant, after receiving notice that his contract and notes had been assigned by Sanderson to the bank, was answerable to the bank on account of payments becoming due under said contract, the plaintiff had by acquiescence in the sale of the property to Kirsher and the carrying out of the terms of that transaction, whatever they may have been, estopped itself from thereafter making any claim against the defendant on account of the contract indebtedness. If the fact had appeared in evidence according to the terms of the finding of the court, no doubt the legal result just indicated would follow, but the evidence is wholly insufficient to sustain the finding. Nowhere in the bill of exceptions is it shown just what the contract proposed to be made with Kirsher, and which was presumably evidenced by some writing placed with the escrow holder, was. Defendant Ross admitted that before the deal with Kirsher had been carried out he received notice from the plaintiff bank that it held his contract and notes, and he himself testified upon that subject as follows: "The money was put up in the bank about July 19, 1907, and I learned that the Exchange National Bank held the notes a short time after that. At the time the money was paid over and the deed from Sanderson to Kirsher delivered, I knew that the Exchange National Bank held these notes. Prior to that time I had gone to Mr. Julian (the escrow clerk) and told him not to turn that money over to Sanderson until he had possession of the notes. I had several conversations with Mr. Wallace of the Exchange National Bank with reference to these notes prior to the closing of the deal on September 6, 1907." The following testimony given by the cashier of plaintiff bank was uncontradicted by any testimony which appears in the record: "While the money was still in escrow in the Citizens' Savings Bank, and in the early part of August, 1907, Mr. Ross told me that he had instructed Mr. Julian not to deliver the money to Sanderson until he had possession of the notes. During the early part of August, 1907, after I had written Mr. Ross relative to these notes, notifying him that we were the owners of the same, and after I had received a reply, I had several conversations with Mr. Ross relative to the payment of these notes. He came to the bank two or three times trying to get the notes and stated that he had sold the property and asked me if I wouldn't turn over those notes so that he could complete the escrow as he had sold the property. I suggested he could, upon satisfying what Mr. Sanderson owed us, I would turn over the notes. Then he said he would notify Mr. Julian or notify the bank, not to turn over that money until we got the money concerning that point. This occurred after I had written him as I before stated and after he had replied and during the early part of August, 1907." There was also introduced in evidence the following letter,

which was identified by defendant as having been received by him: "August 6, 1907. Mr. J. A. Ross, Pasadena Calif.—Dear Sir: We are in receipt of your letter of the 2nd inst., explaining that the $1,650 had been in the First National Bank of this city since June 28th to pay off notes bearing your name. We thank you for this information and will have to admit that we were not aware of the transaction. We are notifying the First National Bank to-day and urging them to hasten the cleaning up of this matter. Very truly yours, Wm. H. Wallace, Cashier."

[2] This is in substance all of the testimony introduced touching the matter of any alleged consent given by plaintiff bank to the carrying out of the Kirsher deal, and it is far from establishing the important fact found by the court, that the bank consented to the carrying out of the escrow agreement in the way in which it was carried out, with the result that plaintiff should receive nothing on account of the contract and notes held by it. As before noted, the testimony as shown in the record is meager indeed, upon the subject of just what the escrow directions, as given to the Citizens' Savings Bank, were. Conceding that the promissory notes and agreement of purchase taken together evidenced a contract nonnegotiable in form, and that therefore until defendant Ross had notice of the assignment thereof to plaintiff, he would have been justified in making payment of his obligation to his original creditor, Sanderson, the case as it is presented to us stands without any evidence tending to show that Ross had by any binding contract satisfied his indebtedness to Sanderson before notice that the bank held his contract and notes was received by him. The defendant did in fact recognize the claim of the bank and represented to the latter that he had given instructions that the Kirsher deal was not to be carried out until the notes held by the bank had been surrendered. Quoting his own words, he said: "Prior to that time I had gone to Mr. Julian and told him not to turn that money over to Sanderson until he had possession of the notes." We do not regard the evidence referring to the satisfaction of the mortgage held by Mrs. Shaw, and the finding based thereon, as material to a determination of the controversy. It may be added that the evidence does not show that the total consideration received on the Kirsher deal was only sufficient to satisfy the mortgage held by Mrs. Shaw. Witness Julian, the escrow clerk, testified as follows: "The total amount put up was something like $2,100. The selling price of the property as we had it was part money and part trade." The fact was that defendant Ross, having made payment of $600 on account of a total sum of $2,250 to be paid under his contract for the purchase of real estate, entered into a negotiation with Sanderson and Kirsher by which he proposed to transfer his interest in the property and so satisfy his debt to Sanderson. At that time he owed no debt to Sanderson, plaintiff bank having acquired the right to receive all moneys due under the contract, and any settlement or compromise made with Sanderson was without effect as against the right of the bank to make collection of the full amount of the indebtedness. As we have pointed out, there is no evidence sufficient to justify the finding of the court that the plaintiff bank gave consent to any attempted settlement made by the defendant with the original payee of the contract and notes.

It follows that the judgment and order must be reversed, and it is so ordered.

We concur: ALLEN, P. J.; SHAW, J.

17 Cal. App. 247

PEHL v. FANTON. (Civ. 875.)

(District Court of Appeal, Second District, California. Oct. 16, 1911. Rehearing Denied Nov. 15, 1911. Denied by Supreme Court Dec. 15, 1911.)

1. Appeal and Error (§ 171*)—Trial—Theory of Cause—Questions Not Raised at Trial.

Where in an action for broker's commissions, the court inadvertently struck from defendant's answer matter denying that plaintiff had procured a purchaser, but, notwithstanding this, plaintiff introduced evidence to prove the fact, and both parties tried the case on the theory that a material issue had been raised thereon, plaintiff could not claim for the first time on appeal that there was no denial of such fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053–1069, 1161–1165; Dec. Dig. § 171.*]

2. Brokers (§ 60*)—Performance of Contract.

Where a broker is employed to negotiate a sale of property, and has found a purchaser ready, able, and willing to purchase on the vendor's terms, the broker's right to commissions does not depend on final consummation of the sale by the vendor; the broker's contract being complete when he delivers or tenders to the owner a valid written contract containing the terms of sale agreed on, signed by a party able to comply therewith, or to answer in damages if he fails to perform.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 91–97; Dec. Dig. § 60.*]

3. Brokers (§ 49*) — Contract — Services — Procurement of Purchaser — Escrow Agreement.

Where a broker, employed to sell property on specified terms, procured a person who executed an escrow agreement to purchase the property, or forfeit $1,000, such agreement was a mere option to purchase, and not a sale, and did not entitle the broker to commissions.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 70–72; Dec. Dig. § 49.*]

4. Brokers (§ 49*)—Employment to Sell Realty—Terms of Contract—"Sale for Cash."

Where a broker was employed to sell real estate for a specified price, payable half cash and the balance in a year's time, such terms required payment of the cash portion immediately on a delivery of the property sold; and hence an agreement with a proposed purchaser, authorizing him to pay the cash part of the price within 15 days, was not a compliance with the terms.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 70-72; Dec. Dig. § 49.*]

Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by N. G. Pehl against C. D. Fanton. From a judgment for defendant, and from an order denying plaintiff's motion for a new trial, he appeals. Affirmed.

Chas. P. Huey and Walter C. Davison, for appellant. G. R. Freeman, for respondent.

SHAW, J. Plaintiff, a real estate broker, brought this action to recover from defendant $300 for commissions alleged to be due him for obtaining a purchaser for certain real estate owned by defendant. Judgment was rendered for defendant, from which, and on order denying his motion for a new trial, plaintiff prosecutes this appeal.

As shown by the record, defendant, on February 5, 1907, by a memorandum in writing, authorized plaintiff to sell the property therein described as lot No. 406 of Ontario colony lands for the price of $11,000 payable one-half in cash and the balance in one year, with interest thereon at the rate of 7 per cent. per annum, payment thereof to be secured by a mortgage on the property sold, which agreement contained the following provision: "If sale is made, I hereby agree to execute and deliver a good and acceptable conveyance of said property, and to pay a commission of 5 per cent. on the first $1,000 or less, and 2½ per cent. on all over that amount, out of the first payment." No time was specified when plaintiff's authority to sell should terminate, and the authority given was at no time revoked by defendant. In his complaint plaintiff alleged that on March 6, 1908, he procured a buyer who was then and there ready, willing, and able to purchase and pay for the property in conformity with the the terms and conditions set forth in said contract, and notified defendant to that effect, but defendant refused to consummate the sale. This allegation (other than that defendant refused to make the sale) was denied by the answer, which also, in addition to its denials, set up certain affirmative matter, beginning on line 11, p. 3, of the answer, and ending on line 18, p. 4, thereof. Plaintiff moved that all of said matter (specifying it by line and page) be stricken from the answer as irrelevant and redundant. This motion was by the court granted, but, instead of limiting the order as made to that part of the answer to which the motion was directed, the court, as shown by the minute entry, ordered stricken out certain designated pages of the answer, which included the allegations of denial, leaving as the only issue to be tried under the pleadings certain affirmative defenses, as to which the court found adversely to defendant. Notwithstanding the fact that it clearly appears the order of court was due to inadvertence, and not responsive to the motion, counsel for appellant strenuously insists that this court should eliminate from consideration all issues, other than those raised by the answer, after the making of the said order as shown by the record; and thus considered it is claimed that certain material findings in favor of defendant are not within the issues.

[1] It is apparent, however, that upon the trial of the cause both the court and the parties regarded the question whether or not plaintiff had, as alleged, procured a purchaser for the property, in accordance with the terms of the contract authorizing the sale, as the chief issue involved. Without objection, both plaintiff and defendant introduced evidence touching the question, and the court made its findings thereon. If the plaintiff had desired to take advantage of such condition of the pleadings, he should not only have refrained from introducing evidence in support of the allegation of his complaint which he now claims was not denied, but should also have entered an objection to the defendant introducing testimony thereon. Having failed to do so and the parties and the court having tried the case upon the theory that such material issue was involved in the pleadings, appellant cannot in this court for the first time raise the question that there was no such issue to be tried. Flinn v. Ferry, 127 Cal. 648, 60 Pac. 434; Barbour v. Flick, 126 Cal. 628, 59 Pac. 122; Murdock v. Clarke, 90 Cal. 427, 27 Pac. 275; Klopper v. Levy, 98 Cal. 525, 33 Pac. 444.

In support of plaintiff's allegation that he had procured one ready, able, and willing to purchase the property in accordance with the terms and conditions of the memorandum authorizing the making of the sale, he introduced evidence establishing the following facts: On March 6, 1908, 13 months after the date when plaintiff was so authorized to sell the property, he procured one Henry S. Grunenwald to execute certain escrow instructions, directed to the First National Bank of Upland, California, wherein it was stated: "I herewith hand you check for $1,000, and agree to deposit with you $4,500 in cash on or before fifteen days from this date, and agree within said fifteen days to execute and deliver to you one promissory note and mortgage securing same on the property described below, dated March 6, 1908, due one year after date, with interest at 10 per cent. per annum, with 3 per cent. rebate clause" —which note and mortgage was to be in favor of defendant for the sum of $5,500, and the bank was instructed to deliver the $1,000, together with the mortgage agreed to be executed and the $4,500 agreed to be deposited, to defendant upon receipt of a deed for the property, accompanied by a certificate of title from the Pioneer Abstract & Title Guaranty Company, or the Consolidated Abstract & Title Company, showing title to be vested in defendant, free of incumbrances, except taxes, etc. It was further provided in said escrow that, "in event you are unable to comply with these instructions within fifteen days from the date hereof, on account of my failure to comply with the terms herein stated, you are authorized to pay to the seller $1,000 as forfeit, and hold balance subject to my order," to all of which plaintiff assented in writing, signing the same "N. G. Pehl, Agent." That at said time defendant was living near Corona, Cal., and plaintiff wired him from Upland, Cal., that he had sold the property in accordance with the terms of the contract, which telegram was followed by a letter to the same effect. The court made its findings in accordance with the facts thus established, except that the court erroneously found that, as a condition of sale, defendant was required to furnish certificates from two abstract companies, certifying to the satisfactory condition of title; whereas, the escrow contract required a certificate from either one of two such companies therein designated.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[2] The law is well settled that where a broker is employed to negotiate a sale of property, and has found a purchaser ready, able, and willing to purchase upon the vendor's expressed terms, the broker's right to recover the agreed commission does not depend upon the final consummation of the sale by the vendor. "The contract on the part of the broker is complete when he delivers or tenders to the owner a valid written contract, containing the terms of sale agreed on, signed by a party able to comply therewith, or to answer in damages if he should fail to perform. * * * The necessity of a written contract of sale may be rendered unnecessary if the agent bring the vendor and vendee together, and the latter is able and willing and offers to complete the contract, provided the vendor will make the conveyance. In such a case the agent has done all that he can do, and if the vendor, under such circumstances, refused to complete the sale, he, nevertheless, will be compelled to pay the agent his commissions, * * * whether the trade is finally consummated or not, because if the vendee refuses to take the property the vendor holds the contract, which renders the former liable for all damages." Hayden v. Grillo, 35 Mo. App. 647, cited with approval in Gunn v. Bank of California, 99 Cal. 353, 33 Pac. 1105.

[3] Plaintiff's right to recover is dependent upon whether or not the execution and delivery of the escrow contract, the substance of which is hereinabove stated, accompanied by his check for $1,000, to be applied as therein specified, constituted either a sale of the property, or the procuring of a purchaser therefor, within the terms of the authorization given. Tested by the authorities, we are firmly convinced that it did not. At most, the escrow constituted a proposed purchase of an option on the part of Grunenwald to buy the property within 15 days from the date of the escrow, according to the terms of the memorandum given plaintiff, authorizing him to make a sale, and in the event of Grunenwald's failure to exercise such option and complete the purchase on his part the $1,000 was to be paid to defendant as forfeit money; otherwise to be applied on the first payment of $5,500. Indeed, counsel for plaintiff admits as much, for he says, referring to Grunenwald's contract: "This agreement was placed in escrow, together with a $1,000 check, in the First National Bank of Upland; said $1,000 being forfeit money, in case said Grunenwald refused to buy the property." And, again, that "defendant would receive $1,000 as forfeit money, then on deposit in the First National Bank of Upland, California," in case Grunenwald made default in paying the balance of $4,500 and causing the delivery of the note and mortgage for $5,500. It is not claimed that plaintiff at any time brought the parties together, or that defendant ever assented to the sale to Grunenwald. Conceding the latter was ready, willing, and able to purchase upon the terms authorized by defendant, nevertheless he signed no agreement or contract binding himself so to do. Had defendant accepted the offer of Grunenwald, obtained through plaintiff as broker, the latter would have been entitled to recover his commissions (Sibbald v. Iron Co., 83 N. Y. 378, 38 Am. Rep. 441; Gunn v. Bank of California, supra); but, for a failure on the part of Grunenwald to execute the note and mortgage and make the further payment provided within the time specified, defendant's only remedy would have been the enforcement of the provision for the forfeiture of the deposit of $1,000. "This," says counsel for plaintiff, "was ample deposit to protect the owner, had the purchaser refused to perform further." The record being silent upon the subject of the sufficiency of the deposit for such purpose, this court cannot, as a matter of law, so hold; suffice it to say, the plaintiff had no authority to make such contract for the defendant. Moreover, one-half of the sale price was payable in cash, while Grunenwald's proposition contemplated an extension of time of 15 days within which to make payment of the $4,500.

[4] A sale for cash is one wherein the money is to be paid immediately upon the delivery of the property sold. Bliss v. Arnold, 8 Vt. 252, 30 Am. Dec. 467; Chapman v. Devereux, 32 Vt. 616; Civ. Code, § 1784. Under the terms of the memorandum authorizing the sale to be made by plaintiff, defendant had the right to insist upon payment of the entire $5,500 and delivery of an executed note and mortgage immediately upon tender of a sufficient conveyance, transferring good title to

the buyer. To postpone such payment for a period of 15 days was not "cash," within the terms of the authority given plaintiff.

In view of the fact that plaintiff did not, as alleged in his complaint, procure a purchaser for the property within the terms upon which he was authorized to make the sale, it is unnecessary to discuss other alleged errors to which our attention is directed. In no event, under the circumstances of this case, could the substantial rights of appellant be prejudiced by reason thereof.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

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17 Cal. App. 241

JOHNSTON v. JOHNSTON. (Civ. 869.)

(District Court of Appeal, Second District, California. Oct. 14, 1911.)

1. Divorce (§ 127*)—Desertion—Evidence—Corroboration.

Where, in an action for divorce for desertion, the only evidence in corroboration was the affidavit of a witness, averments of which in the main were mere conclusions, and did not contain any statement with reference to the husband's alleged misconduct or threats to injure the wife, there was no sufficient corroboration, required by Civ. Code, § 130, providing that no divorce can be granted on a default of the defendant, or on the uncorroborated admission or testimony of the parties.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 403–407; Dec. Dig. § 127.*]

2. Divorce (§ 127*)—Evidence—Corroboration.

Corroboration required by Civ. Code, § 130, in an action for divorce, is sufficient if it is pertinent to some fact or facts which is or are sufficient to support the action, and to justify the entry of a decree.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 403–407; Dec. Dig. § 127.*]

3. Divorce (§ 31*)—Grounds—Nonsupport.

Where, at the time plaintiff left her husband for alleged cruelty, he furnished her with means of transportation, and gave her a check for $50, and it did not appear that she ever requested or desired any further contribution from him while she remained away from his place of abode, but the evidence indicated that she did not expect defendant to contribute to her support after she left, she was not entitled to a divorce for nonsupport.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 95, 96; Dec. Dig. § 31.*]

4. Divorce (§ 249*)—Division of Property—Homestead.

Civ. Code, § 146, provides that, in case of the dissolution of a marriage, the community property and the homestead shall be assigned to the former owner, if it has been selected from the separate property of either, subject to the power of the court to assign it for a limited period to the innocent party. *Held* that, where plaintiff, in an action for divorce, claimed that certain real property was her separate estate, and prayed a decree to that effect, but on the trial it was proved that she and her husband had joined in a declaration of homestead affecting the property, the court was limited to a disposition thereof in accordance with section 146, which right was dependent on the granting of a divorce; and this being denied the homestead rights of the parties continued.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 701–713; Dec. Dig. § 249.*]

Appeal from Superior Court, Los Angeles County; George R. Davis, Judge.

Action for divorce by Jessie E. Johnston against James C. Johnston. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Jones & Weller, for appellant. G. A. Gibbs, for respondent.

JAMES, J. Action for divorce. Appeal by defendant from the decree entered against him. In the complaint of plaintiff were set out two causes of action; one for the desertion of her by defendant, and the other for defendant's failure to provide her with the necessaries of life. Defendant in his answer, denied generally the allegations of plaintiff's complaint, and on this appeal contends that the evidence heard at the trial is insufficient to support the judgment of the court.

[1, 2] The parties were married in the year 1876, in the county of Los Angeles, and lived together until about the year 1887, when plaintiff left defendant and remained away from him for a great many years, returning again to reside with her husband in 1905. During the interval of her absence, she lived with another man as his wife. In September, 1905, defendant was living at a mining settlement called Cactus Flats, in California. After it had been arranged that his wife was to return and live with him, the couple went before a magistrate at San Bernardino, and a second marriage ceremony was performed, after which they immediately left for Cactus Flats, and there took up their abode. In July of the following year, the plaintiff again left the defendant and came to Los Angeles, where she continued to reside up to the time of the commencement and trial of this action. She testified that her husband had paid her traveling expenses when she left him, and the husband testified that he gave his wife a check for $50 at the time of her departure. Plaintiff further testified that defendant was willing that she should go, and knew that she never intended to return. As to the cause assigned by her for leaving, we quote her own words as they appear in the transcript of the testimony: "It was his continual accusation of wrong, and another was a continual threat of my life. * * * There was no one there to do wrong with. It was a continual accusation of wrong, and what he was going to do, and if he caught any one around there, and all this. He carried a shotgun or rifle continuously. I told him if he killed some innocent person it would be a terrible thing; and he said he had a right to kill anybody that came on his place.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

And on the 13th day of May, 1906, he was very angry. I don't know why he should be; but it was always just after the stage left. * * * I told him that he would have to tell me what in the world had made him act so, why he should do so; and I told him I would not stand any such treatment as that. I could not live with anybody and live under those conditions; and that was the first cause of our trouble, years and years ago, when I left him, a continual accusation of something wrong. So he got very angry. He took up the shotgun, dragged me into the front room, and pulled the shotgun on me, and I took the shotgun away from him, and he knows it. He says he never threatened to kill me; he knows he said that." The foregoing statement is the substance of all of the material testimony given by the plaintiff touching the matter of the cause which defendant furnished for her act of leaving him. It will be noted that plaintiff was not specific as to the particular charge which her husband made against her. She did, however, testify to acts of violence committed by him against her person; and if enough corroboration of her testimony is to be found in other evidence furnished at the trial a sufficient case would be made out to sustain the decree of the court, given upon the first cause of action set out in the complaint, to wit, that for desertion. Section 98, Civ. Code. Corroboration of the testimony given by the plaintiff in support of her first cause of action was sought to be shown by an affidavit made by one Anna D. Crain, which was admitted in evidence by stipulation of counsel. The material parts of that affidavit read as follows: "I know there was a great deal of trouble between the plaintiff and the defendant while I was there, caused by the jealousy of the defendant for the plaintiff, which was without any reason; that upon Memorial Day the plaintiff visited my school, and her appearance indicated that she was in great distress of mind, and that she had been crying. The same night I went back to the plaintiff's house and stayed all night. Things were in great disorder at her house, and I said, 'It looks as though you were going to move,' and Mrs. Johnston said: 'Yes; I am going to move, because Mr. Johnston is accusing me of things that I am not guilty of,' and this was said in the presence of Mr. Johnston, and he did not deny it; he turned and walked away. The next day a party went over to Rose Mine, and Mr. Johnston went along and would not converse with any one, unless spoken to, and then only in monosyllables, so that it was noticed very much and remarked among the people that something was the matter with him." In the main, the statements made in this affidavit were expressions of mere conclusions upon the part of the deponent. It was not shown that the plaintiff, in the presence of her husband and Anna D. Crain, stated what her husband had accused her of, and nothing at all was said by the plaintiff to Anna D. Crain, so far as the affidavit expresses the things which she did state, about any violence committed by the husband against the wife, or of any threats made by him to injure plaintiff in any way. In our opinion, the testimony given in support of the cause of action for desertion is entirely without corroboration. Section 130 of the Civil Code provides that: "No divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission, or testimony of the parties. * * *" Attention has been called by counsel for respondent to the case of Venzke v. Venzke, 94 Cal. 225, 29 Pac. 499, in which it is claimed a condition of evidence parallel to that shown in this case is disclosed. An examination of the decision referred to, however, does not bear out that contention. In the Venzke Case, the ground of extreme cruelty was assigned by the plaintiff, consisting of various alleged harsh conduct indulged in by the defendant there, and upon each of the several items of said charge there was some specific and direct testimony furnished by witnesses, other than the plaintiff herself. It has been said that corroboration in divorce actions is sufficient, if such corroboration is pertinent to "some fact or facts which is or are sufficient to support the action, and justify the entry of the decree in plaintiff's favor." Cooper v. Cooper, 88 Cal. 45, 25 Pac. 1062; Matthai v. Matthai, 49 Cal. 90. In our view of this case, this measure of corroboration has not been here satisfied.

[3] There was no sufficient evidence to sustain the finding that defendant had willfully failed to provide plaintiff with the common necessaries of life for more than one year preceding the commencement of her action. Without dispute, it appears in testimony that at the time plaintiff left Cactus Flats in July, 1906, defendant furnished her with the means of transportation, giving her a check for $50; and it nowhere appears by any of the testimony that the plaintiff ever requested or desired any further contribution from him while she remained away from his place of abode. In fact, every natural inference to be drawn from all the facts and circumstances shown in evidence supports the conclusion that the plaintiff did not require or expect the defendant to contribute to her support after she left him the last time.

[4] In the course of the allegations of plaintiff's complaint, it was set up that plaintiff was the owner of certain real property situated at Wilmington, in the county of Los Angeles, which was her own separate estate. She asked for a decree so declaring it to be, and the judgment of the court followed in accordance with the prayer of the complaint. The defendant in

his answer denied that the property mentioned was the separate property of the wife, and alleged that the property had been acquired by purchase by him subsequent to his marriage with the plaintiff. Evidence was introduced on the part of plaintiff touching the purchase of this property, which was sufficient to establish the fact, as found by the court, that the land in question was of the separate estate of the wife. However, in the course of the trial, the plaintiff voluntarily showed that in the year 1884 a joint declaration of homestead affecting this property had been duly executed by herself and husband, and no showing was made that this homestead so selected had ever been abandoned or relinquished. If it had not been shown that the character of a homestead had become attached to the property, the decree of the court, having been made without any objection raised to its jurisdiction to make such a decree in this kind of an action, might be sustained and remain undisturbed, notwithstanding the reversal of the judgment for divorce. This court has held that where, by cross-complaint in a divorce action, conflicting claims to real property are sought to be settled, and no objection is urged by the parties, and trial is had, such parties would be precluded thereafter from questioning the jurisdiction of the court to make and enter a judgment affecting issues thus presented. Huneke v. Huneke, 12 Cal. App. 199, 107 Pac. 131. But here the plaintiff in making her proof showed to the court that the property which she claimed as her separate estate was subject to homestead rights created by the joint act of herself and husband, and this fact appearing, the court in the disposition thereof would be controlled by the provisions of section 146, Civil Code. The provisions of that section, in so far as they are material in their application to this case, are as follows: "In case of the dissolution of the marriage by the decree of a court of competent jurisdiction, the community property, and the homestead, shall be assigned as follows: * * * 4. If a homestead has been selected from the separate property of either, it shall be assigned to the former owner of such property, subject to the power of the court to assign it for a limited period to the innocent party." By this section, the right of the trial court to make any order or decree which would be determinative of the interests of the respective parties in the homestead is dependent upon a decree first being made, dissolving the marriage. If the marriage is not dissolved, then the homestead rights of the parties continue undisturbed. The decree in this case determines that the plaintiff's title to the real property is quieted against all claims of the defendant, and that the defendant is estopped from setting up any claims thereto. The decree in its entirety must therefore be set aside.

The judgment is reversed, and the cause remanded for a new trial.

We concur: ALLEN, P. J.; SHAW, J.

17 Cal. App. 254

SAN FRANCISCO & SUBURBAN HOME BLDG. SOCIETY v. LEONARD et al.

(Civ. 828.)

(District Court of Appeal, Third District, California. Oct. 17, 1911.)

1. Forcible Entry and Detainer (§ 4*)—Possession of Manager of Corporation—Limitation of Employment.

Code Civ. Proc. § 1159, provides that every person is guilty of forcible entry, who, either by breaking open doors, windows, or other parts of a house, or by any kind of violence or circumstance of terror, enters on any real property, or who, after entering peaceably upon real property, turns out by force, threats, or menacing conduct the party in possession. *Held*, that where a corporation's manager, after the termination of his employment, refused to surrender possession of premises previously occupied by him by virtue of his appointment or employment, his possession having been acquired peaceably, he was not guilty of forcible entry by his refusal to surrender.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 5–22; Dec. Dig. § 4.*]

2. Forcible Entry and Detainer (§ 27*)—Complaint—Amendment.

Where a complaint in forcible entry and detainer as originally filed alleged generally that plaintiff by defendant's acts in detaining possession of the premises had suffered damages in the sum of $15,000, the court had power, in the exercise of discretion conferred by Code Civ. Proc. § 473, authorizing amendments, to permit an amendment served two days prior to the commencement of the action, averring specified sums as special damages and claiming punitive damages for vindictiveness, and the refusal to allow such amendment was an abuse of discretion.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. § 126; Dec. Dig. § 27.*]

3. Forcible Entry and Detainer (§ 27*)—Pleading—Amendment.

Code Civ. Proc. § 1173, providing that where it appears that defendant has been guilty of either forcible entry or a forcible or unlawful detainer, and other than the offense charged in the complaint, the judge must order that the complaint be forthwith amended to conform to the proofs, etc., confers no authority to allow amendments for any other purpose than that prescribed.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 126, 127; Dec. Dig. § 27.*]

4. Pleading (§ 236*) — Amendment—Power of Court.

Code Civ. Proc. § 473, authorizing amendments, confers general power to allow amendments at any time before, during, or after trial, and before judgment, where it clearly appears that it would be in the furtherance of justice, and a refusal to do so constitutes an abuse of discretion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601; Dec. Dig. § 236.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. Forcible Entry and Detainer (§ 30*)—Damages—Loss of Rents—Protecting Property—Cessation of Business.

In an action for forcible entry or unlawful detainer, Code Civ. Proc. § 1174, authorizes a recovery under appropriate averments in the complaint of any damage which is the natural and proximate consequence of the alleged forcible entry and unlawful detainer, such as loss of rents, expense of protecting the property, loss by cessation of plaintiff's business, etc.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 141–152; Dec. Dig. § 30.*]

6. Pleading (§ 236*)—Amendment.

Great liberality should be shown by a trial court in permitting the amendment of pleadings, where it can be done without working great delay, and will facilitate the production of all the facts bearing on the questions involved in the action.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 236.*]

7. Forcible Entry and Detainer (§ 30*)—Damages—Elements.

Where plaintiff's manager, on the termination of his employment, refused to surrender plaintiff's premises so as to permit plaintiff to proceed with its business of constructing houses, etc., though he did permit some of plaintiff's officers to enter the building and office, but refused, however, to allow them to take charge of plaintiff's affairs or to do any act in the furtherance of its business, and refused to permit the men employed by plaintiff to proceed with the completion of the houses in the process of construction, or to take lumber or other materials essential for the completion of the unfinished buildings, plaintiff was entitled to recover damages for injuries to its business.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 141–152; Dec. Dig. § 30.*]

8. Forcible Entry and Detainer (§ 30*)—Punitive Damages—Pleading.

Since a charge of forcible detainer of real property carries an implication that it was from a bad motive, an allegation of forcible detainer is sufficient without more to sustain an award of exemplary damages.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. § 146; Dec. Dig. § 30.*]

9. Forcible Entry and Detainer (§ 34*)—Exemplary Damages—Allowance—Question for Court or Jury.

Code Civ. Proc. § 735, provides that, if a person recovers damages for forcible entry or unlawful detainer, judgment may be entered for three times the amount of the actual damages. Section 1174 declares that the damages occasioned to the plaintiff by any forcible entry or detainer shall be assessed, and that judgment may be entered "in the discretion of the court either for the amount of the damages and rent found due or for three times the amount so found." *Held*, that whether the damages should be trebled and exemplary damages thereby awarded in an action of unlawful detainer is a question for the court, and not for the jury.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. § 157; Dec. Dig. § 34.*]

Appeal from Superior Court, City and County of San Francisco; G. A. Sturtevant, Judge.

Forcible entry and unlawful detainer by the San Francisco & Suburban Home Building Society against Joseph A. Leonard and others. Judgment for plaintiff for less than the relief demanded, and it appeals. Reversed and remanded.

Chas. F. Hanlon, Pringle & Pringle, and E. K. Taylor, for appellant. James G. Maguire and E. T. Barrett, for respondents.

HART, J. The plaintiff is a corporation organized under the laws of the state of California. The business of said corporation is that of selling improved real estate, and for that purpose it became the owner of a large number of lots situated in what is designated as "Jordan Tract," in the city of San Francisco. The scheme of the corporation was the erection of dwelling houses on the lots in said tract and the selling or the leasing thereof. On the 26th day of January, 1905, the plaintiff and the defendant Joseph A. Leonard entered into a writtten agreement, by the terms of which said Leonard became, for the term of four years from the 1st day of January, 1906, the manager of plaintiff's business, for the performance of the duties of which he was to receive certain stipulated compensation. Among other covenants, said contract contained the following: "In the event that the land owned or hereafter acquired by the society in the 'Jordan Tract' is finally built up by the erection of houses as now contemplated, or building operations thereon are suspended for ninety (90) days on account of inability to sell houses and lots at a profitable price, or if, for any reason, the net profits for any period of ninety (90) days shall be less than the expenses properly charged against that period of time, then this agreement may be terminated by either party upon giving sixty (60) days notice, and thereupon accounts between the parties thereto shall be closed, and, as soon as ascertainable, profits adjusted in accordance therewith." It was further provided by said contract that "at the time of the settlement between the parties hereto, if any question arises as to the value of any of the securities, mortgages or any property," etc., such question "shall in the event the parties hereto cannot agree as to the value, be appraised by two appraisers, one to be selected by the first party and one to be selected by the second party."

On the 9th day of January, 1908, the board of directors of the corporation, then composed of James C. Jordan (president), E. K. Taylor, William B. Pringle, H. G. Pendleton, and Joseph A. Leonard (defendant), who also held the office of vice president, held a meeting at which a resolution was adopted by which, after setting forth that the net profits of plaintiff "for a period of thirty days have been less than the expenses properly charged against that period of time," the contract made with Leonard was, in accordance with the terms of paragraph 5 thereof, above quoted, terminated, it being therein further provided that 60 days' notice be given Leonard of the election of the corporation to terminate said contract. Leonard was present at said meeting, and voted against the adoption of said resolution. On the same occasion, the president of the corporation wrote and delivered to Leonard a letter, formally notifying him of the foregoing action of the board of directors. On March 4, 1908, a committee selected from the board of directors, having previously been appointed for that purpose, reported to the board at a regular session thereof that "the value of the goods, securities, mortgages and properties, and the amount to be written off for depreciation, are materially different from those given in the statement referred to the committee and reports of Mr. Leonard now on file." Said report was received and filed, and thereupon the board of directors adopted a resolution declaring that a dispute had arisen between plaintiff and Leonard "as to the value of the securities, mortgages and property of this company, and as to the amount to be taken off for depreciation," and appointing, under the authority so to do provided for by the contract between plaintiff and Leonard, one Stanley Pedder to be its arbitrator and appraiser, "to join with an arbitrator and appraiser to be appointed by J. A. Leonard under said contract, and to act under said contract in said matters, and that Mr. J. A. Leonard be and is now requested to appoint an arbitrator and appraiser in accordance with said contract." On the same day—March 4th—a resolution was adopted instructing Leonard to deliver up on March 9th possession of the keys to the offices and buildings and of "everything pertaining to the company to Mr. Pendleton, the secretary of the corporation," etc.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The offices of the manager and the board of directors were located in a building situated within the exterior boundaries of "Jordan Tract." On March 11, 1908—a trifle over 60 days after notice had been served upon Leonard of the action of the directors terminating the contract by which he was employed as manager of the corporation—directors Pringle, Pendleton, and Taylor, accompanied by several other parties, including Pedder, who, as seen, was appointed by the board as arbitrator and appraiser to examine into the affairs of the company, called at the office of the manager, and demanded a surrender of the possession of his office and the properties of the corporation. Pringle read to Leonard, in the presence of some other men, some of whom were special policemen who were there to aid Leonard in keeping possession, the several resolutions theretofore adopted by the board of directors—the one terminating Leonard's employment and the others appointing Pedder as an appraiser, etc., and authorizing Pendleton, as secretary of the corporation, to take charge of the keys and the properties, etc. But Leonard, assisted by the special policemen, refused to permit the directors to take charge of the affairs of the corporation. Pedder, having entered the office, was ejected by force. While Pendleton was permitted to go into the office and the other buildings, he was not allowed to handle any of the properties of the corporation.

On several occasions thereafter, the directors, either through agents specially commissioned for that purpose or by their own personal efforts, attempted to secure possession of the manager's office and the properties of the company, but were each time repelled by Leonard, the latter at different times forcibly ejecting Pedder, a Mr. Derby, appointed by the board to take charge of the affairs of the company, and the Kinney Bros., who were on the 20th day of March, 1908, appointed and authorized by the directors to take and maintain possession, on behalf of the corporation, "of all the real property of this corporation in Jordan Park, including the mill thereon and its contents." One Sullivan, a carpenter, had been sent by the board to the premises to take charge of the mill, and proceed with the completion of certain dwelling houses then in process of construction, and upon which no work was then being done on account of the differences between the company and Leonard. The latter refused to permit Sullivan to take charge of the mill and execute the duties thus committed to him. In addition to the commission of the foregoing acts of resistance to the efforts of the corporation to secure possession and control of its properties and affairs, Leonard changed the locks on the doors to his office and other buildings on the premises, and also changed the combination to the safe. He, however, turned the keys to the new locks and the combination over to the secretary, Pendleton, on March 12th. Leonard, with his family, resided in the upper story of the building in which his office was located.

From the statement of the facts as thus given, it will be observed that the conduct of Leonard throughout the whole controversy consisted entirely in a persistent refusal on his part to allow any person authorized so to do by the directors to have any voice in the management of the company's business, and to that end ejected by force, where necessary, any person commissioned and sent by the corporation to supplant him as manager. And thus the situation remained until the 9th day of April, 1908, when he surrendered his position as manager and the possession of the properties of the company to the board of directors. The action here is for forcible entry and forcible and unlawful detainer of the premises referred to, for restitution of said premises, and for damages for the entry and detention thereof so alleged. The complaint was filed March 28, 1908. The action was tried by jury and a verdict was returned in favor of plaintiff for forcible detainer, and therefore for the restitution of the premises, but awarding no damages.

The court thereupon caused judgment to be entered that defendants "have been and are guilty of a forcible detainer of the said lands and premises and improvements, but have not been and are not guilty of any forcible entry, * * * and it is further decreed that the plaintiffs do not recover or have judgment for any damage or damages herein," etc. This appeal is prosecuted by the plaintiff from that part of the judgment decreeing that defendants were not guilty of a forcible entry, and that "plaintiff do not recover or have judgment for any damage or damages herein," etc., and from the order denying plaintiff a new trial.

It may be well here to explain that the defendant Holzhausen was an employé of the corporation under Leonard, and that at the times the directors attempted to obtain possession of the properties of the corporation from Leonard he (Holzhausen) assisted Leonard in resisting the directors, and, in fact, had been commissioned a special policeman, no doubt for that specific purpose.

In its charge the court instructed the jury that there was no evidence of a forcible entry by the defendants, and thus eliminated that issue from the case, and therefore excluded it from consideration by the jury.

The main contention of the appellant is that the court erred to its prejudice in thus taking the question of forcible entry from the jury, and, further, that the court abused its discretion by disallowing a proffered amendment to the complaint under the averments of which certain special damages might be shown; evidence offered in proof of such damages having been rejected on the ground that they were not pleaded.

It is further claimed that the court erred by refusing to read to the jury an instruction submitted by the plaintiff covering the question of exemplary damages.

We think the case must be sent back for retrial for the ruling disallowing the proposed amendment to the complaint. But we have conceived it to be proper to decide the first point above stated, and thus dispose of it as an issue on the retrial, if the evidence adduced therein be no different from that presented in this record. We shall also pass upon the third point above stated.

[1] In the outset it is just as well to say that we are unable to perceive any element of forcible entry of the premises described in the complaint or of any part thereof on the part of either of the defendants or both. Section 1159 of the Code of Civil Procedure thus defines forcible entry: "Every person is guilty of forcible entry who either: (1) By breaking open doors, windows, or other parts of a house, or by any kind of violence or circumstance of terror enters upon or into any real property; or, (2) who, after entering peaceably upon real property, turns out by force, threats, or menacing conduct, the party in possession." Of course, it is not claimed, nor could it be under the evidence, that the conduct of the defendants comes within the purview of the first subdivision of the foregoing section. But the contention is that the acts of the defendants as disclosed by the evidence may be so construed as to bring them within the terms of the second subdivision of said section. In support of this view, counsel for appellant cite section 1172 of the Code of Civil Procedure and a number of California cases which, it is claimed, sustain appellant's construction of the meaning and scope of that section. Said section provides, inter alia, that on the trial of any proceeding for any forcible entry the plaintiff shall only be required to show, in addition to the forcible entry complained of, that he was peaceably in the actual possession at the time of the forcible entry.

To sustain the contention of appellant, it would be necessary to hold that with the expiration of the 60-days notice which the contract between the parties stipulated should terminate Leonard's employment as manager, the plaintiff would, ipso facto, or by operation alone of the terms themselves of the contract, and without any further act or steps on its part or that of Leonard, be placed in actual possession of the premises. This could, of course, no more be true than that the violation by a lessee of a vital covenant of a lease would itself have the effect of immediately putting the lessor into the actual possession of the demised premises. It is very manifest that a lease or a contract by which the possession of land is held cannot work automatically in that respect. Leonard's possession arose by virtue of his appointment or employment as manager of plaintiff's business, and, if he never himself abandoned or surrendered the possession of the premises so acquired, then, it seems obvious to us, he could not be guilty of forcible entry merely for the reason that the plaintiff had declared his contract at an end and therefore his right to the actual possession of the property forfeited. Indeed, to the contrary; if, under such circumstances, the plaintiff had forcibly driven Leonard from the premises and thus taken possession thereof, it would itself have been guilty of forcible entry, although it might transpire, as it has transpired, that, as a matter of legal right, it was entitled to the possession. This proposition necessarily follows from the very theory upon which or the purpose for which the forcible entry and forcible and unlawful detainer statute is enacted, viz., to secure a judicial adjustment of differences of that character, and thus prevent the parties themselves from redressing or attempting to redress their own wrongs which is likely to lead to serious wrongs against the public or society. While the question of the right of possession must necessarily arise in such cases, since the power to award restitution of the premises involved rests with the jury or the court, and since, moreover, it may enter into the determination of the question whether punitive damages should be allowed, still it is only an incidental issue; the gist of such actions being in the wrong which inheres in the very act itself of forcibly entering upon and invading the possession of another or forcibly or unlawfully detaining a possession to which the detainer is not lawfully or rightfully entitled.

The undisputed evidence, as seen, shows that Leonard had been put in possession of the premises as manager of the corporation's business by plaintiff itself, and it further shows that he had never abandoned or surrendered such possession and still maintained the possession thus obtained until the surrender of the same by him on the 9th day of April, 1908. It is true that the meetings of the board of directors were regularly held in one of the rooms of the building on said premises in which Leonard's office was located; but Leonard never had nor claimed to have ever been given possession of that room. The possession of said room by the directors or the corporation was not inconsistent with, nor did it in any measure whatsoever impair, Leonard's right to the possession of his office and of the balance of the premises and property, into the possession of which he entered under his contract with plaintiff. There is no evidence showing that the directors or the corporation were ever at any time prevented by Leonard or any other person employed by him from occupying for any purpose the room in which they had customarily held their meetings and transacted their official business. It is no doubt true, as the jury found, that it was the duty of Leonard to have surrendered possession of the premises upon the expiration of the 60-days notice to him that his contract with the company had been terminated and a demand by the officers of the corporation for the return of the possession, but this omission or refusal does not constitute proof that he was not in actual possession, peaceably obtained, or that his conduct in forcibly ejecting the agents and representatives of plaintiff from his office or those parts of the premises of which he had possession, however indefensible in law his conduct might be, constituted anything more than a wrongful and forcible detention of a possession which he had lawfully and peaceably acquired. These views are not at all out of harmony with the rule as it is enunciated and applied in the cases cited by appellant. Indeed, the most recent of these (Kerr v. O'Keefe et al., 138 Cal. 415, 71 Pac. 447), if anything at all, is an authority against the contention of appellant. In that case the plaintiff (lessee) was in default in the payment of rent. The lease provided that on such default by the lessee the lessor might re-enter the premises, take possession thereof, and remove all persons therefrom. The defendant (lessor), upon the lessee being so in default, made a peaceable entry upon the premises, in the absence of plaintiff, and took possession. Thereafter the plaintiff returned to the premises, ordered the defendant to leave the same, and thereupon the latter, reinforced by his brother and a loaded shotgun, proceeded to "remove" and in fact ejected the plaintiff from the premises and took possession thereof himself. Action for forcible entry was instituted by plaintiff and sustained by the courts. The defendant (the lessor) set up the plea that, the lease having provided that he might re-enter and retake possession of the premises upon default in the payment of the stipulated rent, he therefore entered upon the possession under color of right and in good faith. All that was decided in that case of importance was that the plea so made was without merit; the Supreme Court saying: "We cannot see that good faith constitutes an element in a defense to a forcible entry or forcible detainer, * * * nor that an entry peaceably made and in good faith cuts any figure in a defense to a forcible detainer." But, while the defendants in the present case could not, in an action for forcible detainer, defend their unlawful and forcible detention of the property on the ground that they believed in good faith that they were entitled to its possession, yet, having been given and taken peaceable possession thereof, and being so in possession, their resistance to dispossession by the plaintiff, who was entitled to actual possession, cannot, as we have before declared, be construed into a forcible entry thereof merely because the defendants had no right to the possession or no defense which they could successfully interpose to such unlawful and forcible detainer.

Our conclusion upon this point is that the court was right in taking from the jury the question whether there was a forcible entry by the defendants—an issue tendered by the complaint which, as we have seen, derives absolutely no support from the evidence.

[2] But, as announced in the outset of the discussion, we think there was a clear and palpable abuse of discretion in the denial to plaintiff of its application to amend its complaint. The complaint as filed alleged generally that the plaintiff had by the acts of the defendants in detaining from it the possession of the premises for a period of nearly one month suffered damage in the sum of $15,000. The action was commenced on the 28th day of March, 1908. The trial was begun on the 16th day of April, 1908. On the 14th day of April, 1908—two days prior to the commencement of the trial—the plaintiff served on the attorney for the defendants a copy of a proposed amendment to the complaint. Said proposed amendment contained averments of special damages, as follows: (1) Rental value, one month, of the real estate, $625; (2) delay in receiving purchase price, four houses, $65.45; (3)

cost, maintaining plant during forcible holding, $5,000; (4) cost of watchmen to guard during suspension of work by the unlawful and forcible detainer, including wages of Sullivan and his crew, who were forced to cease work, $1,069.50; (5) punitive damages for vindictiveness. On the first day of the trial counsel for the plaintiff made an application to the court for leave to amend its complaint in the particulars mentioned. Objection to the allowance of the amendment was made by counsel for defendants and sustained by the court. What the specific ground of the objection was does not appear in the record, but it is stated by counsel for appellant, and not denied, that no objection was taken to the proposed amendment on the ground of surprise or on the ground that the granting of the motion would necessitate a postponement of the trial. Thereafter counsel for appellant undertook and offered to prove the special damages as specially pleaded in the proposed amendment, promising that, if the court would permit such proof, they would amend the complaint so that its allegations would conform thereto. The court allowed proof of rental value under the general allegation of damages (Tewksbury v. O'Connell, 25 Cal. 263), but as to all other damages the offer was rejected on objections interposed thereto by counsel for defendants on the ground that the same were not pleaded.

[3] We do not think, as counsel for appellant contend, that the amendment proposed comes within the provisions of section 1173 of the Code of Civil Procedure. That section does not vest in the court the power of allowing all sorts of amendments in cases of this class, as will readily be observed upon reading it. It provides that where "it appears from the evidence that the defendant has been guilty of either a forcible entry or a forcible or unlawful detainer, and other than the offense charged in the complaint, the judge must order that such complaint be forthwith amended to conform to such proofs," etc. We apprehend that nothing further by way of amendment can be authorized by the court under that section than what is therein expressly prescribed. In other words, there is no authority given the court by said section to allow amendments for any other purpose than that expressly stated.

[4] But trial courts are, by virtue of section 473 of the Code of Civil Procedure, possessed of general and ample power to allow amendments at any time before, during, and even after trial and before judgment to any pleading, and where it clearly appears, as we think it does here, that it would be in furtherance of justice to allow an amendment proposed at an opportune time within the meaning of that section, a refusal to do so constitutes an abuse of the discretion which said section has committed to trial courts. The undisputed evidence shows, as we have seen, that the plaintiff served its proposed amendment on the attorneys for the defendants two days before the commencement of the trial, and that application for leave to amend was urged on the day on which the trial began and before evidence was taken. There was no claim, as there could scarcely be consistently with reason, that counsel for appellant were taken by surprise, nor was there any showing made that a continuance would have been necessary by reason of the amendment, if allowed, and, if there had been, the court could have granted the motion upon any reasonable terms to which it might, in its discretion, have felt constrained to subject the moving party.

[5] It will not, of course, be denied that the plaintiff was entitled to show, if it could, under a complaint sufficient for that purpose, any damages occasioned to it by the forcible or unlawful detainer complained of (section 1174, Code Civ. Proc.); that is to say, it was entitled to recover, if it could prove it, under appropriate averments of its complaint, any damage that was the natural and proximate consequence of the alleged forcible or unlawful detainer. 2 Green. on Ev. § 256; Anderson v. Taylor, 56 Cal. 131, 38 Am. Rep. 52. If, therefore, plaintiff could show that it had suffered the loss of rents through the acts complained of against defendants or had necessarily been put to expense in protecting its property while the defendants wrongfully and forcibly detained the same and by reason thereof or that it had sustained loss by the cessation of the prosecution of its business during the period of the wrongful detention and by reason thereof, then all such facts would disclose proper items of damages, and, if pleaded, the rejection of proof thereof would manifestly be erroneous and prejudicial. And, as seen (with the exception of the items for rent and punitive damages), such were the special damages to which the proposed amendment, if allowed, would have given plaintiff an opportunity to address whatever proof that was available to it in those respects.

[6] The Supreme Court of this state has repeatedly declared that great liberality should be shown by a trial court in permitting, where it can be done without working great delay, such amendments to pleadings as will facilitate the production of all the facts bearing upon the questions involved in the action. Spelling on New Trial and Appellate Practice, § 107, and cases therein cited. "The object of judicial proceedings is to discover all the facts of a case and apply the law; and the theory of the Code is that the parties should each have reasonable opportunity to present his side of the case." L. K. R. W. D. Co. v. K. R. & F. C. Co., 67 Cal. 577, 8 Pac. 91.

We have been unable to discover, from the circumstances under which the application was urged for permission to amend the complaint in this case, any reason why the amendment should not have been allowed. The action here is a summary proceeding, and was designed to afford the speediest legal remedy by which one may secure redress for the wrongful or forcible invasion of his possession of real property, or, where the possession of the same, though rightfully obtained, is forcibly or unlawfully detained, for the restitution of the premises, and damages, if any are sustained, for the wrongful act. In such cases it is likely to often happen, as it no doubt has frequently occurred, that complaints are hastily, and, as a consequence, carelessly drawn, with the result that many facts which might properly be proved are either not properly pleaded or not pleaded at all. In such cases, therefore, trial courts should be particularly liberal in allowing amendments, especially so where, as here, it appears reasonably clear that full justice may not be done without such amendments.

In the present case, it does not appear, as before stated, that either the court or the defendants would have been subjected to great, if any, inconvenience or the defendants placed at any undue disadvantage by the granting of plaintiff's application to amend, and, while it may be true, as counsel for the defendants suggest, that, the possession of the premises having been turned over to plaintiff before the commencement of the trial, the present action could have been dismissed and the plaintiff have instituted another action to recover all the damages it claims to have sustained, yet the law requires no such course to be followed, and the suggestion is no argument in support of the court's action in denying plaintiff's application.

It is, however, intimated by counsel for the respondents that the amendment could have served no useful purpose, since the evidence discloses "that the respondents never interfered with appellant's possession of any part of the tract mentioned in the complaint, except a portion of one block and four lots upon which houses were being built"; that "there was no evidence that the plaintiff or any of its officers or employés ever sought admission to the paint shop or the plumbing shop or the warehouse or the drafting room, which was a part of the office, or to the lumber yard, except that a demand made for keys to those shops and rooms was not complied with until five or six days afterwards."

[7] But the gist of Leonard's sinning did not consist so much in refusing to allow the officers of the company to enter the premises or the buildings thereon, as it did in refusing to allow them to take possession of the premises and so proceed with the business of the corporation. The evidence, it is very true, shows that he permitted the physical entrance of some of the directors into the building and into his office, but he positively refused to allow them to take charge of the affairs of the corporation or to do any act in furtherance of the business of the concern. He would not permit the men employed by the corporation to proceed with the completion of the houses then in course of construction. He would not allow it or its employés to take lumber and other material essential to the completion of the unfinished buildings. These constituted hindrances or delays which might result in great damage to the corporation. A. might employ B. as his manager to take sole possession of and conduct his mercantile business. If A. should finally demand from B. the return of the possession of the building and the business and the latter should refuse the demand, and not allow A. to do any act in connection with the business, or should close down the business, and refuse to allow A. to reopen it or to take any other steps looking to a resumption of the business, the mere fact that B. might have allowed A. physical entrance into the building in which the business was carried on would most certainly not absolve B. from the charge of unlawful or perhaps forcible detainer, nor from liability for any damages A. might suffer by reason of B.'s conduct.

The business of the plaintiff here is, as stated, the building, selling, and renting of houses upon a large tract of land, and the acts of Leonard necessarily had the effect of stopping the business, practically closing it down for a period, and certainly it cannot be maintained that, because Leonard generously permitted its officers to go upon the premises, with permission, however, to exercise no more authority over the affairs of the corporation than if they were perfect strangers, the defendants may escape the responsibility of responding in whatever damages plaintiff may be able to show were proximately occasioned to it by their unauthorized acts.

[8] It was not necessary in our opinion for the plaintiff to plead more than the alleged forcible detainer to entitle it to prove facts which would have justified the court in awarding exemplary or punitive damages. The charge of forcible detainer of real property necessarily carries with it the implication that such detainer is from a bad motive, and what the precise nature of that motive is—whether it be founded in malice or fraud or oppression of any sort—may properly be shown under the general averment that the detainer is forcible. It may be that the defendant in such a case can show that the force used was only in furtherance of the maintenance of his rights; yet, the statute having said that such detainer is in violation of law, the mere charging of the act presupposes the existence therein of all the elements essential to the consummation of the charge as it is defined by the statute, and whether, as a matter of fact, elements justifying the imposition of punitive damages are present in the act must, of course, depend upon what the proof discloses.

[9] But the court did not in our judgment err by its refusal to allow the instruction, proposed by the plaintiff, which would have authorized the jury to allow exemplary damages or damages which may be allowed under the provisions of section 3294 of the Civil Code. Indeed, we think that an examination of our statute relative to actions for forcible entry and forcible or unlawful detainer will show very clearly that the Legislature intended to commit to the court, rather than to the jury, the determination of the question whether in such cases damages by way of punishment shall be allowed, and manifestly, under this view of the proposition, an instruction to the jury upon the question of exemplary damages would be entirely out of place. Section 1174 of the Code of Civil Procedure, among other things, provides that "the jury or the court, if the proceedings be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent. Judgment against the defendant guilty of the forcible entry, or forcible or unlawful detainer may be entered *in the discretion of the court either for the amount of the damages and rent found due, or for three times the amount so found.*" Section 735 of the same Code provides: "If a person recover damages for a forcible or unlawful entry in or upon, or detention of any building or any cultivated real property, judgment may be entered for three times the amount at which the actual damages are assessed." Thus it will be perceived the Legislature has clearly limited the power of the jury in such cases, so far as damages are concerned, to the assessment of such damages only as have actually been suffered by the complaining party and has conferred upon the court the sole power of determining, in the exercise of its discretion, whether, in a given case, the circumstances are such as to justify the entry of judgment in favor of plaintiff, as a penalty for the acts of the defendant, for three times the amount found by the jury either as damages or for rent. That the power thus specially given the court was intended to be exercised in those cases only where the evidence discloses that the defendant has committed the tortious act charged against him wantonly or by oppression or with malice, express or implied (section 3294, Civ. Code, supra), is a proposition which, in our opinion, is rendered free from any kind of doubt, if not alone by the language of section 1174 of the Code of Civil Procedure, then most surely by that of section 735 of the same Code. In other words, the power to treble the damages or rent is a power to be exercised by way of punishment only, and the Legislature has (wisely, we think, as the writer further thinks would be true if it were so in all cases as to the awarding of punitive damages) committed the exercise of that power to the courts in preference to the jury, the theory of the lawmakers no doubt being that the court, having equal opportunity with the jury of hearing and passing upon the testimony, is better able to decide whether the evidence warrants the imposition of any penalty at all or an allowance in excess of the amount found by the jury to be the damages actually sustained.

But, if any doubt could arise, from the mere reading of sections 1174 and 735 of the Code, as to the construction thus given those sections—that is, that the Legislature thereby intended to restrict the power of the jury, in cases of forcible entry and of forcible or unlawful detainer, to the passing upon and deciding of the question of the actual damages, if any, sustained by the plaintiff and to vest in the court the exclusive power and discretion of annexing a punishment by trebling the amount of the damages or rent—then such doubt will readily disappear upon reference being made to some very early California cases which have never been reversed, and which, we think, can never be reversed by any logical process so long as the statutes concerning forcible entry and forcible or unlawful detainer remain as they now exist and read. In the case of Hicks v. Herring, 17 Cal. 568, Chief Justice Field, speaking of a provision of the law precisely similar to the one we are considering, said: "This section is added, not merely to indemnify the complainant for the injuries suffered from loss of rents and profits, and for waste committed, but to punish the offending party." "In other words," said Judge Currey, referring to the same section, in Tewksbury v. O'Connell, 25 Cal. 264, "by the amendment the landlord was held only to claim and prove damages; and then, when assessed, it became the magistrate's (the court's) duty, not by reason of the claim therefor, but in the enjoined exercise of penal authority, to treble them." Certainly, it will not be contended that, the statute, having said that the court may, in the exercise of its discretion, add, by way of example or punishment, the amount specified therein to that found by the jury as representing the amount of the rent or the damage actually suffered by the plaintiff, the jury may, nevertheless, also add exemplary damages. The manifest result of such a construction would be that the defendant could not only be required to pay three times the actual damages found, but could also be compelled to pay three times the amount of the exemplary damages awarded. And, if the jury may, in addition to actual damages, allow damages by way of a penalty, the court may obviously likewise do so, where the cause is tried by the court without a jury. Surely it cannot be said that the court could find actual damages, to which, as a finding from the evidence, it could add punitive damages, then, additionally, in the exercise of the discretion with which it is invested by section 1174 of the Code of Civil Procedure, treble the total amount so found. Nor is it a reply to the construction to which we here subject the sections in question to say that, in case the jury, in addition to finding actual damages, awards exemplary damages, the court will not enter judgment for treble the damages so found, and that, if it did do so under such circumstances, it would be an abuse of the discretion committed to it by the statute; for in no case could the court know or segregate the actual from the exemplary damages, and we know of no case where the jury have done so in their verdict.

It follows, of course, from the foregoing views that evidence bearing upon the question of punitive or exemplary damages is, in cases of forcible entry or forcible or unlawful detainer, always to be addressed to the court and not to the jury, and that, as before announced, instructions to the jury upon that question could obviously subserve no useful purpose.

There are no other questions presented which in our judgment require special notice.

For the reasons herein stated, the judgment and order are reversed and the cause remanded for retrial.

We concur: CHIPMAN, P. J.; BURNETT, J.

161 Cal. 348

SHEPPARD v. SHEPPARD. (L. A. 2,757.)

(Supreme Court of California. Nov. 22, 1911. Rehearing Denied Dec. 22, 1911.)

1. Divorce (§ 182*)—Appeal—Alimony.

Where a husband appealed from a decree denying his application for a divorce, and filed a supersedeas, staying execution on the part of the decree awarding alimony to his wife, the court was authorized to grant an order providing for her support and maintenance pending the appeal, and requiring plaintiff to pay such sums as were reasonably necessary therefor, notwithstanding such support was for a period of time covered by the maintenance judgment.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 625; Dec. Dig. § 182.*]

2. Divorce (§ 182*)—Alimony—Appeal—Order for Maintenance.

Where a husband appealed from an order denying his application for a divorce and requiring payment of alimony at the rate of $50 a month, filing a bond to stay execution on the judgment for alimony pending appeal, and it appeared that $50 per month was all defendant was entitled to receive for her support pending the appeal, a subsequent order, requiring plaintiff to pay defendant $50 per month for her support and maintenance pending the appeal, was erroneous, in so far as it failed to provide that, in the event of an affirmance, plaintiff should be credited with the amount paid under the order pending the appeal.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 182.*]

Department 1. Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by Samuel Sheppard against Lucinda Sheppard. From an order granting an award of alimony pending appeal, plaintiff appeals. Modified and affirmed.

See, also, 115 Pac. 751.

E. B. Drake, for appellant. Gray, Barker, Bowen, Allen, Van Dyke & Jutten, for respondent.

ANGELLOTTI, J. This is an appeal by plaintiff from an order, made after judgment and on July 11, 1910, requiring plaintiff to pay defendant the sum of $50 per month alimony pendente lite from December 17, 1909, to and including the final determination of the cause, which was then pending on appeal, $350 thereof (being the amount due to and including July, 1910) to be paid forthwith, and $50 on the 1st day of each subsequent month; also $50 costs and $150 attorney's fees, to be paid forthwith.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

No question is raised on this appeal as to the correctness of the order, in so far as it gives defendant the amounts specified for costs and counsel fees; the only question being as to the alimony pendente lite.

The material facts are as follows: Plaintiff commenced an action for divorce against defendant. Defendant by her answer denied the charges made against her by plaintiff, and by cross-complaint sought an allowance for her maintenance and support. The trial court found against plaintiff, and also found that he had willfully deserted and abandoned defendant, and that $50 per month was reasonably necessary to provide defendant with the common necessaries of life, and that such amount was a reasonable sum to be allowed her for her support and maintenance. This decision was rendered on December 15, 1909, and on the same day judgment was given, denying plaintiff relief, and awarding defendant "permanent alimony at the rate of fifty dollars per month * * * for her maintenance and support, * * * and continuing during the natural life of said" defendant. The judgment also gave her $150 attorney's fees and costs. Plaintiff appealed from this judgment to this court, and stayed the execution thereof by giving such an undertaking therefor as is required by law. Thereupon defendant made the motion for alimony pending such appeal, resulting in the order here under review, stating in her affidavit that the sum asked by her ($50 per month) is necessary for her maintenance and support, and that it is the amount of permanent alimony ordered paid her by the judgment. The evidence before the court on the hearing of the motion was sufficient to warrant the conclusion that such sum was reasonably necessary for the support and maintenance of defendant; that she had no means of support; and that plaintiff was financially able to pay said sum. Upon these facts the trial court made the order here under review.

[1] It cannot be disputed, in view of the authorities, that the trial court was authorized to provide for the support and maintenance of defendant by plaintiff pending the determination of the appeal from the judgment, and to this end to make an order directing plaintiff to pay defendant such sums as were reasonably necessary for that purpose. See Bohnert v. Bohnert, 91 Cal. 428, 27 Pac. 732; Gay v. Gay, 146 Cal. 237, 79 Pac. 885. And the fact that such support and maintenance for the period of time covered by the order sought was already provided for by the maintenance judgment did not compel the absolute denial of the motion. Execution of the judgment was stayed by the appeal therefrom and the stay bond given on such appeal, and consequently there was no enforceable judgment or order providing for her support and maintenance during the pendency of the appeal. Then, too, the appeal from the judgment might result in a reversal, in which event it might result that defendant would never receive anything for her support and maintenance during the period of the pendency of the appeal, although clearly, under the authorities, she was entitled to such support and maintenance pending the appeal.

[2] But the plain effect of the order as made, without reservation or qualification, was that if the maintenance judgment was affirmed, or the appeal therefrom dismissed, and plaintiff required, as he undoubtedly would be in such event, to pay to defendant all the amounts due thereunder, he would be required to pay $100 per month for the support and maintenance of defendant during the whole time of the pendency of the appeal, viz., $50 per month under the judgment, and $50 per month under the order, although on the motion for alimony pending the appeal defendant claimed only $50 per month for that purpose, and did not attempt to make any showing that more than $50 per month was necessary for her support and maintenance. There was absolutely nothing before the lower court on the hearing of this motion to support a conclusion by that court that defendant should have more than $50 for her support and maintenance for any month during the pendency of the appeal. It was plainly shown by the evidence on the motion that all that defendant was seeking, and all that she was entitled to have in the way of alimony pending the appeal from the judgment, was the amount awarded her by the judgment, the payment of which to her had been stayed by the appeal therefrom. As an illustration of the injustice that would follow the affirmance of this order in its present form, we have what has actually happened in this case, according to the showing made on the oral argument. The maintenance judgment has been affirmed, and the judgment became final May 12, 1911 (Sheppard v. Sheppard [App.] 115 Pac. 751), and plaintiff has been compelled to pay thereunder to defendant at the rate of $50 per month from December 1, 1909, to and including October 1, 1911, together with interest; the same being for her support and maintenance between such dates. If this order be now affirmed in its present form, plaintiff would be compelled to again pay defendant at the rate of $50 per month for her support and maintenance from December 17, 1909, to May 12, 1911, a period fully covered by the amounts already paid, although there was nothing in the showing before the lower court on the hearing of this motion to warrant a total allowance for maintenance and support for any month of more than $50.

We are satisfied that it was the duty of the trial court in making this order, with the facts as to the maintenance judgment before it, to have protected plaintiff against the possibility of being compelled, by reason of the affirmance of such judgment or the dismissal of the appeal therefrom, to pay twice for any period of time the amount deemed necessary by the court for the support and maintenance of defendant during such period of time. To that much plaintiff was clearly entitled, and, in so far as the order made fails to give such protection, it was erroneous, and, as has developed, most prejudicial to plaintiff. The case of Smith v. Smith, 147 Cal. 143, 81 Pac. 411, is full authority for the proposition, if authority be needed, that the maintenance judgment and the liability of the husband thereunder were required to be taken into consideration by the court in making its order for alimony pendente lite. And taking them into consideration it appears to us to necessarily follow, in view of the defendant's own showing as to the amount reasonably necessary for her support and maintenance, that the order was erroneous, in so far as it fails to protect plaintiff against the possibility of being compelled thereby to pay more than $50 per month for such support and maintenance for any period of time. The effect of the error can be obviated by a modification of the order, and its affirmance as modified. In view of our conclusion on the point discussed, and the facts as to satisfaction of the judgment for the period of time covered by the appeal, shown by the affidavit of plaintiff presented on the oral argument, it will be unnecessary to consider any other point made in the briefs.

It is ordered that the order appealed from be modified by inserting at the end thereof, after the word "forthwith," the following words and figures, viz.: "Provided, however, that all amounts paid hereunder by plaintiff to defendant on account of alimony at the rate of $50 per month shall, in the event of the affirmance of the judgment in this action, providing for permanent maintenance at that rate, rendered December 15, 1909, be credited in favor of plaintiff in satisfaction pro tanto of such judgment; and provided further, that if, in the event of the affirmance of the portion of such judgment, providing for such permanent maintenance, plaintiff pays defendant thereunder at the rate of $50 per month for support and maintenance for any period of time covered by this order, such payment shall operate pro tanto as a satisfaction of the requirements of this order as to support and maintenance for such period of time, and plaintiff shall not be required to make under this order any further payment for such period of time"—and as so modified the order is affirmed.

We concur: SLOSS, J.; SHAW, J.

161 Cal. 362

RHEINGANS v. SMITH (E. L. HOPPER & SON, Intervener). (L. A. 2,718.)

(Supreme Court of California. Nov. 23, 1911.)

1. Fraud (§ 23*)—Misrepresentations—Reliance.

In absence of confidential relations between the parties, a vendor may not rely upon statements by the purchaser as constituting fraudulent misrepresentations, except as to facts of which the vendor was ignorant, and which he had reason to believe the purchaser knew, and except, possibly, as to the law based on facts of which he had reason to believe the purchaser's knowledge was greater than his own.

[Ed. Note.—For other cases, see **Fraud, Cent.** Dig. §§ 20, 23; Dec. Dig. § 23.*]

2. Vendor and Purchaser (§ 44*)—Actions—Sufficiency of Evidence.

In an action to cancel a contract for the sale of land for fraud in misrepresenting that an option theretofore given by plaintiff to another had expired, evidence *held* to show that plaintiff did not rely on defendant's statement that the option had expired.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 69–76; Dec. Dig. § 44.*]

3. Fraud (§ 11*) — Misrepresentations — Matters of Opinion.

Where both the vendor and purchaser knew the facts as to a prior option given by the vendor, a statement by the purchaser that such option expired on a certain date was merely an opinion, as to a question of law, based on facts known to both, so that the vendor could not predicate fraud upon its falsity.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 12, 13; Dec. Dig. § 11.*]

4. Fraud (§ 12*)—Fraudulent Promise.

In absence of confidential relations between the parties, the mere making of a promise, which the promisor afterwards fails or refuses to perform, is not actionable fraud, unless the promise was made without any intention of performing it; Civ. Code, § 1572, providing that a promise, made without any intention of performing it, in order to induce another to enter into a contract, constitutes actionable fraud.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 14; Dec. Dig. § 12.*]

5. Cancellation of Instruments (§ 43*)—Actions—Proof—Variance.

In an action to cancel a contract for the sale of land for fraud in misrepresenting that an option theretofore given by plaintiff to another had expired, in which plaintiff did not allege or reply upon fraud by defendant in promising to cancel his own agreement to purchase, if the other option holder accepted his option, without any intention of performing such agreement to cancel, he is not entitled to relief on that ground, though the evidence tended to show such facts, and if alleged it might have been ground for relief.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 96–99; Dec. Dig. § 43.*]

6. Vendor and Purchaser (§ 18*)—Option Agreements—Acceptance.

The unconditional acceptance of an option to purchase land constitutes a binding contract, enforceable by the acceptor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. § 18.*]

7. Cancellation of Instruments (§ 25*)—Grounds—Fraud—Defenses.

If defendant fraudulently induced plaintiff to execute a contract to sell land after plaintiff had executed an option agreement to sell to another, the mere fact that, after the acceptance of plaintiff's option by such other, his agreement to purchase from plaintiff was changed slightly as to the terms of payment and the rate of interest would not be a defense to plaintiff's action to annul his contract with defendant for fraud.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 25.*]

Department 1. Appeal from Superior Court, Los Angeles County; Chas Monroe, Judge.

Action by Jacob Rheingans against Oscar B. Smith, in which E. L. Hopper & Son intervened. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Reversed.

Valentine & Newby, for appellant. Haas, Garrett & Dunnigan, for respondent.

SHAW, J. The defendant appeals from the judgment and from an order denying a new trial.

The plaintiff sues to cancel a contract, executed by him to the defendant, and to quiet his title against all claims of said defendant under said contract. The contract was made on November 29, 1909. It was signed by both parties. Rheingans thereby agreed to sell to Smith a certain tract of land for $156,500, of which $1,000 was then paid by check. $4,000 was to be paid on completion of title to the land, $31,500 in six months, $60,000 on June 1, 1913, and $60,000 on June 1, 1914. It is alleged that Smith induced Rheingans to execute the contract by fraud. The court below made findings to that effect, and gave judgment accordingly for the relief prayed for. In support of his appeal, Smith insists that neither the evidence nor the facts alleged support the charge of fraud.

The facts alleged as constituting the fraud complained of are as follows: Rheingans, being the owner in fee of the land, had given to the intervener, E. L. Hopper & Son, a corporation, an option, in writing, to buy the land at the price of $155,975, to be exercised within 90 days from its date, which was September 1, 1909. One-third of the price was to be paid on the execution of a deed, and the balance in five equal annual payments at 7 per cent. interest. Smith knew of this option and all its terms. It expired, as must be observed, on November 30, 1909. On November 29, 1909, Smith represented to Rheingans that this option had expired on September 28, 1909, and that Rheingans was then free to sell the land to Smith. Rheingans then declared that he would not sell to Smith, unless the Hopper option had expired, or was not accepted. Smith thereupon further represented that if Rheingans would execute the contract to sell to him, and the option had not so expired, and Hopper & Son should exercise the right within the time actually limited, he (Smith) would regard the agreement between himself and Rheingans as ineffective, and would cancel the same and return it to Rheingans. Rheingans was not sufficiently conversant with the English language to fully understand the meaning of the phrase "within ninety days from the date hereof." He believed said representations of Smith that the option had expired, and relying thereon, and also upon the promise of Smith to cancel the contract if his statement was wrong, and the option was duly exercised by Hopper & Son, he then and there executed the contract now sought to be canceled, and accepted Smith's check for $1,000 thereon. The complaint alleges that it was executed on the 30th, but the contract itself and the undisputed evidence shows that it was executed on the 29th. On November 30th Hopper & Son, in writing, accepted the option, and thereupon Rheingans made an agreement to sell the land to that corporation. A few weeks afterward this suit was begun. The findings are substantially the same as the allegations.

[1] Without considering the sufficiency of the facts, as charged, to constitute fraud, and proceeding to the evidence, we think it is clearly insufficient to show legal fraud in the false representation charged. Smith and Rheingans did not occupy confidential relations to each other. One was the seller, the other the buyer; and they dealt as strangers. Rheingans, therefore, had no inducement or right to rely on the statements of Smith, except as to the facts of which Rheingans was ignorant, and which he had reason to believe Smith knew, and except, possibly, as to the law based on facts of which he had reason to believe Smith's knowledge was greater than his own. He could not predicate fraud on a statement by Smith as to the law applicable to facts equally well known to both of them. Rheingans had a duplicate copy of the option to Hopper & Son. At the interview on the evening of November 29th, when the contract in question was made, Rheingans said that the option ran out on the evening of November 30th. Smith said, "It will run out tonight." Rheingans then got his copy of the option agreement and showed it to Smith, who then said, 'It will run out tonight at 12 o'clock." Rheingans said, "I don't believe it." Smith then proposed the plan of taking an agreement and canceling it, if Hopper & Son took the land the next day upon the option. Rheingans consented, signed the agreement with Smith, and accepted Smith's check for $1,000 thereon. This is Rheingans' version of the transaction, and it is not contradicted. There was no claim by Rheingans to Smith, nor upon the trial, that he was not entirely familiar with the language of the option, or that he did not understand its meaning.

[2,3] It is plain from this evidence of Rheingans himself that he did not credit

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Smith's statement as to the time the option expired, and did not rely on it. And, even if he had believed it and relied on it, the statement of Smith was a mere opinion—an opinion on a question of law, based on facts known to both alike. Such an opinion by one occupying no confidential relation toward the person to whom it is addressed does not justify such person in relying upon it, and it is not a sufficient basis to support a charge of fraudulent misrepresentation. Choate v. Hyde, 129 Cal. 584, 62 Pac. 118; Rendell v. Scott, 70 Cal. 514, 11 Pac. 779; Nounnan v. Sutter, etc., Co., 81 Cal. 6, 22 Pac. 515, 6 L. R. A. 219; Lee v. McClelland, 120 Cal. 147, 52 Pac. 300; 20 Cyc. 17; 14 Am. & Eng. Ency. of Law, 34.

[4, 5] The promise of Smith to cancel his agreement, if the option of Hopper & Son was taken up, appears to have been the inducement upon which Rheingans relied in making the agreement with Smith. The mere making of a promise, which the promisor afterwards fails or refuses to perform, does not constitute actionable fraud. 20 Cyc. 20; 14 Am. & Eng. Ency. of Law, 47; Lawrence v. Gayetty, 78 Cal. 131, 20 Pac. 382, 12 Am. St. Rep. 29. In the absence of confidential relations between the parties, it is only when such promise is made without any intention, of performing it that it becomes fraudulent in law or equity. Civ. Code, § 1572; Lawrence v. Gayetty, supra; Brison v. Brison, 75 Cal. 527, 17 Pac. 689, 7 Am. St. Rep. 189; Langley v. Rodriguez, 122 Cal. 581, 55 Pac. 406, 68 Am. St. Rep. 70. Smith, in his testimony, admitted that he knew all the time that the option did not expire until November 30th, and there is some evidence tending to support the inference that when he made the promise to cancel his own agreement he intended not to perform it. But there is no averment regarding such intent, nor any finding upon it, and the record shows that this species of fraud was not suggested during the trial, and that the case was not tried upon the theory that such fraud was the basis of the action. The briefs on this appeal contain no reference to such fraud. In such circumstances, we must adhere to the rule that a party is required to prove the case as alleged, and cannot recover upon proof of other facts not alleged, which might entitle him to the relief asked. If such fraud is relied on, it can only be done upon a new trial under an amended complaint.

It has occurred to the court that the defendant might be held to be estopped to assert rights under his contract, upon the principles stated in Seymour v. Oelrichs, 156 Cal. 794, 106 Pac. 88, 134 Am. St. Rep. 154. But here again we are confronted with the fact that neither in the pleadings, nor upon the trial in the court below, nor upon this appeal, has there been any suggestion to that effect, and the rule just stated forbids an affirmance on such new grounds.

[6, 7] As the case is to be remanded for a new trial, and there may be amended pleadings, it is necessary to state our views upon another point. When Hopper & Son accepted the option without qualification, it became at once a binding contract, enforceable by that company. Civ. Code, § 1585; Four Oil Co. v. United O. P., 145 Cal. 624, 79 Pac. 366, 68 L. R. A. 226; 29 Am. & Eng. Ency. of Law, 601. If the contract of Smith with Rheingans is found to be fraudulent, the mere fact that Hopper & Son, after accepting their option, agreed with Rheingans upon slightly different terms of payment and a lower rate of interest upon the deferred payment, would be no defense in favor of Smith to the action to set aside his contract for the fraud. What effect it would have if his contract is not found to be fraudulent, and his right to relief upon his cross-complaint to enforce it becomes important, is a question which, upon the record and agreement before us, we think it best not to consider.

The judgment and order are reversed.

We concur: ANGELLOTTI, J., SLOSS, J.

161 Cal. 353

In re HENDERSON'S ESTATE.

(S. F. 5,885.)

(Supreme Court of California. Nov. 22, 1911. Rehearing Denied Dec. 22, 1911.)

1. Wills (§ 457*) — Construction — "Legatees."

Testator by olographic will, after having bequeathed to his wife the homestead with furniture, etc., together with a one-fourth interest in the residue after paying all bequests made, bequeathed the remaining three-fourths of the residue to his three other children, and provided that, if any of the "legatees" died before testator's death, then the legacy provided for him or her should be divided equally among the residuary legatees. *Held*, that the word "legatees" was used in an ordinary nontechnical sense to include bequests of both real and personal property, and that, under the rule that the testator's intention, as disclosed by the language used, must control, such term included the bequest to the wife, and that on her predeceasing the testator her share became a part of the residue within the substitutionary clause.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 975; Dec. Dig. § 457.*

For other definitions, see Words and Phrases, vol. 5, pp. 4084–4086.]

2. Wills (§ 522*)—Construction—"Gift to Class."

A bequest to a class is a gift of an aggregate sum to a body of persons, uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in definite proportions; the share of each being dependent for its amount on the ultimate number.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1114; Dec. Dig. § 522.*]

3. Wills (§ 523*)—Construction—Substitutionary Clause—Gift to Class.

Testator, having bequeathed certain legacies, gave the homestead to his wife, and then provided for a division of the residue of his estate equally between her and his three surviving children, providing that, should any of the legatees die before testator's death, the legacy provided for him or her should be divided equally among the residuary legatees. *Held*, that such substitutionary clause provided for a gift to the residuary legatees as a class, so that on the death of the wife before testator her share of the residue was divisible between the surviving residuary legatees.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1115; Dec. Dig. § 523.*]

Department 1. Appeal from Superior Court, Humboldt County; Clifton H. Connick, Judge.

Application for an order of distribution of the estate of James W. Henderson, deceased. From an order denying the claim of certain legatees to a share in the residue, Ruth Henderson appeals. Affirmed.

Rehearing Denied; Beatty, C. J., dissenting.

E. W. Wilson, for appellant. Denver Sevier and J. F. Coonan, for respondents.

SLOSS, J. This is an appeal from a decree of partial distribution. James W. Henderson died on July 13, 1910, leaving a will which was admitted to probate in the county of Humboldt. The will, which was olographic, was dated October 3, 1905. By its first and second paragraphs, the testator declares his desire to save trouble to his wife and children, and to deal justly and fairly by all for whom he makes provision, and appoints as executors his wife, Amelia J., his daughters, Ida H. Sevier and Alice J. Henderson, and his son, George Y. Henderson. Paragraph 3, disposing of the estate, reads as follows:

"3rd. That after paying all my just debts and funeral expenses the rest and residue of my estate shall be disposed of as follows, viz.:

"To my grand children Abby J. Sevier one thousand dollars, to Henry Sevier one thousand dollars, to Stanley Sevier one thousand dollars, to Ernest Sevier one thousand dollars, to Randolph Sevier one thousand dollars, to Josephine Sevier one thousand dollars and to Helen Sevier one thousand dollars.

"Also to my grand children of my son E. W. Henderson, deceased: To James W. Henderson ten thousand dollars and to Ruth five thousand dollars, and to their mother Eda Henderson, five hundred dollars and all my interest in the house and lot on Seventh Street, in Eureka, where she now resides with her family.

"To my sister, Bell H. Love, of Boulder, state of California, one thousand dollars.

"To Cora Cattemole (nee Cora Love) five hundred dollars.

"To my sister, Martha Coombs, now of Windsor, Canada, one thousand dollars.

"To David H. Henderson, one thousand dollars and all interest I have in his farm in the town of Norfolk, in the county of St. Lawrence, state of New York, where he now resides.

"To my dear wife, Amelia J., the homestead where we now reside on the corner of 4th and H streets, Eureka, California, and all furniture, books and pictures, and all my jewelry and one-fourth interest in all the rest and residue of my estate after paying all the bequests herein provided to be paid.

"To my daughter, Ida Sevier, one-quarter interest in the residue of my estate, after paying the bequests herein provided for.

"To my daughter Alice J. Henderson, one-quarter interest of the residue of my estate after paying the bequests herein provided for.

"And to my son, George Y. Henderson, one-quarter interest of the residue of my estate after paying the bequests herein provided for.

"Should any of the legatees herein provided for die before my death, then the legacy provided for him or her shall be divided equally among the residuary legatees.

"My executors shall have power to collect, buy, sell, or trade in any of the property hereby bequeathed, and so far as possible to avoid the interference of courts."

[1] The wife, Amelia J. Henderson, died after the making of the will and before the death of the testator. Surviving the testator as his heirs at law were his son, George Y. Henderson, and the two daughters, Ida Sevier and Alice J. Henderson, named as executor and executrices of his will, and two grandchildren, James W. Henderson and Ruth Henderson, son and daughter of E. W. Henderson, a son of the testator, who had died prior to the making of the will. The proceedings now before us were instituted by a petition for partial distribution presented by George Y. Henderson, Ida Sevier, and Alice J. Henderson, the surviving children of the testator. By such petition, they asked distribution to them of the entire residue of the estate over and above the amount required for payment of the cash legacies and the devises of interests in real property given by the will to Eda Henderson and David H. Henderson, respectively. The contention of the petitioners was that they were entitled to receive equal one-third shares of the residue, including the property devised and bequeathed to the testator's wife, Amelia J. Henderson. On the other hand, the granddaughter, Ruth Henderson, who was a minor and appeared by her guardian, opposed the application, and filed a petition on her own behalf for partial distribution; her contention being that the bequests and devises to the wife, Amelia J. Henderson, lapsed by her death and passed to the testator's heirs at law, of whom said minor was one. The court below granted partial distribution as prayed by the surviving son and daughters of the decedent. The granddaughter appeals.

The correct solution of the problem so presented depends principally upon the meaning of the following clause of the will: "Should any of the legatees herein provided for die before my death, then the legacy provided for him or her shall be divided equally among the residuary legatees." The widow was herself one of those to whom the residue was given. The distribution to the respondents of the share which she would have taken requires a holding, first, that the widow is included in the phrase "any of the legatees herein provided for" in the substitutionary clause; and second, that the gift over is to the takers of the residue as a class, and is consequently to be divided among those members of the class who may survive the testator.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The primary purpose of all interpretation of wills is, of course, to ascertain the testator's intent, as disclosed by the language he has used. Civ. Code, § 1317. Of this class of questions, it may be said, with more truth, perhaps, than of any other, that each case depends upon its own peculiar facts, and that precedents have comparatively small value. "Except for the establishment of general principles, very little aid can be procured from adjudged cases in the construction of wills. It seldom happens that two cases can be found precisely alike"—says Washington, J., in Lambert's Lessee v. Paine, 3 Cranch, 131, 2 L. Ed. 377. Rosenberg v. Frank, 58 Cal. 387, 411; Le Breton v. Cook, 107 Cal. 410, 416, 40 Pac. 552. It is particularly important to bear this in mind in considering two cases presently to be mentioned as strongly relied on by the appellant.

In the case at bar, the appellant contends that the testator made a distinction between "legatees" and "residuary legatees," and that the latter were not described as among those whose "legacies" were, in the event of their death, to go to the residuary legatees. As a mere matter of definition, the word "legatees" includes residuary as well as other legatees. But, if the two expressions are to be differentiated, the widow (whatever may be said of the surviving daughters and son) certainly answered the designation of "legatee," in addition to that of "residuary legatee." She is given, not only a share in the residue, but the testator's furniture, books, pictures, and jewelry. As to these items, she is clearly a legatee, and the property so bequeathed to her is a legacy. To this extent, at least, the provision for her falls within the express terms of the substitutionary clause. It is hardly to be supposed that the testator designed that the property specifically bequeathed to his widow should go as directed if she should die, while the residuary provision for her should lapse and pass to his heirs as undisposed of. No intent to make such distinction appears on the face of the substitutionary clause.

The appellant argues further that, inasmuch as the estate (and the residue) included both real and personal property, such real property as was contained in the residue could not be covered by a gift over of "legacies" given to "legatees." But, while technical words in a will are ordinarily to be taken in their technical sense, they will not be so taken when it appears that they were used in another sense by a testator who drew his will without an acquaintance with the technical sense. Civ. Code, § 1327; Estate of Peabody, 154 Cal. 173, 97 Pac. 184. The will before us was, as we have said, olographic, and it is perfectly clear from its provisions that the testator was unfamiliar with the distinctions between terms appropriate to testamentary gifts of personal and those of real estate. Although the estate comprised realty, the will does not contain the word "devise" or "devisee." The testator makes gifts of his interest in real estate, and then speaks of the residue, after paying all the "bequests herein provided for." He makes provision for "residuary legatees," but says nothing of "residuary devisees." It is plain, therefore, that the testator used the terms "bequests," "legacy," "legatees," and "residuary legatees" loosely, and without regard to their exact technical meaning. In order to give full effect to these expressions, they must be read as referring to gifts and takers of realty, as well as of personal property.

The position that the widow, unquestionably a legatee taking a specific legacy, is excluded from the operation of the substitutionary clause can be supported only by making the gift over dependent upon the death of legatees receiving *pecuniary* legacies. This construction would, however, require us to write into the clause words of qualification not used by the testator—a course which is unauthorized, unless required to carry out the intent disclosed by the entire instrument. We find nothing in this will tending to show that Henderson meant "pecuniary legatee" when he said "legatee." Again, the construction urged by appellant would lead to intestacy as to one-fourth of the residue, a result that is not presumed to have been intended (Civ. Code, § 1326), particularly where, as here, the will as a whole indicates that the testator intended to dispose of all the property he should leave. O'Connor v. Murphy, 147 Cal. 148, 81 Pac. 406; Estate of Lux, 149 Cal. 200, 85 Pac. 147.

Two cases are cited by appellant, who confidently asserts that they require a contrary holding to that above indicated. Of each of them it may be said that the language construed differs materially from that used in the Henderson will. As we have suggested, great caution must be exercised in seeking to apply to one will the interpretation which has been given to another. In Estate of Richards, 154 Cal. 478, 98 Pac. 528, the will, after providing for the payment of certain enumerated legacies, gave and bequeathed the rest, residue, and remainder of the estate, of whatever kind and character, to testator's two brothers, William S. and Francis Richards. It then went on: "In the event of the death of any one or more of the legatees herein named, before they, or either of them, shall have received their bequests, the share of such deceased legatee or legatees shall be paid to my brother William S. Richards." Francis died before distribution. The court held that his share of the residue did not, by virtue of the substitutionary clause, pass to William S. Without going into the matter at length, we may point out that this conclusion was based upon and fully justified by a number of considerations which are not applicable to the Henderson case. The will of Richards did not speak of the brothers to whom the residue of real and personal property was given as legatees. It provided for a gift over in the event of the death of one or more of the "legatees" (a term not including, as it does here, any of the residuary beneficiaries); it made these gifts over take effect in case of death of legatees before receiving their bequests, thus referring to payment of bequests in course of administration, rather than to the receipt of a part of the residue, which would take place only upon distribution. It provided that the share of the legatee dying should be "paid" to W. S. Richards, a form of expression apt with reference to money legacies, but inappropriate if applied to a devise and bequest of a residue comprising real and personal property. The other case referred to is Lyman v. Coolidge, 176 Mass. 7, 56 N. E. 831. There a codicil to the will provided that, in case of the death of certain legatees, their legacies should be paid to their legal representatives. It then declared that "if any of the other legatees named in my will or codicils thereto shall die before my decease, the legacies therein given shall lapse, and the amount thereof shall be included in the residue of my estate." The last part of the clause, i. e., "shall be included in the residue," was held by the court to "show that the testatrix had in mind something outside of the residuary estate which was to fall into it." But this reasoning cannot be said to control the meaning of the very different language now before us. The Henderson will does not say that anything is to be "included in the residue," but that "legacies" (a word used in the will as equivalent to "legacies and devises") "shall be divided equally among the residuary legatees."

[2, 3] The remaining point to be considered is whether the gift over is to the residuary legatees as a class. In Estate of Murphy, 157 Cal. 63, 106 Pac. 230, 137 Am. St. Rep. 110, this court quotes with approval the following definition found in 6 Jarman on Wills (section 232): "In legal contemplation, a gift to a class is a gift of an aggregate sum to a body of persons, uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or some other definite proportions; the share of each being dependent for its amount upon the ultimate number." Taking the substitutionary clause alone, its gift of legacies of legatees dying to "be divided equally among the residuary legatees" would seem to fulfill every requirement of this test. Thus it is said in the Murphy Case that a devise to "the four children of my late sister Catherine," without further words, would amount to a devise to a class. In that case, however, the words quoted were coupled with the further language: "That is to say, I give, devise and bequeath all the rest of my * * * estate, * * * share and share alike, to Timothy J. Flynn, William D. Flynn, Mary Jane Logan and Kate I. Prendergast." The fact that the clause, read as a whole, made a gift to the devisees nominatim was held to indicate an intent that they should take individually as tenants in common. It is true that in the original gift of the residue in this case undivided one-fourth interests are given to the widow and children by separate individual provisions. But the substitutionary clause is separate and distinct from this. It deals with a different subject, and is not necessarily controlled by the preceding designation of individuals. Neither the Murphy Case nor the other decisions of this court, relied on by appellant (Estate of Morrison, 138 Cal. 401, 71 Pac. 453; Estate of Hittell, 141 Cal. 432, 75 Pac. 53), present a form of disposition like the one here involved. The Hittell will simply bequeathed all the testator's property to two persons named. It contained no element of a class designation. The will of Morrison contained a gift of the residue to be divided between testator's sister (named) and her daughters and a brother (named) of the testator. There were two daughters of the sister. It was held that this was a gift to the four beneficiaries as individuals, and not a gift of one-half to a class composed of the sister and her two daughters, nor a gift of a third to a class composed of the daughters. There was no claim, and no room for a claim, that the four persons who were to take constituted a class. These circumstances, coupled with other indications of the entire will, fully justified the conclusion that gifts to four individuals were contemplated. But the case is very different from one where a gift, complete in itself, is to the residuary legatees.

The cases above cited emphasize the point that, in seeking to ascertain whether a gift is to a class, the paramount consideration is the intent of the testator, as derived from the entire instrument. To this apparent intent, rules of construction must always yield. In the case at bar, the interpretation of a gift to a class is strengthened by a view of the will as a whole. The substitutionary clause, including, as we read it, gifts over of the residue itself, was added for the very purpose of preventing intestacy as to any part of the estate. This purpose would be accomplished by division of the share of any legatee dying among the survivors of those who were to take the residue. It would be defeated, and an inharmonious result would follow, if a part of such share were to pass as undisposed of, while the rest would go to the survivors of the residuary legatees. In the particular event which has occurred, i. e., the death of the widow, it will be observed that the construction contended for by appellant would result in having three-fourths of her share go over, while creating a lapse as to one-fourth of the very interest with respect to which the testator designed to prevent a lapse. The rule favoring a construction against intestacy applies with special force to this feature of the case.

Without undertaking to review all of the many cases cited by the respective parties, we state our conviction that the conclusions reached by the court below on both questions herein discussed are in harmony with the weight of authority, and that they give effect to the testator's actual intention.

The decree is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

(161 Cal. 367)

PEOPLE v. BORELLO. (Cr. 1,616.)

(Supreme Court of California. Nov. 23, 1911.)

Criminal Law (§ 519*)—Confessions—Voluntary Character.

A confession, obtained by threats, intimidation, invective and false statements by the sheriff and district attorney while accused was under arrest, was not voluntary and was not admissible in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1163–1174; Dec. Dig. § 519.*]

In Bank. Appeal from Superior Court, Amador County; R. C. Rust, Judge.

Agostino Borello was convicted of arson, and from a judgment rendered by the District Court of Appeal, affirming the conviction, he appeals. Reversed.

James H. Creely, Alfred H. Cohen, and Milton Shepardson, for appellant. U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., C. P. Vicini, Dist. Atty., and Benjamin P. Tabor, Special Prosecutor, for the People.

LORIGAN, J. This appeal was ordered here for further consideration after judgment rendered by the District Court of Appeal for the Third Appellate District affirming the judgment of conviction and the order of the trial court denying a motion for a new trial, from both of which the defendant appealed.

Defendant was accused and convicted of the crime of arson, and during his trial a purported confession made by him was admitted in evidence, and the principal point on this appeal is as to the correctness of the ruling of the court in that respect.

The crime of which the defendant was accused was the felonious burning, on February 5, 1908, of the "Summit House Hotel," situated on the road leading from the town of Jackson to the town of Sutter Creek, Amador county. It appears that this property was for several years and at the date of its destruction owned by one G. B. Vicini, who, in April, 1905, leased it at a monthly rental of $60, and for a term of six years to C. Lepori and L. C. Bertin, who then, and at the time of the fire, were engaged in business in San Francisco under the firm style of Bertin & Lepori. These lessees placed this defendant and a man named Faracone in possession of the property, who thereafter conducted it as a hotel and saloon. In July, 1906, defendant executed a chattel mortgage covering all the hotel and kitchen furniture, bar fixtures, etc., in the hotel and saloon in favor of said Bertin & Lepori to secure a promissory note for $500 executed by defendant to them. In March, 1907, defendant took out two policies of insurance on the personal property in the hotel for $1,000 each, one of which, however, expired by its terms before the fire. Thereafter defendant sold his interest in the hotel and saloon business to one Rossi, who alone seems to have thereafter conducted it until a few days before the fire when he abandoned the business, closed the hotel, and left that part of the country. A few days afterward and while the hotel premises were vacant they were destroyed by fire. The defendant for several months before the fire had been living in San Francisco but, a few days before it occurred, had been seen in the vicinity of the Summit House, once in company with Lepori of the firm heretofore mentioned, lessees of the hotel; another time with one Manzo, a resident of San Francisco; and some 11 months prior to the fire defendant had endeavored, but unsuccessfully, to prevail on one James Bryant to burn the hotel, offering him $200 to do so.

There was considerable other evidence in the case—conduct on the part of the defendant and circumstantial evidence—relied on by the people to establish the guilt of the defendant, but no positive evidence except his alleged confession directly connecting him with the commission of the crime. We make no further reference to the evidence because our purpose has been to only state such of it as will make intelligible the matters to which the confession of defendant is claimed to have been addressed, and the condition and circumstances under which it was made.

It was not claimed by the people that the defendant himself actually set the hotel on fire. The theory was that the defendant, at the instigation of Lepori, engaged a man named Manzo to go from San Francisco to burn it, and that he actually did so; the motive prompting Lepori being that by the destruction of the property the firm of which he was a member would be relieved from further payments on their lease, which still had three years to run and was an unprofitable investment, and the motive of defendant was to secure the insurance money on his personal property situated in the hotel.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Now as to the conditions and circumstances under which the confession of defendant was made:

On February 8, 1908, three days after the hotel was burned down, the defendant, who had left San Francisco for Jackson, Amador county, was arrested by the sheriff of that county at Martell, a railroad station a short distance from Jackson, and taken to the county jail. The next evening, Sunday, February 9th, he was brought from the county jail to the office of the district attorney of the county, where were present the district attorney, the sheriff of the county, a deputy sheriff, the official stenographer of the superior court, and a constable of Amador county, the latter being present at the request of the district attorney, to act as interpreter, the defendant being an Italian, who, though able to speak the English language, did so brokenly. This interview in the district attorney's office lasted at least two hours and a half, although some of the parties present testified that it lasted nearly five hours. It resulted, after defendant had been interrogated by both the district attorney and the sheriff, in what purported to be a confession of the defendant. The statement made by him was dictated to the stenographic reporter, who transcribed it at once. It was this statement which was admitted in evidence as the confession of defendant, and in which he admitted having taken part in the burning of the building, having at the instigation and request of Lepori employed a man whose name is not disclosed in the written confession who agreed to and did burn it.

On the preliminary showing the sheriff, district attorney, and the deputy sheriff testified generally that no promises were held out to defendant or any threats or intimidation or other improper means used to procure him to make the confession. As to what took place at the interview the district attorney testified: "I was in that meeting or investigation for a period of about two hours. Both Mr. Gregory and myself asked defendant, Borello, some questions. Of course he willingly made the statement, the whole statement himself, and then we asked him as to little points and one thing and another that we wanted to find out, and that took up about two hours. * * *" Mr. Willis, the stenographer who was present during all the interview which culminated in the making of the alleged confession, was not called by the prosecution at the preliminary showing, and his presence as a witness had not been required by it.

On the part of defendant he himself testified, among other things, that both the sheriff and district attorney told him that it would be better for him if he would tell the truth about the burning of the hotel; also, that if he would do so both he and his brother Marco (who was then under arrest also accused of burning the hotel) would be allowed to "go free"; that the district attorney told him that he did not want to keep him in jail, but that he wanted to get Lepori. He stated further that the sheriff had told him that his brother Marco had made a full statement of the cause and origin of the fire, and that the sheriff stated other facts tending to convey the impression that, in this statement so claimed to have been made, his brother had implicated defendant in the crime, and that, if defendant would not tell the truth and sign a statement, his brother Marco could get 14 years. Other matters were testified to by defendant and other witnesses on the preliminary showing tending to support the claim of defendant that his confession had not been procured from him freely and voluntarily. All these statements of defendant and the other witnesses in his behalf were specifically denied by the sheriff and district attorney.

The prosecution then offered the confession of the defendant in evidence, to which the defendant objected on the ground that it had not been shown to have been freely and voluntarily made. Before a ruling thereon the defendant asked for a continuance in order to procure the testimony of Mr. Willis, the stenographer, who was present when the interview between the sheriff, district attorney and the defendant was had, and the alleged confession was obtained. The court refused the continuance and said: "If you gentlemen want to argue upon the evidence that is in, you can do that, with the understanding that hereafter, if Mr. Willis comes, you can introduce his evidence. If the court should sustain your objection, there will be no necessity for the evidence of Mr. Willis. If the court should overrule your objection, and admit the confession, you can have Mr. Willis hereafter in rebuttal on your case, and the court then can get the benefit of his evidence as well as the jury; and if necessary, after such a showing is made, the court can rule at that time, withdraw the confession from the jury, and instruct them not to entertain it. I think that is the only way out of it."

After argument, the court, over the objection of defendant, admitted the confession in evidence, which confession consisted of but three pages of the record, and amounted only to a declaration by defendant, as heretofore stated, that Lepori had engaged him to employ a man, to be paid by Lepori, to burn up the hotel, and that defendant employed such a man and the hotel was burned.

At a subsequent session of the court, the defendant in the meantime having procured the attendance of Mr. Willis, the official stenographer of the court (not then, however, reporting the trial of defendant) called him as a witness. While the testimony on the preliminary showing on the part of the prosecution was that, in the interview with the defendant on the 9th of February, the defendant made his statement freely and willingly, and that the sheriff and district attorney "then would ask him as to little points and one thing and another that we wanted to find out," the notes taken by the stenographer and from which he testified show very clearly just what took place, and how the interview with or investigation of the defendant was held as far as the notes speak on the subject. What the stenographer took down he had not been requested to do by any one, but did it of his own volition. He testified that all the public officers heretofore named were present in the office of the district attorney with the defendant and that the latter was questioned by both the district attorney and the sheriff directly, and also through the medium of an interpreter, and that they were all in the office of the district attorney engaged in that matter from about a quarter to 7 in the evening until half past 10 or 11 o'clock that night. All the conversation which was had between the officers, the interpreter, and the defendant was not taken down by the stenographer; but the greater and more important part of it was, and shall be referred to as the undisputed evidence in the case of what actually took place at the interview and bearing on the question whether the confession was freely and voluntarily obtained from the defendant or not. Before doing so, it is to be said that, when this appeal was before the District Court of Appeal for determination, that court, as appears from its opinion, was strongly persuaded that if the confession of defendant had been obtained solely through the declarations of the sheriff, and his conduct and that of the district attorney on the evening of the 9th, as disclosed by the stenographer Willis, such confession would have been shown to have been improperly obtained and inadmissible in evidence. That court was of the opinion, however, that the declarations of the defendant on the evening of the 9th of February when the notes were taken and the confession signed by the defendant were but repetitions of admissions of guilt which he had made to the officers, (the sheriff and district attorney) the night previous (February 8th), and, having voluntarily confessed the crime on the previous evening, the subsequent conduct of the sheriff and the district attorney on the night of February 9th, however threatening or otherwise reprehensible it might have been, could not be said to have anything to do with causing defendant to then admit his guilt, because he had already admitted it on the previous evening. But there is not a particle of evidence in the record that the defendant made any confession of guilt or stated any circumstances of an incriminatory nature on the evening of February 8th or at any other time than during the interview of February 9th. No such claim is made in the brief of respondent. Nowhere in the record is there even a suggestion that he had done anything of the kind excepting as might appear from some declarations of the sheriff and district attorney in questions they asked him on the evening of the 9th and which imported that the defendant had made them the previous evening. But, in as far as any questions by the sheriff or district attorney stated or implied that defendant had made any incriminatory admissions on the evening previous to February 9th, such statement or assumption was untrue and was a species of deception employed to embarrass, disconcert, and entrap the defendant, because it affirmatively appears from testimony directed specifically to the fact that the defendant made no admissions of guilt or statements of any incriminatory character at any time previous to the evening of the 9th of February. This is directly shown by the testimony of the sheriff and district attorney themselves, who explicitly state that on the evening of the 8th the defendant would not talk about the burning of the hotel, denied any knowledge about it; the district attorney testifying that, while he asked and the defendant answered some unimportant questions, the important ones which he asked him were not answered by the defendant at all.

Recurring now to the testimony of Willis as to the actual occurrences and the true situation and circumstances under which the alleged confession was obtained: Reasonable limits of an opinion preclude a detailed statement of all that occurred. It appears that on the afternoon of the 9th the district attorney had visited the defendant in jail; that the defendant made no statement to him, but said, "I will see you to-night"; and that it was on account of this statement that defendant was subsequently brought to the district attorney's office, where the various officers of the county heretofore referred to were assembled. If defendant intended by the expression, "I will see you to-night," to convey the impression that he would then make a confession to the officers of any connection with the offense charged, it is quite apparent that he abandoned any such intention before he was brought before them. It does not appear that he was then asked to make, nor did he make, any spontaneous statement of his connection with the burning of the building, but, on the contrary, the sheriff and district attorney at once proceeded to interrogate him respecting the matter, and this investigation on their part continued for a long period of time before he made any confession respecting his connection with the commission of the offense. His general attitude when he was brought in, and which continued during the examination and while he was being subjected to examination by the officers, is stated by the district attorney himself: "He would hem and haw about it. * * * When I say he hemmed and hawed, I mean he would not say anything. He was holding his head down a great deal. One minute he would want to tell and the next minute he did not want to tell. * * * The reason why he wanted to tell I could not tell you. I would say it was because he was scared, and then he would want to tell and hem and haw about it, and finally came out and told the whole story. * * * Mr. Gregory (the sheriff) and I just kept on asking questions relating to the matter."

But it is these very questions put by the sheriff and district attorney, the continuous and searching examination to which the defendant was put by both of them in an endeavor to wring out a confession when it was apparent that he was not disposed to make one, and their statements and conduct toward him, which showed that the confession was not freely and voluntarily made, but was the result of threats, intimidation, invective, accompanied with coarse profanity, mental coercion, and false statements used to procure it, the employment of which the law absolutely discountenances and prohibits.

The notes of Willis—the correctness of which are not questioned—show that the sheriff and district attorney, principally the former, in English, and through the medium of the Italian interpreter, interrogated the defendant persistently for upwards of an hour, if not for several hours; that they persisted in making repeated inquiries on the same matters to which the defendant gave them what in their judgment were unsatisfactory replies to such an extent as to elicit from the defendant through the interpreter this declaration to the sheriff, his interrogator: "He says he cannot say anything more than he knows. It looks as if you are not satisfied with what he says." Responded to by the sheriff with, "He says one thing and then he wants to take it back."

During the long inquisitorial ordeal through which he was put by the officers and before he had made any admission of guilt, he was told by the sheriff that he would have to tell all he knew and was accused by both the sheriff and district attorney of not telling the truth in the answers he was giving. The sheriff declared to him that he had absolute proof of his guilt and could convict him before a jury; charged him with another crime in connection with the crime of arson; declared that he could prove he had offered a man money to burn the hotel and could prove that fact whether it was so or not; stated that they had sufficient proof without any confession on his part to convict him; that his brother Marco had made statements in which he implicated the defendant in the burning of the hotel, and if his brother went back on it he would go to the penitentiary for 14 years; they asserted that he had made statements to them the night before of an incriminatory character, when in fact he had made no such statements at all; charged him with repudiating in his answers the statements declared to have been so previously made; and indulged in coarse profanity throughout their examination relative to the statements he was making and to emphasize their disbelief in their truth.

Supplementing these references to the conduct of the officers during the examination with a few extracts from the notes of Willis: Almost at the beginning of his examination when the defendant had stated, among other things, that he did not know the name of the man who it was assumed by the officers had actually burned the hotel, the district attorney declared: "Don't you think if I told you those things, then you would ask me what was the man's name, and I would say, 'I don't know,' you would tell me I was a damned liar. That is what you would say. You would tell any reasonable man under the sun; you can't tell any man that has got a damned ounce of sense, and tell them that state of facts, that you don't know a man's name, he would be a God damned fool if he believed you."

Following a large number of interrogatories by both the officers based on purported statements made the night before by the defendant, which questions however elicited no answer from the defendant incriminating himself, he was further asked why he had said his brother Marco had gone to San Francisco with him, to which he answered, "It don't make any difference." The district attorney then said: "I understand you now, that you don't want to tell the truth; that is the way I understand you. A. I am telling the truth. Q. You don't want to when you say it is none of your business, when your brother go to San Francisco. Suppose my brother and I go to San Francisco and a man asked me whether I knew. You know damned well I would lie if I said I didn't know. A. You ask my brother. Q. Does he tell the truth? You don't. Can't you tell the truth? A. Yes. Q. Don't you know whether he went down with you? It is the God damndest proposition I ever heard of."

It also appears from a consideration of the notes of Willis that after an unremitting, searching, and protracted questioning by the officers in regard to the burning of the hotel had failed to draw any admission from defendant of his connection with it, he was finally asked who had telegraphed to Lepori at San Francisco that the hotel had been burned. Defendant made no answer. Asked if he knew the name of the person who had done so, and answering in the negative, the sheriff addressed him as follows: "I ain't going to let you go. I won't lie to you. I got too much proof. I am not going to let you go; that is all there is about it. You are going to stand trial as I told you last night, and you don't have to tell me anything if you don't want to; but, if you want to tell me anything, it must be free and voluntary. I want the truth. I want to know the truth. That is all I do want. Now, do you think that when I can prove that you offered a man $200—I can prove it whether it is so or not—that you offered a man $200 to burn that place, that you told him that you had got the coal oil, that you went down to Rose's and had the place insured, and you came back and told a man it was all right, and he told you that you were crazy? Now, I can prove that, and when I can prove that you came up here and shipped away the goods, and I can prove that you said Lepori told you to ship the goods away, and I can prove to you that you told other people that Lepori told you there was going to be a fire, and if your brother goes back on it, he will go to the penitentiary for 14 years; I don't lie to anybody. I don't lie to anybody. I am telling you what he said. But he said that. I am not telling you all that your brother said. I am not going to tell you all your brother said. I will tell you right now I won't tell you all your brother said; but you did tell your brother that, and your brother swore that you told him that Lepori was going to have a man come up here to set that house afire. I can prove that by every man in this room. They all heard it, by God, every man in this room heard that. Now, I can prove that you went to work and you did ship this stuff as Lepori told you. I can prove that man came up here from San Francisco with you, and that you stayed here with him and stayed until your brother came up and you—at the Summit House—and when your brother came up here, then you took your brother into his bedroom, the first night, and told him this story. Now, you shipped this stuff away, and you shipped stuff that didn't belong to you—not a God damned bit of it. That cash register didn't belong to you or Lepori. It belonged to Rossi. You said this that you sold it to Rossi, and you shipped the wine and you shipped the bedding and you shipped the mineral water, and, by God, it is selling goods that don't belong to you. That belongs to Rossi, and Rossi has got a bill of sale for that."

Here the district attorney intervened with: "When you went to San Francisco, you went with Rossi and your brother, and they got off at Galt for Sacramento. You told us that Lepori told you to pack that stuff, and that Lepori didn't own it any more than you did. You told us that Lepori told that when you went back to San Francisco. You went down to Lepori's store to tell him that you had shipped that stuff and you was also going to tell him that the man that went up with you was at your brother's house. Do you suppose that when I can prove that— "

Here the sheriff, interrupting the district attorney, proceeded: "Do you suppose now that when I can prove that to you that any jury in the world is going to let you go? You have got to show where you got all this news. That is all there is about it. You have already told us that Lepori told you, but that won't clear you. You asked me if you could go, and I told you no. I am telling you I can't turn you loose. Suppose I turned you loose with all that evidence against you, what would people say about me? Here is a God damned pretty sheriff and a God damned pretty district attorney, to have all this proof against a man and turn him loose. * * * If he (defendant) wants to say anything, he can say it now, because if he don't I am going to strike out to-morrow morning and I am going to round up this whole God damned bunch. I can't stay here for a week, and I am not going to do it. If he wants to say anything, he can say it now. I want to say to you right now, Borello, that if you don't want to say anything you don't have to. If you don't want to make any statement, you don't have to, but if you do it must be free and voluntary on your part, without any concessions, promises, rewards, or anything else. Now, if you want to do it, you can."

Immediately following these declarations by the sheriff and district attorney, the defendant, in response to further questions, stated that Lepori had instigated the burning of the hotel and had asked him to employ a man to do it, Lepori agreeing to pay the man a hundred dollars if the destruction was successful; that the defendant employed one Dominico Morozi, or a man having some such similar name—defendant could not tell exactly—to do it; that he took him to the Summit House from San Francisco for that purpose, left him there, and the hotel was burned.

Additional excerpts from the notes of Willis might be given showing highly improper conduct on the part of the officers to procure a confession from defendant, but the above will suffice. In this connection it is to be observed that in the lengthy and forceful declaration of the sheriff to the defendant last above quoted the sheriff did not specifically state to the defendant how far the statement of his brother implicated him in the burning of the hotel; but there can be no reasonable doubt but that the sheriff intended to convey the idea and have the defendant believe, as he naturally would, that his brother had made a statement to the sheriff directly implicating him in it. The defendant knew that his brother Marco was under arrest and had made a statement, but did not know what it contained. No other meaning or intention could be taken by defendant from the language of the sheriff when referring to the statement made by Marco: "I am not telling you all your brother said. I am not going to tell you all your brother said. I will tell you right now I won't tell you all your brother said; but you did tell your brother that and your brother swore that you told him that Lepori was going to have a man up there and set that house on fire"—except that its emphatically reiterated character was to suggestively and insinuatingly impress the defendant with the belief that his brother's statement had in fact implicated him.

No attempt was made on the part of the prosecution to question the accuracy of what is shown by the testimony of Willis to be the exact circumstances and method employed by the officers to procure the confession.

On this showing made, the defendant moved the court to set aside the order theretofore made admitting the confession in evidence, under the right reserved to him by the court to do so at the time the confession was originally admitted in evidence, and on the ground that it was not freely and voluntarily made, which motion the court denied. This was error. The court should have granted the motion. While, upon the preliminary showing made by the prosecution and upon which the admission of the confession was made, it appeared in answers to general questions that the confession had been obtained freely and voluntarily, the uncontradicted testimony of the stenographer showed exactly how it was obtained and by what method and conduct on the part of those who had testified to its free and voluntary character, and conclusively showed that it was not so made, but was obtained by a method inquisitorial in its nature and of the "third degree" in character; the assumption of a dominating and browbeating attitude of the officers toward the defendant, and the employment of deceptions, threats, and intimidations, emphasized with coarse profanity.

That a confession so extorted cannot be admitted in evidence is firmly established in the jurisprudence of this country. Bram v. U. S., 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568; People v. Loper, 112 Pac. 720.

The judgment and order appealed from are reversed.

We concur: BEATTY, C. J.; HENSHAW, J.; MELVIN, J.; SHAW, J.

SLOSS, J. I concur. The methods employed to induce the defendant to confess were, I think, more extreme and unfair than those which were held by a majority of the court in the Loper Case to require the exclusion of the confession there obtained. It is impossible in the present case to avoid the conclusion that the confession was forced from the defendant by means of intimidation. Apart from anything else, there was a direct threat that defendant's brother would be subjected to a long term of imprisonment for perjury if he did not so testify as to fasten upon the defendant the guilt of the crime with which he was charged. A confession resulting from the use of such means cannot in any fair sense be said to have been free and voluntary.

ANGELLOTTI, J. I concur.

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161 Cal. 403

MARSIGLIA v. DOZIER et al. (L. A. 2,746.)

(Supreme Court of California. Nov. 29, 1911.)

NEGLIGENCE (§ 111*)—PLEADING—PROXIMATE CAUSE.

Defendants maintained a fire escape, consisting of a ladder, attached at one end by hinges to the building at the second-floor level. From the other end of the ladder, a rope passed over a pulley, attached to the building at the third-floor level; there being at the other end of the rope a weight, constituting a counterbalance. Children at play moved the loose end of the ladder up and down, and the pulley became detached, allowing the weight to fall on one of them. *Held*, that the proximate cause of the accident was the defective construction or fastening of the pulley, so that the complaint, alleging no negligence with respect thereto, but simply in respect to leaving the ladder lowered, within the reach of children, stated no cause of action; negligence not being presumed, but being required to be pleaded.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 182–184; Dec. Dig. § 111.*]

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Vincent Marsiglia, by Malkola Marsiglia, his guardian, against Melville Dozier and others. Judgment for defendants; plaintiff appeals. Affirmed.

Peyton H. Moore and H. A. Massey, for appellant. Leslie R. Hewitt and H. E. Riggins, for respondents.

SHAW, J. A demurrer to the complaint was sustained, and thereupon judgment was given for the defendants. Plaintiff appeals therefrom.

The action is to recover damages suffered by plaintiff from an injury caused by a heavy weight falling against him. The defendants are the members of the board of education of the city of Los Angeles. The board maintains a high school in a high school building under its control. The building was more than two stories high. The law requires the board of education to provide such buildings with fire escapes. Pol. Code, § 1890. The fire escape provided by the defendants for this building consisted of a stepladder attached at one end by a hinge at the level of the second-story floor, and so arranged that the other end could be lowered to the ground, if necessary for use. To facilitate this lowering, a wire rope was run from the movable end over a pulley, attached at third-floor level, and thence to a weight or counterpoise suspended in the air some 12 feet from the ground. The proper position of the ladder when not in use was at such a height that the lower end could not be reached by a person on the ground. When the end was lowered, it would, of course, raise the weight. The injury was caused by this weight falling against the plaintiff's shoulder.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The alleged negligence is as follows: When the end of the ladder was down within reach of a person on the ground, it could be raised, lowered, and made to oscillate by a child. Consequently it formed an attractive plaything for children in the vicinity. It did attract the plaintiff and other children thereto, as defendants well knew. Plaintiff was 10 years old. In the position just stated, the fire escape was a dangerous thing for children to play with. The reason why it was dangerous in that position is not stated. At the time of the injury, the defendants had negligently allowed the ladder to be lowered so as to be accessible to children on the ground, and to remain there unguarded and without fastenings. Plaintiff and other children, by the negligence of defendants, as aforesaid, were attracted to it. Plaintiff was standing beneath the weight. The other children were moving the ladder. By reason of their so moving the ladder, the pulley above, over which the rope ran, became loosened and detached from its fastenings, and allowed the weight to fall against plaintiff's shoulder, causing the injuries complained of.

The only negligent act here stated is the act of allowing the ladder to be lowered so as to be within reach of the children, and to remain there unguarded and unfastened. This allowed the children to move the lower end of the ladder up and down, and thus raise and lower the weight. But it was the purpose and plan of the apparatus that the weight as a counterpoise should thus move as the ladder was moved. This would turn the pulley, of course. It was so designed and constructed. Given a proper condition of the pulley, and the ladder might have been moved freely, with no result, except the turning of the pulley and corresponding moving of the weight. Such movement would not have detached the pulley from its place, or caused the weight to fall. Therefore the direct and proximate cause of the injury must have been the defective construction or defective fastening of the pulley. There is no allegation that the pulley was either negligently made or negligently affixed, nor any averment of negligence in respect to it. If the moving of the ladder caused the pulley to break loose and the weight to fall, it was solely because of the condition of the pulley. Unless that condition was the result of the negligence of the defendants, they cannot be held liable for the injury. Negligence is not presumed. The plaintiff must allege and prove that the negligent act of the defendants was the direct or proximate cause of the injury, or he cannot recover. No negligence being alleged with respect to the thing which caused the injury, it must be presumed that the defect was a latent defect, with notice of which the defendants are not chargeable, or that the detachment of the pulley was brought about by the act of some third person for whom they are not responsible. The consequence is that the complaint does not state a cause of action.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

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161 Cal. 397

CONSOLIDATED LUMBER CO. v. FIDELITY & DEPOSIT CO. OF MARYLAND. (L. A. 2,735.)

(Supreme Court of California. Nov. 29, 1911. Rehearing Denied Dec. 29, 1911.)

1. Bills and Notes (§ 537*)—Presentment—Waiver—Evidence.

Evidence that an indorser of a note did not waive its presentment to the maker when due *held* sufficient to go to the jury.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 537.*]

2. Evidence (§ 471*)—Question Involving Conclusion.

Even if the question, asked of the indorser of a note, whether he ever agreed with any one to waive presentment of it to its maker, on the day it became due, for payment, calls for a conclusion, it is in the discretion of the court to allow it.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 471.*]

3. Witnesses (§ 269*)—Cross-Examination.

Plaintiff, in an action by the holder of a note against the surety of a notary, for failure of the notary in protesting the note to present it to K., its maker, by reason whereof plaintiff, in an action against S., its indorser, was defeated, may, on cross-examination of S., ask if he ever agreed with any one to waive presentment of the note to K., though defendant, in his examination in chief of S., had merely asked about his conversations with W., plaintiff's agent, about the note before it became due, and he had answered that, while he had such conversations, he was then unable to give their substance; W., having, in the action of plaintiff against S., testified that S., in conversations with him, waived such presentment; and plaintiff, from the pleadings, having good reason to suppose that defendant would offer in evidence the testimony of W., given in the former action; the question, in view of these facts, being germane to the examination in chief and proper cross-examination.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 269.*]

4. Bills and Notes (§ 526*)—Maturity—Options—Exercise—Evidence.

Evidence, in an action in which a defense was that an option given by a note to declare the principal due for nonpayment of interest had been exercised, *held* to authorize a finding that it had not been exercised.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 526.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. Bills and Notes (§ 226*)—Accommodation Indorsers—Consideration.

One who, before execution of a note, signed it as accommodation indorser, in effect making him a surety, was liable, though he personally received no consideration from the payee, but the only consideration was credit to the maker on a prior obligation due by him to the payee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 534–541; Dec. Dig. § 226.*]

6. Depositions (§ 111*)—Notice and Affidavit for Taking—Waiver by Stipulation.

Notice and affidavit, required by Code Civ. Proc. § 2031, for taking a deposition, are waived by a stipulation that the deposition of a certain person may be taken before a certain person, and when so taken may be used on the trial.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 329–339; Dec. Dig. § 111.*]

7. Depositions (§ 99*)—Use in Another Action—Deposition on Stipulation.

That a deposition is taken under a stipulation, waiving notice and affidavit required by Code Civ. Proc. § 2031, for taking a deposition, makes it none the less admissible in another action, under section 2022, providing that a deposition, "taken and returned as provided in this chapter," may be used in another action; such notice and affidavit being no part of the taking of the deposition.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 288–296; Dec. Dig. § 99.*]

8. Depositions (§ 99*)—Use in Another Action—Limitation of Use by Stipulation.

The provision of a stipulation for taking a deposition, that when so taken it "may be used on the trial of said action," does not limit its use to the action in which it is taken, and so take it out of Code Civ. Proc. § 2022, providing that a deposition may be used in any other action between the same parties on the same subject.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 288–296; Dec. Dig. § 99.*]

9. Depositions (§ 99*)—Use in Another Action—Actions Between Same Parties.

The parties to the two actions, both on the same cause of action, are the same, within Code Civ. Proc. § 2022, providing that a deposition taken in one action may be used in any other action between the same parties on the same subject, where the action in which it is taken is against both the obligors on a joint and several obligation, and the second action is against only one of them.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 288–296; Dec. Dig. § 99.*]

Department 1. Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by the Consolidated Lumber Company against the Fidelity & Deposit Company of Maryland. From a judgment for plaintiff, and from an order denying a motion for new trial, defendant appeals. Affirmed.

Gray, Barker, Bowen, Allen, Van Dyke & Jutten, for appellant. W. W. Middlecoff, for respondent.

SHAW, J. Appeals are presented from the judgment and from an order denying a new trial. Plaintiff sued to recover damages arising from a breach of duty by one C. T. Gifford, notary public; the defendant being the surety upon his official bond. Plaintiff held a note for $5,000, executed by L. E. Kiefhaber, and indorsed by C. F. L. Kinnear and G. H. Seaton. It was dated September 20, 1906, and was due on April 1, 1907, with interest at 6 per cent. per annum, payable monthly. It provided that if the interest was not paid as it became due the whole amount of principal and interest should thereafter be due and payable at the option of the holder; such option to be exercised within 90 days after such default. Kiefhaber resided in Redlands. A short time before April 1, 1907, plaintiff sent the note to the First National Bank of Redlands for collection. It was not paid on April 1st, and thereupon the Redlands Bank delivered it to Gifford, as notary, to be protested. Gifford appended thereto his official certificate in due form, showing a regular protest thereof by him and the sending of proper notices to the indorsers. In fact, however, he did not present the note to Kiefhaber for payment, and by that omission the indorsers were released. Kiefhaber and Kinnear were insolvent, and Seaton was the only party financially responsible upon the note. The plaintiff sued him on the indorsement, and was defeated in the suit, and lost the debt because of the nonpresentation to Kiefhaber. This action is based on said failure of Gifford, as notary, to properly protest said note.

In defense the defendant claimed (1) that Seaton had waived the presentment to Kiefhaber for payment; and (2) that the plaintiff had exercised its option as provided in the note, and had declared it due and payable long before April 1st. Upon the first ground, it claimed that no protest was necessary; and hence that Seaton was bound, notwithstanding his successful defense to the suit on the indorsement. Upon the second ground, it claimed that the plaintiff itself had suffered the note to become due without protest, or demand upon Kiefhaber for payment, and thereby released Seaton. The general verdict of the jury in favor of the plaintiff implies that neither of these defenses were proved. In answer to special interrogatories, the jury found that neither of them was true. It is claimed that these findings are contrary to the evidence.

[1] We think this claim cannot be sustained. The testimony relied upon to prove the waiver of presentment consisted of the complaint filed by the plaintiff in the suit against Seaton, and the testimony of Wheatley, the plaintiff's general manager, and of Seaton. The said complaint stated that some time prior to March 27th Seaton had requested plaintiff not to protest the note, or to resort to any legal action, or to incur any expense, and had positively promised to

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

pay it at maturity; but it further stated that on March 27th he had informed plaintiff that he had decided not to pay the note at maturity. In his answer in that action, he denied all the allegations of the complaint. The judgment roll was introduced in evidence, and the judgment was in his favor. The testimony of Wheatley consisted of extracts from the transcript of his testimony in the trial of the suit against Seaton. He testified at that time, in substance, that prior to April 1st Seaton had asked and he had promised to give further time on the note; that Seaton said he would pay it, but could not do so at maturity, and that it would not be necessary to go to any expense; that Wheatley told Seaton that he would have to protest the note on account of the other indorser, but that it was not necessary, so far as Seaton was concerned. Seaton's deposition was taken and introduced in evidence. One of the questions and answers was as follows: "Did you at any time ever agree with any one to waive the presentment of this note to Mr. Kiefhaber, on the day it became due, for payment? Answer: No, sir." It is apparent that this evidence does not conclusively show the waiver of presentment by Seaton. There is no express declaration of such waiver, and it is a fair inference that the parties did not understand that they were waiving such formality. The testimony of Seaton directly contradicts it. This raised a conflict in the evidence which was for the jury to resolve. The finding upon either side of the question would be beyond the power of this court to set aside. The court properly left the matter for the jury to determine.

[2, 3] Defendant insists that the aforesaid question and the answer of Seaton were improperly admitted. The objection made to it was that it was not cross-examination, and that it called for the conclusion of the witness. Whether it called for a conclusion or not, we think it was within the discretion of the court to allow it in the form in which it was put. In the previous part of the deposition, defendant's counsel had asked Seaton about his conversations with Wheatley concerning the note before it became due, to which he answered that he had such conversations, but was unable at that time to give the substance of them. Plaintiff knew of the testimony of Wheatley in regard to these conversations, given in the former action against Seaton, and from the pleadings in this action it had good reason to suppose that Wheatley's testimony in the former action would be offered in evidence by the defendant. The aforesaid question to Seaton related to the same subject, and in view of these facts we think it was germane to the examination in chief and proper cross-examination.

[4] With regard to the exercise of the option to declare the note due before its expressed maturity, the testimony of Wheatley upon the trial of the suit against Seaton was introduced. He there stated that he had many times notified Seaton, both orally and by letter, that he had elected to declare the note due for nonpayment of interest; but he said further that on March 26, 1907, which was the last interview he had prior to its expressed maturity, he asked Seaton if he was going to pay the note when it became due on the 1st of April, and Seaton said he could not pay it, and thereupon asked for an extension. On redirect examination, he said he did not understand from the questions put to him that he was asked whether the note itself was made due before the 1st of April. We have not given the testimony in full, but taking it as a whole, in connection with that of Seaton on the same subject, it tends to show that neither himself nor Seaton understood that the note had been declared due in advance of its expressed maturity on April 1st. It was a fair inference that any declarations previously made to that effect had been withdrawn, or that they were not understood to intend to declare the immediate maturity of the note.

[5] The court properly refused to instruct the jury that if there was no consideration for the indorsement of the note by Seaton, and the plaintiff knew that fact at the time it accepted the note, the verdict should be for the defendant. There was no evidence to justify such a finding. Kiefhaber was the principal debtor, and Seaton was an accommodation indorser. His indorsement was made prior to the execution of the note. The consideration to Kiefhaber was a credit of $5,000 upon a prior obligation due from him to the plaintiff. Seaton was, in effect, a surety. There was no dispute about these facts, and Seaton fully understood them. His testimony that he personally received no consideration from the plaintiff for his indorsement was, under these circumstances, immaterial.

[6-9] It is further claimed that the court erred in admitting in evidence the deposition of C. T. Gifford, taken in a former action by the plaintiff against the defendant and C. T. Gifford upon the same bond and for the same breach. That action had been dismissed. The complaint in that action and in this were identical, except that Gifford is not a party to this action. The deposition of Gifford was taken in the former action under a stipulation providing "that the deposition of C. T. Gifford, one of the defendants, as a witness in behalf of the plaintiff, may be taken before Charles L. Allison, * * * and when so taken the said deposition may be used on the trial of said action." It is conceded that Gifford's absence at the trial of the present action was duly accounted for, and that, except as to the formality of giving the notice and making the affidavit required by sections 2031 and 2021 of the Code of

Civil Procedure, the deposition was in all respects taken and returned as provided in chapters 1–3, tit. 3, article 4, of that Code, sections 1981 to 2054, inclusive. The claim is that the stipulation aforesaid limited the use of the deposition to the trial of the action in which it was taken. Section 2022, Code of Civil Procedure, provides that: "A deposition taken and returned, as provided in this chapter, may * * * be read in evidence by either party * * * in any other action or proceeding between the same parties or their privies or successors in interest upon the same subject." Nothing is here said about the preliminary notice and affidavit. It is sufficient, so far as this section goes, if the deposition was "taken and returned" in the manner provided. The notice and affidavit were waived by the giving of the stipulation. In such cases the deposition is admissible in a second action for the same cause between the same parties, just as it would have been if the affidavit had been made and due notice had been given of the time and place of the taking. The taking of a deposition consists of the examination of the witness, reducing it to writing, and the signing of the same by the witness. Doubtless a party might, by such stipulation, limit the use of the proposed deposition to the trial of the action in which it was taken, or in any other manner he sees fit. But he does not so limit it by inserting in the stipulation the statement that it "may be used on the trial of said action." The fact that Gifford was not a party to this action is not material; the cause of action being the same, the obligation being joint and several, and the other parties being the same. Code Civ. Proc. § 1910; Briggs v. Briggs, 80 Cal. 253, 22 Pac. 334.

These are the only questions presented upon the appeal.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

(161 Cal. 390)

FRASER v. BENTEL et al. (L. A. 2,755.)

(Supreme Court of California. Nov. 28, 1911.)

1. SPECIFIC PERFORMANCE (§ 114*) — COMPLAINT—CONTENTS.

A complaint for specific performance must allege that the contract sought to be enforced is just and reasonable as to the defendants, and that the consideration is adequate.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356–372; Dec. Dig. § 114.*]

2. SPECIFIC PERFORMANCE (§ 114*)—NATURE OF ACTION—PLEADING.

Where the complaint was in the ordinary form of an action to foreclose a mortgage lien alleging defendants' execution of a promissory note and mortgage securing it and nonpayment of the note, the action was one to foreclose a mortgage lien, and not for specific performance of an agreement to sell land, though the mortgage, a copy of which was embodied in the complaint, stated that the amount of the secured note was the balance due on the purchase price of the mortgaged property; the original agreement for the purchase and sale of the land having been executed by the conveyance of the land, and the payment of part of the price, and the giving of a note and mortgage for the balance.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 114.*]

3. COVENANTS (§ 42*)—COVENANTS AGAINST "INCUMBRANCES"—"INCLUDES."

Civ. Code, § 1113, provides that the use of the word "grant" in a conveyance shall imply a covenant that the estate is free from incumbrances, at the time of the execution of the conveyance. Section 1114 provides that the term "incumbrances" includes taxes, assessments, and all liens upon realty. *Held* that, aside from the statutory definition, an "incumbrance," as used in the phrase "covenant against incumbrances," is any right or interest in land which may subsist in third persons to the diminution of the value of the estate to the grantee, but consistently with the passing of the fee, and both within such definition and under the statute a restrictive covenant against the use of firearms on the premises was an "incumbrance"; the word "includes" being ordinarily a word of enlargement and not of restriction (quoting Words & Phrases, vol. 4, p. 3519.)

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 43; Dec. Dig. § 42.*]

4. COVENANTS (§ 127*)—INCUMBRANCES—EFFECT OF BREACH—DAMAGES.

Since a covenant against incumbrances is one of indemnity, only nominal damages may be recovered for an incumbrance which causes the grantee no actual injury, whether the grantee's claim be made as a counterclaim, or otherwise.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 238–242, 258; Dec. Dig. § 127.*]

5. COVENANTS (§ 127*)—ACTIONS FOR BREACH — MEASURE OF DAMAGES — COVENANT AGAINST INCUMBRANCES.

The usual measure of damages, and that prescribed by Civ. Code, § 3305, for breach of a covenant against incumbrances, which is the amount the covenantee actually expends in removing the incumbrance, not exceeding the value of the property at the time of the breach, only applies to incumbrances which may be satisfied by money payments, and does not apply to incumbrances which cannot be so extinguished, such as restrictive covenants on the use of land; the damages recoverable in such case being those naturally and proximately resulting to the covenantee by the existence and continuance of the incumbrance by reducing the market value of the land, in accordance with the general rule for measuring damages from breach of contract.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 238–242, 258; Dec. Dig. § 127.*]

6. COVENANTS (§ 127*)—ACTION FOR BREACH—MEASURE OF DAMAGES—COVENANT AGAINST INCUMBRANCES.

Under Civ. Code, § 3300, providing that the measure of damages for breach of a contractual obligation is the amount which will compensate the injured party for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom, a grantee could not recover, as damages for breach of a covenant against incumbrances by the existence of a restrictive covenant, a loss which he sustained by failure to resell the land because of the existence of such restrictive covenant, where it is not shown that the grantor was informed when he conveyed that the grantee was buying to resell; such damage not being the ordinary consequence of the breach of the covenant.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 238–242, 258; Dec. Dig. § 127.*]

7. DAMAGES (§ 40*)—MEASURE—BREACH OF CONTRACT.

The profits of collateral enterprises in which a party claiming damages for breach of contract has been induced to engage by relying upon the performance of the contract are not recoverable if the other party had no notice of such collateral undertaking.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 75, 76; Dec. Dig. § 40.*]

Department 1. Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by A. R. Fraser against George R. Bentel and another. From a judgment for plaintiff, defendants appeal. Affirmed.

H. C. Millsap and Millsap & Sparks, for appellants. Anderson & Anderson, for respondent.

SLOSS, J. Appeal by defendants from a judgment foreclosing a mortgage of real property. The complaint was in the ordinary form, setting forth the making by defendants of a promissory note, the execution of a mortgage to secure the same, the plaintiff's ownership of the note and mortgage, and the nonpayment of a part of the principal and the interest due. Copies of the note and mortgage were incorporated in the complaint. The mortgage contains a statement that the amount of the promissory note secured by it ($15,200) is the balance due the mortgagee on the purchase price of the mortgaged property. To this complaint the defendants demurred, and they now assign the overruling of their demurrer as error.

[1] Their contention is that the action is in effect one for the specific performance of an agreement for the purchase and sale of real estate, and that it is incumbent on plaintiff in such action to allege and prove that the contract sought to be enforced is just and reasonable as to the defendants, and that the consideration is adequate. Civ. Code, § 3391. That allegations showing the existence of these conditions are necessary to the sufficiency of a complaint for specific performance is not to be questioned. See Herzog v. A., T. & S. F. R. R. Co., 153 Cal. 496, 95 Pac. 898, 17 L. R. A. (N. S.) 428, and cases cited.

[2] But we are unable to agree with appellants that the case at bar is of the character claimed. It is an action to foreclose the lien of a mortgage. The defendants do not contend that the relief sought in a foreclosure suit, as such, amounts to the specific performance of a contract. But it is said that, inasmuch as this mortgage recites that it is given to secure the payment of a note for the balance of the purchase price of land, the purpose of the action is to compel the payment of such balance, and the plaintiff is, in reality, seeking to enforce the performance of the original agreement for the sale of the land. The fallacy in this argument lies in the failure of appellants to recognize that the original agreement for purchase and sale has been fully executed. See Bryan v. Swain, 56 Cal. 616. On the part of the vendor, it has been executed by the conveyance; on the part of the vendee, by the payment of a part of the purchase price and the giving of a note and mortgage for the balance. In foreclosing, the plaintiff is proceeding upon the note and mortgage, not upon the precedent contract out of which the note and mortgage arose. Herein the case differs completely from White v. Sage, 149 Cal. 613, 87 Pac. 193, relied on by appellants. There the vendor in an executory contract of sale, having tendered a deed, sought to compel the vendee to comply with his agreement to pay the purchase price. He further sought to foreclose his vendor's lien upon the defendant's equitable interest under the contract. This, as the court said, was clearly a suit to enforce the specific performance of the contract of purchase and sale. The decision, which is the only one cited to sustain the claim that the present action is one for specific performance of a contract, has no relevancy to the facts here shown. The demurrer was properly overruled.

The defendants answered, setting up, by way of counterclaim, that the note and mortgage were given in consideration of a conveyance of land to defendant George R. Bentel, whereby the grantors (of whom plaintiff was one) covenanted that the land was free and clear of incumbrances done, made, or suffered by them, or either of them. It is alleged that the land was, in fact, subject to an incumbrance created by the deed under which plaintiff acquired title; such incumbrance consisting of a covenant running with the land, forever prohibiting the use of firearms upon the premises conveyed. Defendants averred that the land had been depreciated in value by reason of said incumbrance to the extent of $20,000. A second counterclaim sets forth, further, that the defendant George R. Bentel took the conveyance from plaintiff and his associates, and made the mortgage without knowledge of the incumbrance, that he had contracted to sell parcels of the land, unincumbered, to various purchasers for sums aggregating over $74,000, that such purchasers had refused to carry out their contracts by reason of the aforesaid incumbrance, and that the property cannot now be sold for over $40,000.

The court found against the allegations of damage and found, in addition, that Bentel had knowledge of the restrictive provision concerning the use of firearms at, and long prior to, the execution of the mortgage, and that he expressly waived any and all objections to the said restrictive provision.

[3] The covenant against incumbrances, relied on by defendants in their answer, was that implied, under section 1113 of the Civil Code, from the use of the word "grant" in the conveyance from plaintiff and his associates to the defendants. Section 1114 of the same Code declares that "the term 'incumbrance' includes taxes, assessments, and all liens upon real property." A restrictive covenant against the use of firearms is not covered by this enumeration, and the respondent contends that the existence of the restriction in question, though it be binding upon subsequent purchasers of the land, does not constitute a breach of the covenant against "incumbrances." But the authorities cited to this point (Weber v. McCleverty, 149 Cal. 316, 86 Pac. 706; Wm. Ede Co. v. Heywood, 153 Cal. 615, 96 Pac. 81, 22 L. R. A. [N. S.] 562) lend no support to the claim that section 1114 excludes from the meaning of the word "incumbrances" every kind of limitation of a perfect title other than those described in the section. Nor does the language of the section itself justify this interpretation. The word "includes" is not, ordinarily, a word of limitation, but rather of enlargement. In re Goetz, 71 App. Div. 272, 75 N. Y. Supp. 750; Cooper v. Stinson, 5 Minn. 522 (Gil. 416); Calhoun v. Memphis & P. R. Co., 4 Fed. Cas. 1045. In the absence of any statutory definition, an "incumbrance," within the meaning of a covenant such as that under consideration, has been defined as "any right to or interest in land which may subsist in third persons to the diminution of the value of the estate to the tenant, but consistently with the passing of the fee." Prescott v. Trueman, 4 Mass. 627, 3 Am. Dec. 246; Rawle, Cov. for Title, § 75; 4 Words & Phr. 3519, and cases cited. This definition, sustained by a great weight of authority, is broad enough to include easements and restrictions like the one in the case at bar, limiting the right of the owner of land to freely use it in any lawful way. Kuhnen v. Parker, 56 N. J. Eq. 286, 38 Atl. 641; Mitchell v. Warner, 5 Conn. 497; Huyck v. Andrews, 113 N. Y. 81, 20 N. E. 581, 3 L. R. A. 789, 10 Am. St. Rep. 432. This interpretation has been applied to building restrictions (Roberts v. Levy, 3 Abb. Prac. [N. S.] 311 [N. Y.]; Ayling v. Kramer, 133 Mass. 12) and to covenants prohibiting the sale of spirits on the premises (Hatcher v. Andrews, 5 Bush [Ky.] 561; Rawle, Cov. for Title, § 77). We see no reason for holding that the term incumbrances, as it is used in our Civil Code, is to be taken in any narrower sense.

[4] Inasmuch, however, as the covenant against incumbrances is merely one of indemnity (Rawle, Cov. for Title, § 188), no more than nominal damages can be recovered on account of an incumbrance which has inflicted no actual injury upon the grantee. (Id.). Accordingly, where, as here, the breach is set up by the defendant as a counterclaim, the defense will be of no avail without proof that the grantee has suffered damage from the alleged breach. Thurgood v. Spring, 139 Cal. 596, 73 Pac. 456. The court below found that the defendants have not been damaged in any sum. The judgment against the counterclaim properly followed, unless, as is asserted by the appellants, this finding is not supported by the evidence.

We think the finding was fully justified. The answer seeks to set up two elements of damage: First, that the land as conveyed was worth $20,000 less than it would have been without the incumbrance; second, that the defendant George R. Bentel made contracts for the resale of parts of the land, and that he lost the benefits of such contracts because the existence of the incumbrance made it impossible for him to convey to his proposed grantees the unincumbered title upon which they insisted.

There was no proof to sustain the first element of damage claimed. The defendants showed the value of the lots remaining unsold, but failed to establish that they would have had any greater value if there had been no restriction against the use of firearms. On the contrary, the admissions of George R. Bentel himself were such as to warrant the conclusion that the restriction had no effect whatever on the value of the land.

[5] The other element, i. e., the loss of resales, was too remote to be allowed as an item of damages. The measure of damages for the breach of a covenant against incumbrances is, ordinarily, the amount which the plaintiff has actually expended in removing the incumbrance, not exceeding the value of the property at the time of the breach. Rawle, Cov. for Title, § 188 et seq.; 2 Suth. Dam. § 622. This rule, which has been embodied in section 3305 of our Civil Code, refers to such incumbrances (e. g., mortgages and other liens) as may be satisfied by the payment of money. It is not applicable to incumbrances like easements or restrictions on the use of land, which cannot be extinguished, at the will of the owner, by the payment of any sum. In such cases the damages are based upon "the natural and proximate consequences to the plaintiff of the existence and continuance of the incumbrance." Rawle, Cov. for Title, § 191. "Just compensation in such cases has generally" (as is said in 2 Suth. Dam. § 627) "been estimated by the amount which the existence of the easement reduces the market value of the land." And so, in a case similar to the present one, where the land was subject to a building restriction, it was ruled that the damages were measured by the difference in the value of the property unrestricted and restricted. Foster v. Foster, 62 N. H. 532.

[6] This is in accord with the general rule providing for the measure of damages for the breach of an obligation arising from contract, i. e., "the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom." Civ. Code, § 3300. But the loss resulting to the grantee from his inability to complete a particular sale does not meet the requirements of this test. There is, in the record before us, neither allegation nor proof that the plaintiff and his associates, in conveying to the defendants, were informed that the latter were buying for the purpose of resale. In the absence of such showing, at any rate, it cannot be said that the failure of the purchaser to sell the lots at a price which he might have obtained was the proximate result of the breach of the covenant, or a detriment, likely, in the ordinary course of things, to result therefrom.

[7] "In awarding damages for the nonperformance of an existing contract, the gains or profits of collateral enterprises in which the party claiming them has been induced to engage by relying upon the performance of such a contract, and of which no notice has been given the other party, cannot be included." 1 Suth. Dam. § 47. The claim of the defendants for loss of resales falls within the principle thus stated, which has often been recognized by this court. Friend, etc., Co. v. Miller, 67 Cal. 464, 8 Pac. 40; Mitchell v. Clarke, 71 Cal. 163, 11 Pac. 882, 60 Am. Rep. 529; Elder v. Kutner, 97 Cal. 490, 32 Pac. 563; Martin v. Deetz, 102 Cal. 55, 36 Pac. 368, 41 Am. St. Rep. 151; Shoemaker v. Acker, 116 Cal. 239, 48 Pac. 62. An authority more directly in point is Harrington v. Murphy, 109 Mass. 299, where, in an action for breach of a covenant against incumbrances, it was held that the plaintiff could not recover expenses incurred in making a sale which the purchaser refused to complete upon discovering the incumbrance. Such expense, said the court, was "too remote and indirect to be an element of damages."

Concluding, as we do, that the finding on the issue of damage is supported by the evidence, and is sufficient to sustain the judgment against the counterclaim, we see no other point requiring notice.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

(161 Cal. 380)

DUNPHY v. DUNPHY. (S. F. 5,685.)

(Supreme Court of California. Nov. 28, 1911. Rehearing Denied Dec. 27, 1911.)

1. MARRIAGE (§ 58*)—ANNULMENT—MENTAL INCOMPETENCY.

In order that a marriage may be set aside because of mental incapacity of one of the parties, the mental derangement must be shown to have been one having a direct bearing on the particular act; the test being whether the party was capable of understanding the obligations assumed by the marriage.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 117; Dec. Dig. § 58.*]

2. APPEAL AND ERROR (§ 1010*)—FINDINGS—REVIEW.

In a suit to annul a marriage because of plaintiff's alleged unsoundness of mind at the time it was contracted, a finding that he had not sufficient mental capacity to legally contract a marriage would be sustained on appeal, unless there was a total lack of substantial evidence to support it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3982; Dec. Dig. § 1010.*]

3. APPEAL AND ERROR (§ 994*)—REVIEW—CREDIBILITY OF WITNESSES.

Where, in a suit to annul a marriage on the ground of plaintiff's mental incapacity, nonexpert witnesses testified to their opinion concerning his sanity and assigned reasons therefor, which at least had some bearing on the question of mental capacity, the weight to be given to such opinions, which were admissible under Code Civ. Proc. § 1870, subd. 10, was for the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901–3906; Dec. Dig. § 994.*]

4. MARRIAGE (§ 60*)—CAPACITY OF PARTIES—MENTAL INCAPACITY—EVIDENCE.

In a suit to annul a marriage, evidence *held* to warrant a finding that by reason of plaintiff's intoxication at the time and his previous habits of inebriety he was mentally incompetent to contract the marriage.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 131; Dec. Dig. § 60.*]

5. INSANE PERSONS (§ 94*)—ACTION—GUARDIAN AD LITEM.

Where suit was brought by an incompetent to set aside a marriage for incapacity, a relative was authorized by Code Civ. Proc. § 373, to apply for and be appointed guardian ad litem for plaintiff under section 372, authorizing such appointment when the court or judge thereof deems the same expedient.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 164, 165; Dec. Dig. § 94.*]

6. APPEAL AND ERROR (§ 959*)—REVIEW—DISCRETION.

Whether complainant shall be permitted to file an amended complaint is within the discretion of the trial court and will not be reviewed unless abused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825–3833; Dec. Dig. § 959.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Action by James C. Dunphy against Lydia M. Dunphy to annul a marriage. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 118 Pac. 445.

Timothy J. Lyons and Bishop, Hoefler, Cook & Harwood (Raymond Benjamin, of counsel), for appellant. J. D. Meredith and Perry Evans, for respondent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

SLOSS, J. On the 22d day of June, 1909, a marriage ceremony was performed between James C. Dunphy and Lydia M. Valencia. Six days later, the plaintiff, James C. Dunphy, commenced this action to annul said marriage by filing a complaint in which he alleged that, at the time of the ceremony, he was so intoxicated from alcoholic drinks that he had no comprehension of what he was doing, or of the nature or effect of said ceremony, and that, by reason of said intoxication, he was then mentally incompetent to contract marriage. He alleged, further, that at all times after the ceremony and until the commencement of the action he had been intoxicated and had not had normal control of his mental faculties; that as soon as he realized the purport and effect of said ceremony, on the 26th day of June, 1909, he had left the defendant, and had not thereafter cohabited with her. The defendant demurred, denying the allegations of plaintiff's intoxication and incompetency, and averring that he had voluntarily cohabited with her. She also cross-complained, alleging the marriage, desertion of her by plaintiff, his possession and her want of means, and asking a judgment for maintenance. The plaintiff answered the cross-complaint. Subsequently, on November 15, 1909, an amended complaint, seeking annulment of the marriage upon an allegation that plaintiff, at the time of the marriage and ever since, had been of unsound mind, was filed in the name of plaintiff, by Jennie C. Dunphy, his guardian ad litem. The appointment of the guardian was alleged to have been made on November 10, 1909. To this amended complaint, after filing a demurrer, which was overruled, the defendant answered, denying the appointment of the guardian and the unsoundness of mind of the plaintiff, and averring voluntary cohabitation. The case was tried, and the court found as facts the due appointment of the guardian, that the parties were married as alleged, that plaintiff at the time of said marriage was of unsound mind, that plaintiff had never, since the marriage, freely cohabited with the defendant as her husband, and that he had continued to be of unsound mind from the time of the marriage until after the 21st day of July, 1909, the day upon which he finally left the defendant. Judgment annulling the marriage followed. The defendant appeals from the judgment, bringing up the evidence by means of a bill of exceptions.

The principal contention of the appellant is that the evidence is insufficient to sustain the finding that plaintiff was of unsound mind at the time of the marriage and during the time of his cohabitation with the defendant.

[1] This court has never had occasion to define the degree of unsoundness of mind which will authorize a judgment annulling a marriage. But we take it that the question of what is an unsound mind must, in cases of this character, be determined by the same tests which are applied in any case where it is sought to set aside the contract or other act of a person alleged to be insane. It is universally held that a variation from a normal mental condition is not in itself enough to avoid every act. The mental defect or derangement must be one having a direct bearing upon the particular act which is brought in question. Thus, in will contests, the validity of the testamentary effort is not affected by delusions on the part of the testator, unless the delusions are such as to have been "operative in the testamentary act." In re Redfield, 116 Cal. 637, 48 Pac. 794. They must have a relation to some person or object affected by the will. Id. In Estate of McKenna, 143 Cal. 580, 77 Pac. 461, this court upheld an instruction to the effect that it was only such insane delusions as actually influenced the testatrix in the making of the will, and which caused its production to the prejudice and injury of the contestants, which would invalidate the will. So, in criminal cases, a partial insanity, or an insanity with respect to certain subjects, is not incompatible with the possession of mental capacity sufficient to make the party liable to punishment for his acts. People v. Willard, 150 Cal. 543, 89 Pac. 124. The same reasoning is to be applied when the question is the mental capacity of a party to contract marriage. "The true test in actions to annul a marriage on account of insanity at the time of the marriage," says Nelson (Div. & Sep. § 658), "is whether the party was capable of understanding the obligations assumed by marriage." The capacity requisite to a valid marriage is defined, in Durham v. Durham, 10 Prob. Div. 80, as "a capacity to understand the nature of the contract, and the duties and responsibilities which it creates." See, also, Kern v. Kern, 51 N. J. Eq. 574, 26 Atl. 837; Lewis v. Lewis, 44 Minn. 124, 46 N. W. 323, 9 L. R. A. 505, 20 Am. St. Rep. 559; St. George v. Biddeford, 76 Me. 593. The learned judge below undertook, as appears from his opinion contained in the transcript, to apply this test to the evidence before him, and, so applying it, reached the conclusion that Dunphy, at the time of the marriage and while he was cohabiting with the defendant, did not possess the mental capacity to understand the nature of the duties and obligations imposed by the marriage contract. Was there enough evidence to justify this conclusion?

[2] The testimony, the greater part of which deals with this issue, is voluminous, covering almost 650 pages of the printed transcript. It would prolong this opinion beyond all reasonable bounds to give more than the briefest summary of the facts testified to by the large number of witnesses called. In referring to the testimony, we

must constantly bear in mind that the determination of issues of fact is primarily for the trial court, and that the findings of that court are to be overthrown on appeal only when they totally lack the support of substantial evidence. We are not empowered to determine, as an original question, whether the plaintiff was or was not of unsound mind. Our duty begins and ends with the inquiry whether the trial court had before it evidence upon which an unprejudiced mind might reasonably have reached the conclusion which was reached. Conflicts of testimony are deemed to have been finally resolved in the court below. Accordingly, the testimony in support of the finding attacked, if sufficient to support that finding, is all that need be mentioned in this opinion, and this testimony must, so far as it is subject to differing inferences, be read in the light most favorable to the party prevailing below.

The plaintiff was the only son of wealthy parents, and from his early youth had followed no regular occupation, with the exception of giving some casual and intermittent attention to the affairs of his father's estate, in which he was interested. For many years, he had been addicted to the habit of drinking intoxicating liquors to excess, taking, as one witness testified, from 20 to 40 drinks of whisky in a day. On one or more occasions his excesses in this direction had brought on attacks of delirium tremens. He was frequently seen in public places in a condition of helpless intoxication. He was unable, in conversation, to concentrate his mind upon a subject under discussion, showed little intelligent interest in his own business affairs, was vacillating and uncertain, as well as suspicious, and showed signs of failing memory.

In support of the allegations of the complaint, a number of witnesses, having first qualified as intimate acquaintances of Dunphy, expressed the opinion that he was of unsound mind. In accordance with the provision of the Code of Civil Procedure (section 1870, subd. 10), each of these witnesses gave "the reason for the opinion." The appellant undertakes to analyze the various reasons so given, and argues that they are not adequate to justify the conclusion drawn from them. Reliance is placed upon Estate of Dolbeer, 149 Cal. 227, 86 Pac. 695, where it was said that the opinion of an intimate acquaintance respecting the mental sanity of a person "can have no weight other than that which the reasons" (upon which it is based) "bring to its support." We do not understand this to mean that the appellate court is to put itself in the position of the trial court, and, from an examination of the reasons assigned, determine as an original question whether the opinion of the witness is to be given any weight or is to be rejected. No doubt the reasons assigned may be so irrelevant or inconsequential as to deprive the opinion, professedly based upon them, of any probative value. This, as the court viewed it, was the situation in the Dolbeer Case.

[3] But where the reasons assigned have some bearing on the question of mental capacity, it is for the court below to determine the weight to be given to the opinion of the witness. The statute expressly permits such opinion to be given in evidence, and it must contemplate that some weight may be attributed to the opinion, over and above that which would follow, as matter of necessary inference, from the reasons assigned. If this were not so, there would be no justification for permitting an intimate acquaintance to state his opinion at all. He should then be restricted to a statement of his observations of the person whose sanity was questioned, and a conclusion on the ultimate question of soundness or unsoundness of mind would have to be drawn by the trial court or jury from the facts so stated. But it may be that an intimate acquaintance has a well-founded opinion on this subject, without being able to recall, or to formulate in words, all of the impressions which by their cumulative force have led his mind to the opinion. (Indeed, some of the witnesses here declared that this was, virtually, their situation.) The opinion itself is not for that reason worthless; nor is its weight to be judged solely by the conclusion which another mind might draw from a recital of the reasons which the witness is able to give. If, as we have said, those reasons furnished any logical support for the opinion declared, the opinion, in and of itself, is to be given such weight as the trial court may think it deserves.

[4] With reference to the testimony in this case, it would be impracticable to follow counsel into the field they have entered, and to discuss the multitude of incidents, many of them no doubt trivial in themselves, brought forward by those testifying to their opinion that Dunphy was of unsound mind. We must content ourselves with the statement that some, at least, of these witnesses fortified their opinions by a recital of reasons which had some legitimate bearing upon the question at issue. In this connection, we may cite, in addition to the facts stated by intimate acquaintances regarding Dunphy's habits of life, the account given by himself to witness Curtis of a former marriage contracted by him. On January 3, 1903, he notified Curtis that he had been married on the preceding night, and requested that his family be informed. On the following day he told Curtis that he had not wanted to marry the lady, that the marriage had taken place, in effect, at a moment's notice, that he did not know what he was doing at the time, and that he thought a thousand dollars would "call it off." We mention this, out of many circumstances shown in the record, because it has a more direct bearing on the question

of the plaintiff's capacity to understand the nature of the marriage relation and the obligations attendant upon it.

Besides this, the plaintiff introduced the testimony of three medical experts. In response to hypothetical questions, embodying the showing made by plaintiff's witnesses concerning his intemperate life, each of these witnesses testified that a person who had led such life would be of unsound mind. One of them said that drinking to the extent stated "would have the effect of inducing a mental disease by producing an organic change in the brain. * * * He would necessarily be of unsound mind. * * * His brain has so degenerated by the use of whisky that his thoughts are as liable to be abnormal as normal," even when he is "not under the influence of liquor." The others testified that the person supposed was "of unsound mind."

The circumstances attending the marriage of the parties were, to say the least, peculiar. Dunphy and the defendant had been acquainted for a number of years. The exact nature of their relations does not appear. It was shown, however, that, while both resided in the same city (San Francisco), Dunphy had not, prior to the day of the marriage, visited the defendant at her home. There was no engagement, no exchange or giving of a ring or other presents. According to the testimony, the parties agreed, on the morning of the 22d of June, 1909, to be married, and on the same day, without any further preparation, without having made a change of clothing, or any provision for a wedding journey or a place of residence following the proposed marriage, they went in an automobile, accompanied by several friends of the defendant, to Redwood City, where a license was obtained, and a marriage ceremony was performed by a justice of the peace. On the road to Redwood City, and a few hours before the ceremony, the party had stopped at a roadhouse. A witness who saw them there testified that Dunphy was "very badly under the influence of liquor, or extremely intoxicated"; that he appeared disheveled, and his dress seemed to be more or less disarranged. While the evidence makes it probable that the demeanor of plaintiff at the time the ceremony was performed did not indicate to those who were present that he was intoxicated, the trial court may well have concluded, from all the facts before it, that he was still under the influence of liquor to such an extent as to affect his capacity for rational thought and action. In this connection it may be noted that there was testimony that Dunphy had been seen in a state of pronounced intoxication during every day from the 13th to the 17th of June, 1909, while he was in Sacramento, and that he was intoxicated after his return to San Francisco on the 20th of June, and again on the 21st, the day preceding that of the ceremony. Following the ceremony, the parties returned to San Francisco, and took up their abode in the defendant's flat. On the next day, the morning newspapers of San Francisco, containing articles relative to the marriage, were read by Dunphy. Among these publications was one which depicted the plaintiff as a dissipated spendthrift, and described the defendant's character and antecedents at some length in terms that would necessarily have been extremely offensive to any one entertaining any feeling of respect for her. The ceremony itself was represented as preceded and followed by drunken revels. Without going into greater detail regarding the contents of this article, we may say that it is almost inconceivable that they would not have aroused the deepest resentment and indignation in Dunphy, if he had possessed a rational understanding of the nature and the obligations of marriage. Yet, after reading the papers, he expressed himself as "not at all displeased with them," and said that "they were all very easy."

The testimony concerning Dunphy's condition during the period following his advent at the defendant's flat was such as to justify the inference that his mental capacity, so far as it depended upon his freedom from the influence of alcohol, did not improve during the time of his residence with the defendant. It was testified to that on the 26th day of June he was under the influence of liquor, and "was tapering off." On the 27th he was intoxicated, and on the 28th, the day on which the original complaint was filed, he was in a state of helpless intoxication. On the same day, he returned to defendant's flat, remained there two days, during which he did not become sober, and then left with his nurse for Paraiso Springs. After having been at the springs a few days, he again became intoxicated, and remained so until the 7th of July, when a friend of the defendant appeared and brought him back. He arrived at the defendant's flat on July 9th and remained there until the 21st or 22d of July, when he finally left the defendant. While there is a conflict of testimony on this point, the trial court had before it enough to justify the conclusion that he did not regain a condition of complete sobriety during this period.

Under this showing, we think it cannot be said, as matter of law, that the evidence was not sufficient to sustain the trial court in its finding that Dunphy was incompetent, mentally, to contract marriage, and that his incompetency continued while he was cohabiting with the defendant. His excessive indulgence in alcoholic drink, persisted in for so many years; the testimony of qualified experts regarding the effect upon the mind of such excess; the evidence of irrational and peculiar conduct; the unusual circumstances attending the marriage; the fact that the ceremony took place in the midst of a prolonged debauch or "spree," and that he continued to be more or less affected by liquor while he remained with the defendant; the actions of the plaintiff indicating a want of proper understanding of the relation and obligations of matrimony; the opinions of many reputable persons, who, after an intimate acquaintance with Dunphy, thought he was of unsound mind—all of these considerations, taken together, made a case which vested in the trial court the power of drawing an inference, conclusive upon the appellate court, of the soundness or unsoundness of the plaintiff's mind. That a finding contrary to the one made would find adequate support in the record is beyond question. But, even though we might think, on a mere reading of the transcript, that the preponderance of the evidence was with the appellant, we would not be authorized to overthrow the finding. As we said at the outset of this discussion, the determination of the trial judge on issues of fact is binding, unless it be without substantial evidence to support it. It does not lack such support here.

[5] The other points urged for reversal require but brief consideration. There was no error in appointing a guardian ad litem for plaintiff. Such appointment on behalf of an insane or incompetent party may be made "when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient. * * *" Code Civ. Proc. § 372. The order was made on the application of a relative, as provided by section 373 of the Code of Civil Procedure, and there was evidence tending to show that plaintiff was incompetent.

[6] It is also claimed that the court erred in permitting an amended complaint to be filed. The granting of leave to file amended pleadings is a matter peculiarly within the discretion of the trial court. There is nothing to indicate that the discretion was abused in this instance.

The appellant suggests that the court erred in failing to find upon certain issues. But we think these issues, so far as they were material, were met by the findings which were made.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

161 Cal. 405

CHANDLER et al. v. HART et al.

(S. F. 5,815.)

(Supreme Court of California. Nov. 29, 1911. Rehearing Denied Dec. 29, 1911.)

1. Mines and Minerals (§ 58*)—Leases—Execution—Requisites.

A lease to a corporation to explore and develop land for oil, gas, and minerals, executed in consideration of the delivery by the corporation to the lessor of stock of the corporation, on condition that the same shall remain nonassessable, or otherwise the lease shall terminate, and subject to the right of the lessee to reside on and farm the land, contains no covenants on the part of the lessee to which its signature is necessary as evidence of its consent thereto, and the lease executed by the lessor, and delivered by him to the corporation which accepts it, is sufficiently executed.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 168, 169; Dec. Dig. § 58.*]

2. Landlord and Tenant (§ 31*)—Leases—Execution—Waiver.

A lessor who delivered the lease to the lessee, without requiring him to sign the same, waived the formality of the signature of the lessee, and the lease, though containing covenants to be performed by the lessee, became at once operative against the lessor, his heirs and assigns.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 88–91; Dec. Dig. § 31.*]

3. Mines and Minerals (§ 73*)—Oil and Gas Lease—Rights Acquired—"Demise."

An instrument purporting to "lease and demise" land described for a specified term, and giving the lessee the right to explore and develop the land for oil, gas, and other minerals, and to erect thereon necessary machinery, tanks, and pipes, conveys rights in land to the lessee for the purpose of extracting oil, gas, and minerals from the land and selling the same when acquired; a "demise" being more than a license to enter and occupy for a specified purpose, and being a conveyance in fee, for life, or for years, and creating an implied warranty of title and a covenant for quiet enjoyment; and the right to develop, extract, and market oil, gas, and mineral from the land continued for the specified time, unless forfeited by a breach of the conditions of the lease.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 201, 210; Dec. Dig. § 73.*

For other definitions, see Words and Phrases, vol. 2, pp. 1978, 1979.]

4. Landlord and Tenant (§ 20*)—"Lease."

A "lease" is a conveyance by the owner of an estate to another of a portion of his interest therein for a term less than his own, and it passes a present interest in the land for the period specified.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 50–54; Dec. Dig. § 20.*

For other definitions, see Words and Phrases, vol. 5, pp. 4043–4049; vol. 8, pp. 7702, 7703.]

5. Mines and Minerals (§ 78*)—Leases—Conditions.

A lease of land for a specified term to develop the land for oil, gas, and mineral and sell the same when acquired, on specified conditions which have not been broken, is not forfeited by a mere failure of the lessee to develop and extract oil, gas, and mineral, unless the right of forfeiture is reserved on that ground, either expressly or by necessary implication.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 205–207; Dec. Dig. § 78.*]

6. Mines and Minerals (§ 74*)—Lease—Interests Acquired.

A lease of land for a specified term to explore and develop the land, to remove therefrom oil, gas, and mineral, reserving to the lessor

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

free access over the land, not actually used for the business of the lessee, and the right to farm the land, and containing no covenant forbidding the lessee to assign the lease, or to sublet the premises or part thereof, gives to the lessee a present, subsisting estate for years, which may be transferred, as authorized by Civ. Code, § 1044, and not a mere possibility, not coupled with an interest, which, by section 1045, is not transferable, so that the lessee may sublet a part of the land to a third person to develop the same for oil, gas, and mineral.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 202; Dec. Dig. § 74.*]

7. CORPORATIONS (§ 432*)—CONVEYANCES—VALIDITY—PRESUMPTIONS.

Where the corporate seal is affixed to a contract purporting to be regularly executed for a corporation by one of its officers, the seal is prima facie evidence of the authority of the officer to execute the contract for the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1729; Dec. Dig. § 432.*]

8. CORPORATIONS (§ 425*)—STOCKHOLDERS—QUALIFICATIONS—OBJECTIONS.

The objection that the consideration for corporate stock, represented by certificates of stock regularly issued to persons elected directors, was not lawfully sufficient cannot be raised to invalidate the action of the directors, when third persons have dealt in good faith with them.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1697–1705; Dec. Dig. § 425.*]

9. CORPORATIONS (§ 289*)—OFFICERS—DE FACTO DIRECTORS.

The stockholders of a corporation, at a stockholders' meeting, increased the number of directors from three to seven, and at the same meeting elected the additional directors. A certified copy of the amendment to the articles of incorporation, declaring the increase, was properly filed in the offices of the county clerk and Secretary of State, and the additional directors, from the date of their election, acted as directors, without objection from any stockholder, and the stockholders at a subsequent meeting ratified the action. *Held* that, under Civ. Code, § 290, making the number of directors of a corporation dependent on the will of the majority of the stockholders, the additional directors were at least de facto officers, and their acts were valid, so far as they were acted on in good faith by third persons.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1240–1245; Dec. Dig. § 289.*]

10. CORPORATIONS (§ 424*)—DIRECTORS—TRANSACTIONS—VALIDITY.

Where the de facto directors of a corporation directed the execution of a lease of corporate property, and empowered the secretary to execute the lease, the lessee, acting in good faith, acquired a valid lease, whether the meeting of the directors was regular or not, and though the by-laws authorized the president to sign corporate contracts; and one having no status as a stockholder, but claiming under a lease from a stockholder of the corporation, could not attack the transaction.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 424.*]

11. MINES AND MINERALS (§ 74*)—LEASES—RIGHTS OF LESSEES.

Where a lessee in an oil and gas lease, with a right to develop 160 acres of land for oil, gas, and mineral, and sell the same when acquired, executed a lease to a third person to develop 120 acres for oil, gas, and mineral, the third person, if acquiring the right of possession, could sue for the possession, and to restrain others from interfering with his possession and taking oil from the land.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 74.*]

12. MINES AND MINERALS (§ 74*)—LEASES—RIGHTS OF LESSEES.

An oil and gas lease for 50 years gave the lessee the right to develop the land described for oil, gas, and mineral, and to sell the same when acquired. The lessee leased to a third person, for 20 years, the exclusive right to drill wells on a part of the land and take oil therefrom, but required the drilling to begin within a specified time, and to continue with diligence to a specified depth, unless oil was sooner found. The lessee agreed to protect the third person in his possession during the term, and to give him the further right, after the 20 years, to remain in possession of such part of the premises as should be required to enable him to operate wells thereon that were then producing oil. The lessee reserved the right to enter on the land to inspect the work done by the third person, and the right of the original lessor to reside on the premises, and to farm the land not actually needed for the oil business. *Held*, that the lease gave to the third person a present right of possession for the specified purposes, and vested in him a corporeal interest in the land for years, and he could enjoin another, claiming under a lease from the original lessor, from interfering with him.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 74.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; Walter Bordwell, Judge.

Action by W. F. Chandler and another against William H. Hart and others. From a judgment for plaintiffs, and from an order denying a new trial, defendants appeal. Affirmed.

Wm. H. H. Hart and Aylett R. Cotton (M. F. McCormick, of counsel), for appellants. Sutherland & Barbour, M. B. Harris, and E. M. Harris, for respondents.

SHAW, J. The defendants appeal from the judgment and from an order denying a new trial.

The complaint alleges that the plaintiffs at all times mentioned were the owners of a tract of land containing 120 acres; that they were in possession thereof in March, 1909; and that the defendants on that day ousted them, took possession of the land, and have ever since held the same. They pray for the recovery of possession and damages, and for an injunction to prevent defendants from boring wells or extracting oil from the land. Judgment was given, declaring that plaintiffs were entitled to the possession of the land, with the right to occupy it for the purpose of mining and developing it and carrying out a certain lease, executed on March 6, 1909, by the Fearon Oil Company to the plaintiffs. This lease purported to let, lease, and demise to the plaintiffs, for the period of 20 years, the exclusive right, privilege, and easement of sinking wells in the land, and taking, appropriating, and selling oil and gas therefrom, yielding to the lessor a royalty thereon.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

At the time this lease was executed, the only right or title which the Fearon Oil Company had to the land was under a certain instrument, executed by Joseph Fearon and wife to said Fearon Oil Company on September 6, 1907, leasing a tract of 160 acres, including the 120 acres afterwards leased, as aforesaid, by that company to the plaintiffs. Joseph Fearon at that time owned the land in fee. Defendants claim under a lease, made by Fearon and wife to the defendant the California-Coalinga Oil Company on March 6, 1909. The respective rights of the parties to this action in the land depend upon the validity and effect of the lease by Joseph Fearon to said Fearon Oil Company. Omitting the formal description of the parties and property, we give this lease in full. Fearon and his wife were named as parties of the first part and said Fearon Oil Company as the party of the second part:

"That the said parties of the first part for and in consideration of the issuance and delivery to them of five hundred and twenty-five thousand (525,000) shares of the capital stock of the Fearon Oil Company, full paid up, receipt whereof is hereby acknowledged, does by these presents lease and demise unto the said party of the second part and to its successors and assigns (subject to the provisions and limitations hereinafter mentioned) (describing the 160-acre tract) for a term of fifty years from the 24th day of August, A. D. 1907.

"It is mutually agreed and understood that the said Fearon Oil Company shall have the right to explore and develop said lands for the purpose of removing therefrom oil, gas and such other minerals as the same may contain; to erect thereon the necessary works and machinery, tanks, pipes, and all other appliances required for carrying out the purposes mentioned in the articles of incorporation of the Fearon Oil Company; and to establish and maintain any business or enterprise allowed within the scope of the business of said corporation.

"This lease is made upon the express provision and agreement that the shares of stock delivered to the said parties of the first part in payment therefor shall never be assessed while the same or any of said shares of stock shall remain the property of the said parties of the first part, and in the event said party of the second part shall levy an assessment upon the same or the attempt to collect from the said first parties, or either of them, any assessment upon said shares of stock, then, and in that event, this lease shall immediately terminate. and the said parties of the first part shall have, and they are hereby given, the right to eject therefrom all agents, officers or employés of the said party of the second part.

"It is further understood and agreed that there is now standing upon the land described a residence owned and occupied by the said parties of the first part, and the said parties of the first part are hereby given the right to continue and maintain said residence where the same is now located, together with all necessary buildings in connection therewith and to have free and uninterrupted access over and upon said lands not actually used or needed for the business of said second party, for the purpose of farming the same; and the right to farm said lands is hereby expressly reserved to said parties of the first part.

"This agreement shall bind the successors, assigns, heirs, executors and administrators of the said parties of the first part."

The said articles of incorporation of the Fearon Oil Company show that the capital stock of that corporation was $1,000,000, divided into 1,000,000 shares, of the par value of $1 each. The articles state the purposes of the corporation to be "to explore, acquire, exchange, develop and deal in oil and gas lands; to acquire, build, maintain, operate and dispose of pipe lines for conveying and conducting oil, gas, water and fluids of every description and to acquire, hold, enjoy and dispose of rights of way for the purposes thereof and for other purposes; to purchase, sell, lease, deal in, exchange, convey and accept conveyances of real property, and to mortgage and hypothecate the same; to improve, develop and cultivate lands whether mineral or agricultural, or adapted for any other use whatsoever; to refine, manufacture, buy, sell and deal in minerals and mineral products and personal property of every description and generally to acquire, hold, manage, improve and dispose of such real and personal property and to do such other things necessary and proper for the full and complete execution of the purposes set forth above, and for the exercise of the powers and transactions of the business of the corporation for the creation of which we have hereby associated ourselves."

[1, 2] 1. The lease above set forth was duly executed by Fearon and his wife, but it was not signed by the Fearon Oil Company, or by any one in its behalf. Defendants contend that it could not have any effect, unless it was duly executed by the corporation as the party of the second part. There is no merit in this objection. The lease contains no covenants on the part of the lessee to which its signature was necessary as evidence of its consent thereto. The conditions contained therein became binding upon the lessee by virtue of its execution by the lessors and its acceptance by the lessee. Its

execution became effectual and complete upon delivery to and acceptance by the Fearon Oil Company. Thornton on Oil Leases, § 85; Castro v. Gaffey, 96 Cal. 424, 31 Pac. 363; Crescent, etc., Co. v. Simpson, 77 Cal. 290, 19 Pac. 426; 1 Underhill on L. and T. § 232. The evidence shows, without conflict, that the instrument was delivered to the Fearon Oil Company, and that it was accepted by that company with intent to take under it. This was sufficient to bind the company to the performance of the conditions expressed therein. Even if it is true that Fearon might have insisted upon a formal execution by the company, as suggested in Castro v. Gaffey, supra, where there were covenants to be performed by the lessee, his conduct in delivering it without such formality was a waiver thereof, and it became at once operative against him, his heirs and assigns.

2. It is next claimed by defendants that the lease was inoperative, because the Fearon Oil Company did not explore or develop the land, or any part of it, or discover oil thereon, or take oil therefrom, prior to the lease to the plaintiffs of the 120 acres, on March 6, 1909, or at all, nor do anything on the land to carry out the purposes expressed in the instrument. It is argued that, under the terms of the instrument, no estate or interest in the land would vest in the lessee, unless it did something upon the land in performance of the purposes for which it took the lease, and that, having no interest itself, it could not transfer any to the plaintiffs.

[3] The instrument purports "to lease and demise" the land to the Fearon Oil Company for the term of 50 years from its date, September 6, 1907. It further declares that that company shall have "the right to explore and develop said lands for the purpose of removing therefrom oil, gas" and other minerals, and to erect thereon the works, machinery, tanks, and pipes necessary to carry out the purposes stated in its articles of incorporation. These articles give the company power to acquire, develop, improve, buy, sell, deal in, and dispose of real and personal property and mineral products. These powers and purposes are very broad and comprehensive. They clearly include the business of extracting oil from the land described in the lease, and selling such oil when acquired in that manner. When the entire lease is considered in connection with the articles and the circumstances disclosed by the writings, there can be no doubt that the lease was intended to convey these rights in the land.

[4] It is for these purposes that the instrument demises and leases the land to the company for 50 years. A demise or lease is more than a license to enter and occupy for a specified purpose. A demise is defined as "a conveyance, either in fee, for life, or for years," and as "a lease or a conveyance for a term of years." 1 Bouv. Law Dic. The use of the word "demise" creates an implied warranty of title and a covenant for quiet enjoyment. Id.; Anderson's Law Dic.; 1 Taylor on Landl. & Ten. § 252. A lease is a "conveyance by way of demise" (1 Bouv. Law Dic.), or "a conveyance by the owner of an estate to another of a portion of his interest therein for a term less than his own" (Anderson's Law Dic.). It passes a present interest in the land for the period specified. 1 Taylor Landl. & Ten. § 14a. This instrument, therefore, granted to and vested in the Fearon Oil Company a present interest and estate in the land for the term of 50 years, for the purposes specified. The right to develop, extract, and market oil therefrom must likewise endure for that period, unless forfeited by a breach of the conditions of the lease.

[5] A lease may, of course, limit the uses which the tenant may make of the land, and the purposes for which he shall have the right of possession. This lease does limit the rights of the tenant by particularly describing them. The implication is that it shall not be used by it for other purposes. The result is that the lessee was granted an estate in the land for 50 years for the purposes of discovering oil therein, and of extracting and selling it, with the other incidental rights mentioned. The only conditions of the lease are those referring to the effect of an assessment upon the shares of stock given to Fearon as a consideration for the lease, and reserving to Fearon the right to reside on the land and farm it. There is no claim that either of these conditions have been broken. The lease does not require the lessee to begin operations under the lease within any specified time within the term. Forfeitures are not favored in law or equity. We know of no rule declaring that a demise of land for such purposes, upon a full consideration received in advance, is forfeited by a failure of the lessee to develop and extract the oil, unless such right of forfeiture is reserved in the demise, either expressly or by necessary implication, from the expressed terms.

There are so-called "oil leases" of which this may be true. In them, the so-called lessee is granted the right to enter upon the land within a limited time, for the purpose of making a discovery of oil. If, upon due search, none is found, the right of entry and possession ceases. If oil is found, the lessee is then given a further right, which then usually becomes a vested right in the oil in place, it being while so situated a part of the land, and this right carries with it the vested right to occupy the land for the purpose of extracting it, usually for a named period, or until the oil is exhausted, and conditioned upon the diligent prosecution of the work. A contract of this character was considered in Brookshire Oil Co. v. Casmalia, etc., Co., 156 Cal. 211, 103 Pac. 927. Defendants' counsel cite this and other similar cases, wherein it is held that, under such contracts, no title to the oil or interest in the lands passes until the oil is found, or, in some cases, that no title to the oil passes until it is extracted, and that the estate and right of possession of the lessee in the premises ceases if he does not diligently prosecute to success the work of discovery and the work of extraction after discovery. These decisions are not in point here. In each of them the rights of the parties were controlled by the particular conditions expressed in the contract limiting or forfeiting the right of the licensee or the estate of the lessee. No such conditions are found in the Fearon lease. Cases are also cited of leases for farming purposes upon an annual rent, consisting of a part of the annual crops raised by the tenant, in which it is decided that the tenant forfeits his term if he fails to plant the crop which was to provide the rent. It is said that in such cases there is an implied covenant to plant such crop in due time. Manifestly these cases do not apply where the rent is paid in advance, as in the case at bar. No conditions have been violated, the rent is fully paid, and consequently the estate and right of possession continues to exist, notwithstanding the failure of the company to do any of the work contemplated by the parties to the lease, or to make a discovery of oil in the land.

[6] The estate of the lessee is not a mere possibility, not coupled with an interest, which, by section 1045 of the Civil Code, is not transferable, but is a present, subsisting estate for years, which may be transferred, the same as any other species of property. Civ. Code, § 1044. There is no condition or covenant in the lease forbidding the lessee to assign the lease, or to sublet the premises or part thereof. Hence the conclusion necessarily follows that the lessee had the right to make the sublease to the plaintiffs for only 120 acres of the land, unless there is something in the nature of the estate demised by the original lease which forbids such subletting of a part.

3. It is earnestly contended by the defendants that the estate and right given by the lease to the Fearon Oil Company is indivisible; that a part of the premises could not be lawfully sublet without Fearon's consent; and that by attempting to sublet the 120 acres to the plaintiffs the entire estate of the lessees was terminated and extinguished. In support of this proposition, they cite the following cases: Mountjoy's Case, 1 Godbolt, 17; Caldwell v. Fulton, 31 Pa. 475, 72 Am. Dec. 760; Grubb v. Bayard, 2 Wall., Jr. 81, Fed. Cas. No. 5,849; Funk v. Haldeman, 53 Pa. 229; Harlow v. Lake Superior I. Co., 36 Mich. 105; Smith v. Cooley, 65 Cal. 46, 2 Pac. 880; Hughes v. Devlin, 23 Cal. 502; Hall v. Vernon, 47 W. Va. 297, 34 S. E. 764, 81 Am. St. Rep. 791.

The foundation of all these decisions is the Mountjoy Case. It was decided in 1583, during the reign of Queen Elizabeth. It is reported in Godbolt, as above, and also in Anderson, 307, Moore, 174, 4 Leonard, 147, and in Coke on Littleton, 164b. The case, as reported in Godbolt, states the reasons for the rule briefly, but clearly. We give the report on this point in full, retaining the archaic orthography:

"The Lord Mountjoy by deed, indented and inrolled, did bargaine and sell the manor of Camford to Brown in fee; and in the indenture this clause is contained, provided alwayes, and the said Brown covenants, and grants to, and with the Lord Mountjoy, his heirs and assigns, that the Lord Mountjoy, his heirs and assigns, may digg for ore within the land in Camford, which was a great waste; and also to digg turffe there to make allome and coperess, without any contradiction of said Brown, his heirs and assigns. They agreed, that the Lord Mountjoy could not devide the said interest, viz., to grant to one to digg within a parcel of said waste. And they also agreed, that notwithstanding that Grant, that Brown, his heirs and assigns, owners of the soile, might digg there, also, like to the case of common sans nomber. The case went further, that the Lord Mountjoy had devised this interest to one Laicott for one and twenty years, and that Laicott had assigned the same over to two other men; and whether this assignment was good or not was the question; forasmuch that if the assignment might be good to them, it might be to twenty; and that might be a surcharge to the tenant of the soile. And as to that the justices did agree, that the assignment was good; but that the two assigness could not work severally, but together with one stock, or such workmen as belonged to them both."

The reservation in the deed was as follows: "That it shall be lawful for the said Lord Mountjoy, his heirs and assigns, at all times hereafter to have, take and dig, in and upon the heath ground of the said premises, from time to time, sufficient ores, heath, turves, and other necessaries for the making of alum and copperas." See Anderson, supra, and Caldwell v. Fulton, supra, 31 Pa. 485.

It will be seen that the main reason here given for the proposition that a right to mine in the land of another cannot be divided and transferred as to a parcel only, and cannot be enjoyed by co-owners separately, but only "together with one stock," is that if this could be done a similar right might be given to 20 persons, which "might be a surcharge to the tenant of the soil;" that is, to the lessor or owner of the fee. The idea is twofold: First, that the owner of the soil has a common right to dig for the same ore, and the giving of the same right, separately, to more than the number originally provided, would permit mine openings in many different places, thereby unduly interfering with the owner in the enjoyment of his own mining right, contrary to the intent of the reservation, which implies a single right and a single use of it; and, second, that the owner has the right to make other uses of the land, and this multiplying of the persons and places where the mining right was to be exercised by others, under a reservation which was construed to give only a right to mine "with one stock," would impair the other uses of the owner to a greater extent than the reservation intended.

It is clear that the lease to the Fearon Oil Company, in effect, gives to the company the exclusive right to develop and take the oil, and that Fearon thereafter had no right to do so in common with the company. This is not expressly declared, but the respective provisions necessarily imply it. It leases and demises "all" the land described. This, as above stated, covenants for the quiet enjoyment of all by the lessee. It provides that the lessee shall have the right to explore, develop, and take oil from all of it, except that required for the Fearon residence. The only restriction as to area, and the only reservation as to possession or enjoyment by Fearon, is the paragraph giving Fearon and his wife the right to occupy the house then standing on the land, and the buildings in connection therewith, as a place of residence, and the right to "free and uninterrupted access over and upon said lands, *not actually used or needed for the business of said second party*, for the purpose of farming the same," and reserving the right to farm said lands. Nothing is here said about Fearon and wife taking oil, or using the land for any purpose, except for farming and in part as a residence, and the language quoted does, in effect give the company the paramount right to the exclusive use and possession, so far as necessary for its business of raising the oil. See, on this point, Caldwell v. Fulton, supra, 31 Pa. 479, 483; Funk v. Haldeman, supra, 53 Pa. 247. Therefore, so far as the rule of the Mountjoy Case is based on the fact that the lessor and lessee have a common right to develop and take the oil, the reason is wanting, and the rule, being in derogation of the right conveyed, should not prevail.

Whatever force there may have been in the second branch of the reason under the conditions of law and fact prevailing in England in the sixteenth century, or as applied to the mining of coal and mineral ores, it does not seem to justify the application of the rule of the Mountjoy Case to a lease of a large body of land for the purpose of extracting the oil from it, and especially to the particular lease here involved. The basis of it is the inconvenience to the owner of the land in his use thereof that would arise if a large number of persons were occupying the land in the exercise of the granted right at the same time. Because of this inconvenience, it will not be presumed that he intended such right to be exercised by more than one, unless he so declares in the lease or grant, either directly or indirectly. Thus, it is said, a grant of common of pasture, without stint as to amount, was nevertheless limited at common law to the use by a reasonable number only of the grantee's cattle, and it could not be aliened to several, so as to be enjoyable by each separately, because in each case the right would be enlarged by the additional use, and the grantor's estate would be burdened more than was contemplated. In the case of ores and coal, the usual method of taking them, and perhaps the only practicable one, is to sink a shaft or run a drift to the ore bed or vein, and obtain the mineral by means of underground workings from such shaft or drift. A grant or lease of a mining right for coal or ores would create a presumption that this method was understood and intended, and that it was expected to cause little interference with the ordinary use of the surface.

This is not true with respect to mineral oil. It lies far below the surface. It can be extracted only by means of wells. Each well is separate from every other, and by means of it the oil can be taken only from a limited area of four or five acres immediately surrounding it. For this reason, the extraction of oil from the whole of a large tract granted by an ordinary oil lease requires, not one "stock," or one well, as a means of access to the whole deposit of oil, but a separate and independent well upon every few acres of the oil-bearing territory. The tract must be dotted with wells, each as separate and distinct in its installation and operation as if owned by different persons. Consequently, one who leases his land for this purpose necessarily understands and intends that as many wells will be sunk and operated thereon as may be required to raise all the oil in it. His own possession and use of the surface will be substantially as much interfered with by the operation of all these wells under one management as it would be if each well was operated independently by a different person. If his rent is paid by a royalty, as is common, it will be to his advantage to have the oil taken out rapidly, and this may often be better done by subletting in tracts to different persons than by keeping it in control of one person or corporation. The conditions are the very opposite of those which support the rule of the Mountjoy Case. "When the reason of a rule ceases, so should the rule itself." Civ. Code, § 3510.

If this is so with respect to an ordinary oil lease upon a royalty, it is much more so in the case of the lease to the Fearon Oil Company. That company was organized on August 24, 1907, with 1,000,000 shares of stock, of which only 653,000 have been issued. The lease was made 12 days after the company was incorporated. As a consideration for the lease, the company issued to Fearon 525,000 shares of its capital stock.

The lease constitutes practically all of the property of the company. Fearon owned nearly all of the stock, and was in potential control of the company. In practical effect, he leased the land to himself. The consideration for the lease was complete, and fully paid upon its execution, by the issuance to him of said stock. But his actual profit must come from the dividends to be paid by the company upon that stock. The amount of these dividends would depend upon the number of wells in operation and the quantity of oil taken. It was to his interest to have as many wells in operation as possible. The corporation had no means, and could obtain money to develop and extract the oil only by borrowing or by selling some of the treasury stock. It is easily to be seen that it would be greatly to its advantage, and to Fearon's advantage also, to have the power to sublet parcels to others, who would extract the oil and pay a rental or royalty.

For these reasons, we are of the opinion that the rule of the Mountjoy Case is inapplicable, and that the estate of the Fearon Oil Company, whether capable of being justly partitioned between tenants in common or not, could be sublet in smaller parcels to different subtenants. In Hughes v. Devlin, supra, the court held that mining claims upon public lands of the United States were corporeal interests in land, and, as such, were subject to partition, if owned by tenants in common. The case, in effect, supports our conclusion. In Smith v. Cooley, supra, Smith, being the owner in fee, had granted to Cooley a "mining right" in the undivided one-third of the land, and he afterward sued Cooley in partition. The right of Cooley was declared to be an incorporeal hereditament, and not capable of partition. The case is distinguishable from an exclusive oil lease upon the grounds heretofore stated.

4. The clause imposing the condition that the lease shall terminate, if an assessment be levied on the stock of the Fearon Oil Company, provides that upon a breach thereof the lessors shall have the right to eject from the land "all agents, officers or employés" of said company. Appellants, from the phrase quoted, endeavor to deduce the conclusion that the lessors could not eject any person who was not such agent, officer, or employé, and that, therefore, there is an implied covenant against subletting in parcels. The same argument would apply to an assignment or sublease of the whole tract. Without discussion, we think it sufficient to say that, in our opinion, the conclusion is not justifiable on any allowable theory of interpretation.

5. It is claimed that the lease from the Fearon Oil Company to plaintiffs is void, because its execution was not authorized by the lawful board of directors of the company. It runs in the name of the Fearon Oil Company. It is signed by the plaintiffs and by "Fearon Oil Company, by Wm. W. Goldnamer, its Secretary." The corporate seal of the company is attached, and the execution was duly acknowledged. A resolution, authorizing Goldnamer, as secretary, to execute the lease for the company, purporting to have been adopted by the board of directors of the company, was received in evidence.

[7] When the corporate seal is affixed to a contract, purporting to be regularly executed for a corporation by one of its officers, the seal is prima facie evidence of the authority of the officer to execute the contract for the company. Underhill v. Santa Barbara, etc., Co., 93 Cal. 314, 28 Pac. 1049; Colton L. & W. Co. v. Swartz, 99 Cal. 284, 33 Pac. 878; Burnett v. Lyford, 93 Cal. 117, 28 Pac. 855; Mills v. Boyle M. Co., 132 Cal. 97, 64 Pac. 122; Schallard v. Eel R. N. Co., 70 Cal. 146, 11 Pac. 590; Reid v. Clay, 134 Cal. 213, 66 Pac. 262; Potts Drug Co. v. Benedict, 156 Cal. 327, 104 Pac. 432, 25 L. R. A. (N. S.) 609; McKee v. Cunningham, 2 Cal. App. 687, 84 Pac. 260.

The defendants assert that the authorization to the secretary to execute the lease to plaintiffs was invalid upon a number of technical grounds. They say the meeting of the directors at which it was authorized was not properly called; that three of the four persons who assumed to act as directors at said meeting were neither directors nor stockholders of the company; that the articles of incorporation limited the number of directors to three persons; that Joseph Fearon, Addison Fearon, and Wm. W. Goldnamer were thereby appointed, and have ever since held and exercised office as such directors; that an attempted increase of the number to seven was illegal, because it was made at a stockholders' meeting illegally called and held by persons not stockholders; that the four additional directors thereupon elected, namely, H. Z. Austin, H. G. Traeger, M. B. Harris, and J. H. Fearon, were not and could not be directors, because there were no additional lawful offices of director to be held or filled; that the only persons present and assuming to act as directors at the meeting were Goldnamer, Austin, Traeger, and Harris, and that Goldnamer alone was a lawful director; and that the by-laws empowered the president to execute the contracts of the company, and did not authorize the secretary to do so.

[8] The evidence shows that the meeting of stockholders at which the increase in the number of directors was made was held on December 13, 1907; that the additional directors were elected on the same day; that a certified copy of the amendment to the articles of incorporation, declaring such increase in the directorate, was duly filed in the offices of the county clerk and Secretary of State; and that, from December 13, 1907, to the day the lease was authorized (March 6, 1909), these persons continued to act as directors of the company, without objection on the part of any stockholder. At the

stockholders' meeting of December 13, 1907, all of the 653,000 shares of issued stock were represented, either in person or by proxy, except 2,600 shares. Another meeting of stockholders was held on January 11, 1908, which was attended by the holders of stock amounting to 650,800 shares, at which meeting the proceedings of the stockholders' meeting of December 13, 1907, were ratified. There is no merit in the claim that these persons were not stockholders. They held certificates of stock regularly issued. The objection that the consideration for the stock was not lawfully sufficient cannot be raised to invalidate their action, when third persons have dealt in good faith upon it.

[9] The persons thus chosen as directors, and recognized and permitted to act as such, were at least de facto directors, and their acts were therefore valid, so far as they were acted on in good faith by third persons. "Persons who hold office as directors, or other officers, with the consent of the corporation, and under color of an election or appointment, are de facto officers, although their election or appointment may have been illegal, and their acts as such, in so far as third persons are considered, are just as valid and binding upon the corporation, as if they were officers de jure." 3 Clark & Marshall on Corp. p. 2035, § 6002; Waterman v. Chicago, etc., Co., 139 Ill. 658, 29 N. E. 689, 15 L. R. A. 418, 32 Am. St. Rep. 228, and notes; Bradford v. Frankfort, etc., Co., 142 Ind. 392, 40 N. E. 741, 41 N. E. 819; San Jose Savings Bank v. Sierra L. Co., 63 Cal. 180; Balfour, Guthrie Co. v. Woodworth, 124 Cal. 173, 56 Pac. 891; Barrell v. Lake View L. Co., 122 Cal. 133, 54 Pac. 594; San Joaquin, etc., Co. v. Beecher, 101 Cal. 80, 35 Cal. 349; Sherwood v. Wallin, 154 Cal. 735, 99 Pac. 191.

[10] Joseph Fearon was a large stockholder in the Fearon Oil Company, it is true, but he was also its lessor, and as such he stood in the position of a third person to that company, so far as this question is concerned. Defendants have no relation to that company, other than that which they had as privies in estate with Joseph Fearon as such lessor. They have no status as stockholders, and cannot attack the corporate action in that capacity. They are not entitled to act on behalf of that company. The plaintiffs, so far as appears, acted in the honest belief that the persons who authorized the secretary to make the lease were lawful directors. They are therefore protected by the rule above stated against all attacks of the defendants upon the validity of the lease, grounded upon the claim that the directors were usurpers. And as to the plaintiffs the question whether the meeting of directors was a regular meeting or was duly called is immaterial. 2 Cook on Corp. §§ 713a, 725. And so is the objection that the by-laws do not expressly authorize the secretary to sign corporate contracts, but do authorize the president to do so. 2 Cook on Corp. p. 1825, § 725.

We do not think that the principle that there cannot be a de facto officer, unless there is a de jure office for him to hold, is applicable to this case. The same strictness does not obtain as in the case of public offices, which can be created only by law. Stockholders are private persons, and are subject to the principle of estoppel by conduct, as such, and in their relation to the corporate affairs, the same as in any other business matters. They are the human components of the corporation. The statute itself creates the office of director. Civ. Code, § 290. The number of the directors, in excess of three, is entirely dependent on the will of the majority of the stockholders. They have full power to increase the number. If that majority meets and regularly adopts, certifies, and files in the proper offices an amendment to the articles of incorporation, increasing the number of directors, and then suffers the persons so constituted directors to transact the business of the company without objection, the plainest principles of equity and justice would prevent them, or the corporation in their behalf, from asserting the lack of authority of such board of directors, or a lawful quorum thereof, to do business and make contracts for the corporation. We think the better rule is that the corporation is bound by such conduct to this extent, at least, that a third person may safely deal with the corporation on the faith of such a certificate, regular on its face, and without inquiring whether or not the stockholders had been regularly called to meet at the time the change was made; and that a contract authorized by such board, made by a third person in good faith, with the authorized corporate officers, binds the corporation. The plaintiffs' lease is therefore valid.

[11] 6. Appellants contend that the finding that plaintiffs took possession of the land under their lease on March 10, 1909, is not supported by the evidence. There was evidence that they went upon the land on that day and deposited a wagon load of well-drilling tools thereon, intending to bore a well thereon, and that they returned the next day with more tools for that purpose, but were excluded by Joseph Fearon. This was a sufficient entry, if any entry was necessary, to enable them to maintain the action. We do not regard this part of the finding as important or necessary to the judgment. The plaintiffs were thereafter and ever since excluded from the land by the defendants, and the findings so state. The suit is for the recovery of possession, and to enjoin the defendants from extracting oil therefrom. If the plaintiffs had and have the right of possession, this was sufficient to support the judgment given, to the effect that plaintiffs are entitled to the possession of the land for the purpose of drilling wells and taking

oil therefrom under their lease from the Fearon Oil Company; and that defendants be enjoined from interfering with plaintiffs' work of well drilling thereon and taking oil therefrom; and that defendants be also enjoined from drilling wells thereon themselves.

[12] There is no merit in the claim that the lease of the Fearon Oil Company to the plaintiffs did not give them any right to the possession of the 120 acres. That lease purports to let, demise, and lease to plaintiffs, for 20 years, the exclusive right to drill wells on the 120 acres and take oil therefrom, the said drilling to begin within 90 days, and to continue with diligence to a depth of 2,500 feet, unless oil was sooner found, and the right to continue thereafter to drill at least eight other wells thereon, and to operate the same; the company agreeing to protect the plaintiffs in their possession during the term, and giving them the further right, after the 20 years, to remain in possession of such part of the premises as should be required to enable them to operate all wells thereon that were then producing oil. It also contained a covenant, in favor of plaintiffs, that they should quietly hold and enjoy the premises for the term. The company reserved only the right to enter upon the land to inspect the work done by plaintiffs, and the right of Joseph Fearon to reside in the house then on the land, and to farm the land not actually used or needed for the business of drilling the wells or removing the oil. This clearly gave the plaintiffs the present right of possession for the purposes specified in the judgment. It vested in them a corporeal interest in the land, an estate for years, with right of possession for a limited purpose. Frisbie v. McClernin, 38 Cal. 571; Gracioso Oil Co. v. Santa Barbara Co., 155 Cal. 144, 99 Pac. 483, 20 L. R. A. (N. S.) 211; Brookshire Oil Co. v. Casmalia Oil Co., 156 Cal. 215, 103 Pac. 927. The question whether plaintiffs became the absolute owners of the oil, or had any *title* to it at all before it was raised to the surface, is not material to the case. The issue concerns only the right to the possession of the surface, and the right to protect and keep the oil in place while the plaintiffs are engaged in obtaining it, as provided in their lease.

7. Certain rulings upon the admission and rejection of evidence are assigned as error. The conclusions reached upon the points hereinbefore discussed disposes of all these objections. They are all based on the propositions advanced by defendants, which we have held to be untenable. We do not deem it advisable to extend this opinion by stating or considering them.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

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17 Cal. App. 297

BLAEHOLDER v. GUTHRIE. (Civ. 968.)

(District Court of Appeal, Second District, California. Oct. 23, 1911.)

1. LIFE ESTATES (§ 25*)—LEASE BY LIFE TENANT—RIGHT TO CROPS.

The death of a life tenant does not deprive his tenant for a year or at will of his right, as against the remainderman, to the crops resulting from the tenant's labor.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 47; Dec. Dig. § 25.*]

2. LIFE ESTATES (§ 25*)—LEASE BY LIFE TENANT—RIGHT TO CROPS.

A life tenant executed a lease for a year to a tenant who should be entitled to a half of the crops. After the death of the life tenant, the remainderman gave to the tenant a lease for a year under similar terms. At the time of the execution of the lease, a crop produced under the lease given by the life tenant was matured, but was not harvested. *Held*, that the subject of the lease made by the remainderman was the crop to be raised during the year specified in the lease, and did not refer to the crop produced the preceding year under the lease executed by the life tenant.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 47; Dec. Dig. § 25.*]

3. LIFE ESTATES (§ 25*)—LEASE BY LIFE TENANT—SHARES OF CROPS—ACTIONS—EVIDENCE.

Where, in an action by a tenant for his share of the crops produced during the term of the lease, defendant claimed that a crop which was matured, but not harvested at the time of the execution of the lease, was the crop referred to in the lease, the tenant could show that he was the owner of such crop, having produced the same while in the possession of the property under a lease given by the life tenant.

[Ed. Note.—For other cases, see Life Estates, Dec. Dig. § 25.*]

4. CONTRACTS (§ 169*)—CONSTRUCTION—SITUATION OF PARTIES—EVIDENCE.

Where there is any uncertainty in a contract, it is competent in aid of its interpretation to show the situation of the parties and the surrounding circumstances at the time of the execution of the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 752; Dec. Dig. § 169.*]

5. TRIAL (§ 29*) — MISCONDUCT OF TRIAL JUDGE — RULINGS ON EVIDENCE — STATEMENTS.

A statement by the trial judge, on overruling an objection to evidence, which embodies a correct statement of the law does not amount to misconduct.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 29.*]

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by Henry Blaeholder against Sallie Knox Guthrie, as executrix of J. E. Guthrie, deceased, substituted for J. E. Guthrie. From a judgment for plaintiff, defendant appeals. Affirmed.

F. O. Daniel, for appellant. Clyde Bishop and Williams & Rutan, for respondent.

SHAW, J. On May 1, 1908, plaintiff and J. E. Guthrie, defendant's testator, entered into a written contract of lease, whereby plaintiff was to take care of defendant's ranch, and in consideration of the performance of certain covenants on plaintiff's part, as provided in the contract, defendant was to sell the oranges and walnuts grown thereon and pay plaintiff 50 per cent. of the net proceeds of such sales; it being provided that plaintiff should continue in possession of the property and care for the same, subject to the termination at the will of either party of the relations so created.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Plaintiff's possession of the property under the terms of the contract covered the period from May 1, 1908, to May 31, 1909, when, pursuant to notice given by Guthrie, requesting him so to do, he removed therefrom. At the time of his removal, there was a crop of Valencia oranges, consisting of 1,077 boxes, ripe and matured, and which were picked in the month of June following his removal, and which Guthrie sold and received therefor the sum of $1,186.36. The action was brought upon the contract to recover 50 per cent of this sum. A jury trial was had, with the result that a verdict was rendered in favor of plaintiff for one-half of the proceeds from the sale of the Valencia oranges, and also for the amount of another item, as to which there appears to be no controversy on this appeal. From the judgment entered upon this verdict, and an order denying a motion for a new trial, defendant appeals.

It appears that on May 1, 1908, when plaintiff and Guthrie made the contract, the crop of oranges grown the preceding year, during which period plaintiff occupied the property under a lease in like terms given him by Guthrie's father, who held a life estate therein, although matured and ready to harvest, had not been gathered; that it was thereafter gathered and plaintiff received one-half of the proceeds of the sale thereof. It is appellant's contention that the oranges grown on the ranch, and which Guthrie, as provided in the contract, was to sell and pay one-half of the proceeds thereof to plaintiff, had reference to the then existing crop grown and produced by plaintiff the preceding year under the lease from the owner of the life estate in the property, and not to the crop which was grown and produced during the year that plaintiff was in possession of the property as a tenant of Guthrie. We cannot assent to this contention. The existing crop had been produced by plaintiff under the terms of the lease for the preceding year. At the time of executing the lease (May 1, 1908), it was matured and ready to harvest and was picked in June.

[1, 2] The death of the holder of the life estate did not deprive the tenant of his right to the crop, the production of which was the result of his year's labor. This by reason of what is termed "the doctrine of emblements," the basis of which is "the justice of assuring to the tenant compensation for his labor, and also upon the desirability of encouraging husbandry as a matter of public policy." Section 251, Tiffany's Landlord and Tenant. "If a life tenant, after making a lease, dies before the end of the term thereby created, the lessee is entitled to take the crops as against the remainderman." Section 251, supra. And the same is true where a tenancy at will is terminated by the death of the holder of the life estate. Plaintiff was the owner and entitled to one-half of the existing crop grown by him in the years 1907 and 1908 as lessee of the life tenant. This being true, it must follow that the subject of the contract, made May 1, 1908, with defendant's testator, was the crop to be grown the year following the making of the lease, one-half of the proceeds from the sale of which was the subject of the action. To hold otherwise would be to place an interpretation upon the contract, the effect of which would deprive plaintiff of any compensation for the labor performed by him in the care and cultivation of the orchard.

[3, 4] At the trial, the defendant interposed objections to certain questions touching the possession and occupancy of the property by plaintiff under the lease given him by the life tenant, claiming that the same were outside the issues. The objections were overruled. There was no error in the rulings, for the reason that the defendant based his defense upon a claim that the crop picked in June, and which had been grown the preceding year, was the one to which the contract had reference. It was, therefore, competent for the plaintiff to show that he was the owner of this crop, having produced the same while in possession of the property under the lease given him by Guthrie's father. If there was any uncertainty or ambiguity in the contract, or the application of the same, it was competent in aid of its interpretation to show the situation of the parties and the surrounding circumstances as they existed when the contract was made. Preble v. Abrahams, 88 Cal. 245, 26 Pac. 99, 22. Am. St. Rep. 301.

[5] With reference to the crop of oranges produced in the years 1907 and 1908, plaintiff was asked: "Were you in possession of the premises from the time that crop of oranges set until the time they were picked?" To this question defendant interposed an objection. In overruling the objection, the court stated: "It is so conclusive to the court that the position of counsel for plaintiff is correct that I will have to overrule this objection, and permit counsel for plaintiff to show the condition under which the first crop of oranges was made. It certainly cannot be that this plaintiff should be required to be content with accepting and receiving a crop he was already entitled to at the time of making the lease, unless there is some stipulation or understanding by the lease that that was to be so." It is claimed that the statement so made by the court con-

stituted misconduct on its part. What we have said in regard to the interpretation to be given the contract, and the subject to which the contract applied, sufficiently answers appellant's contention in this regard. Moreover, as the language of the court embodied a correct statement of the law, we are unable to perceive wherein the same constituted misconduct.

There are other alleged errors, but an examination of the same convinces us that they merit no discussion.

The judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

TALMAGE v. MONROE, Superior Judge.

(Civ. 1,063.)

(District Court of Appeal, Second District, California. Oct. 19, 1911.)

MANDAMUS (§ 162*)—PERFORMANCE—EFFECT.

Where a return shows that the respondent has complied with the directions of an alternative writ of mandamus, the writ will be quashed.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 338–340; Dec. Dig. § 162.*]

Application by George Talmage for a writ of mandamus to be directed against Charles Monroe, as Judge of the Superior Court of the State of California, in and for the County of Los Angeles. Writ discharged.

Miner P. Goodrich, for petitioner.

PER CURIAM. This court having heretofore issued an alternative writ of mandamus, directing the respondent to set for trial the case of Talmage v. Talmage, otherwise to show cause for his refusal so to do, and the respondent having made answer to said alternative writ, and by said return it appearing that said respondent has complied with the direction of this court, and has set the above-entitled action for trial, it is now, therefore, ordered that the writ heretofore issued be and the same is hereby discharged, and that petitioner recover his costs herein.

17 Cal. App. 278

Ex parte SULLIVAN. (Cr. 223.)

(District Court of Appeal, Second District, California. Oct. 20, 1911.)

1. ADULTERY (§ 1*)—STATUTORY OFFENSES.

An unmarried man is incapable of committing the offense denounced by Pen. Code, § 269a, as amended by Act March 21, 1911 (St. 1911, p. 426), providing that every person living in a state of cohabitation and adultery is guilty of a misdemeanor; Civ. Code, § 93, defining adultery as the voluntary intercourse of a married person with a person other than accused's husband or wife.

[Ed. Note.—For other cases, see Adultery, Cent. Dig. §§ 1–6; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 1, pp. 212–214.]

2. LEWDNESS (§ 5*)—PARTIES TO OFFENSE—PRINCIPALS—"ADULTERY."

Under Civ. Code, § 93, defining adultery as the voluntary intercourse of a married person with a person other than accused's husband or wife, and Pen. Code, § 31, providing that all persons concerned in a crime are principals, and section 269a, as amended by Act March 21, 1911 (St. 1911, p. 426), providing that every person who lives in a state of cohabitation and adultery is guilty of a misdemeanor, a complaint alleging that accused, an unmarried man, lived in a state of cohabitation and adultery with a married woman, and which does not purport to charge the married woman with any offense, and which does not allege that accused knew that she was a married woman, does not state an offense against accused, on the theory that accused was guilty as a principal in aiding the woman to commit the offense.

[Ed. Note.—For other cases, see Lewdness, Dec. Dig. § 5.*]

3. CRIMINAL LAW (§ 59*)—PARTIES TO OFFENSES—PRINCIPALS.

Pen. Code, § 31, providing that all persons concerned in the commission of a crime are principals, does not declare a person guilty of aiding and abetting another in the commission of a crime where such person by reason of his status is himself incapable of committing the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 71–74, 76–81; Dec. Dig. § 59.*]

Application of Francis A. Sullivan for a writ of habeas corpus for his discharge from custody. Prisoner discharged.

Charles S. McKelvey, for petitioner. Guy Eddie, City Prosecutor, and Ray E. Nimmo and Frank W. Stafford, Deputy City Prosecutors, for respondent.

PER CURIAM. Petitioner was committed to the custody of the chief of police on account of nonpayment of a fine imposed by a police judge in a certain proceeding wherein petitioner was charged with cohabitation and adultery with a married woman named. The affidavit of complaint upon which the proceedings before the police court were based charged that on a day named, in the city of Los Angeles, "the crime of adultery and cohabitation was committed by Francis A. Sullivan (petitioner herein), who at the time and place last aforesaid did willfully and unlawfully live with one Corinne Royse in a state of cohabitation and adultery, the said defendant Francis A. Sullivan being then and there an unmarried man, and the said Corinne Royse being then and there a married woman." The sufficiency of this affidavit is the question for determination. The proceeding was based upon section 269a of the Penal Code, as amended March 21, 1911 (St. 1911, p. 426), which provides that "every person who lives in a state of cohabitation and adultery is guilty of a misdemeanor and punishable by a fine," etc.

[1] Adultery is defined by section 93 of the Civil Code as "the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It was made to appear in the affidavit of complaint that petitioner was not a "married person"; hence, he was shown to be incapable of committing the offense.

[2] Conceding that petitioner was not, for the reason given, charged with committing the substantive offense as the same is defined by the Code, it is, nevertheless, insisted by respondent that, inasmuch as the complaint alleged the woman with whom he cohabited to be a married woman, and therefore guilty of adultery, he must be deemed a principal under the provisions of section 31 of the Penal Code, which provides that "all persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, * * * are principals in any crime so committed." The theory of respondent is that, inasmuch as the woman named in the complaint was shown to have been guilty of the offense, in aid of the commission of which petitioner contributed, therefore he is properly charged therewith as a principal. The complaint, however, does not purport to charge the woman with any offense; neither does it appear therefrom that petitioner knew that she was a married woman. Hence, in no event, under the circumstances here disclosed, can the complaint be said to state a public offense against petitioner.

[3] While unnecessary to the decision of this case, we are of the opinion that it manifestly was not the intent of the Legislature, by said section 31, to declare a person guilty of aiding and abetting another in the commission of a crime where such person, by reason of his status, is himself incapable of committing the offense.

The prisoner is discharged.

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17 Cal. App. 273

PEOPLE v. ROBINSON. (Cr. 336.)

(District Court of Appeal, First District, California. Oct. 20, 1911.)

1. CRIMINAL LAW (§ 1023*) — APPEAL — MOTION IN ARREST OF JUDGMENT.

No appeal lies from an order denying a motion by accused in arrest of judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2591; Dec. Dig. § 1023.*]

2. CRIMINAL LAW (§ 1068½,* New, vol. 13, Key. No. Series)—APPEAL—ORDER DENYING A NEW TRIAL.

Since Pen. Code, § 1237, authorizes an appeal from an order denying a motion for a new trial, but neither the Code nor the rules of the appellate court prescribes any procedure on such an appeal, the appellate court is authorized, by Code Civ. Proc. § 187, to adopt any proper method which may have been employed by the aggrieved party in perfecting his appeal.

3. CRIMINAL LAW (§ 1087*)—APPEAL—ORDER DENYING NEW TRIAL—PROCEDURE.

Pen. Code, § 1237, having authorized an appeal from an order denying a new trial, but no procedure having been prescribed, a record on appeal from such an order, in the form prescribed for use on an appeal from final conviction, purporting to show in full the proceedings and evidence at the trial, including the hearing and determination of the motion for a new trial, is sufficient to move the court to dispose of the appeal on its merits.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1087.*]

4. CRIMINAL LAW (§ 564*) — VENUE — EVIDENCE.

In a prosecution for embezzlement, evidence *held* to justify a finding that the embezzlement occurred in the city and county of San Francisco, where accused was tried, and not in another county.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1277–1284; Dec. Dig. § 564.*]

5. EMBEZZLEMENT (§ 47*)—PLACE—QUESTION FOR JURY.

In a prosecution for embezzlement, evidence *held* to require submission to the jury of the question when and where a definite and final demand for the return of the money alleged to have been embezzled, and defendant's refusal to repay the same, was made.

[Ed. Note.—For other cases, see Embezzlement, Dec. Dig. § 47.*]

Appeal from Superior Court, City and County of San Francisco; Geo. H. Cabaniss, Judge.

Francis H. Robinson was convicted of embezzlement, and from an order denying a new trial, and denying his motion in arrest of judgment, he appeals. Affirmed.

Thos. A. Keogh, for appellant. Attorney General Webb, C. M. Fickert, Dist. Atty., and Jas. F. Brennan, Asst. Dist. Atty., for the People.

LENNON, P. J. The defendant was convicted of the crime of embezzlement. He has appealed only from the order of the lower court, refusing him a new trial, and denying his motion in arrest of judgment.

The Attorney General, upon behalf of the people, has interposed a preliminary motion to dismiss the appeal, upon the grounds (1) that an order denying a motion in arrest of judgment is not appealable; (2) that there is no statutory procedure provided for the presentation to this court of an appeal from an order denying a motion for a new trial in a criminal case; and therefore, if such an order can be reviewed at all, it must come here upon an appeal from the judgment.

[1] It is clear that no appeal lies in a criminal case from an order denying a motion in arrest of judgment; and therefore the appeal in this case, in so far as it relates to the order denying defendant's motion in arrest of judgment, cannot be considered. People v. Markham, 64 Cal. 157, 30 Pac. 620, 49 Am. Rep. 700; People v. Majors, 65 Cal. 100, 3 Pac. 401; People v. Henry, 77 Cal. 446, 19 Pac. 830; People v. Cline, 83 Cal. 374, 23 Pac. 391; People v.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Dolan, 96 Cal. 315, 31 Pac. 107; People v. Sansome, 98 Cal. 241, 33 Pac. 202; People v. Ford, 138 Cal. 140, 70 Pac. 1075; People v. Jackson, 138 Cal. 463, 71 Pac. 566.

[2] It is true that nowhere in the Codes, or the rules which govern this court, is there to be found a prescribed procedure for perfecting an appeal to this court from an order denying a motion for a new trial in a criminal case. The Code, however, does grant to a defendant in every criminal case an appeal from such an order (Pen. Code, § 1237); and it may now be considered the settled law of this state that, where a court has been by the Constitution invested with appellate jurisdiction in a particular class of cases, that court has inherent power, in the exercise of its jurisdiction, and for the purpose of bringing before it a cause in which an appeal has been granted and taken, to adopt any appropriate and approved mode of procedure which may have been employed by an aggrieved party in the perfecting of his appeal, even though the Legislature and the rules of this court have failed to prescribe the means or method of taking such an appeal. Code Civ. Proc. § 187; People v. Jordan, 65 Cal. 644, 4 Pac. 683; Cummings v. Conlan, 66 Cal. 413, 5 Pac. 796, 903; Somers v. Somers, 81 Cal. 616, 22 Pac. 967; In re Jessup, 81 Cal. 479, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594.

[3] The record before us upon the defendant's appeal from the order denying his motion for a new trial is in the form prescribed by the statute for use upon an appeal from a judgment of final conviction; and, as it purports to show in full the proceedings and evidence had and taken in the lower court up to and including the hearing and determination of the motion for a new trial, we deem it our duty to resort to that record and dispose of the appeal upon its merits.

[4] In support of his appeal, the defendant relies mainly upon the claim that the evidence shows that the offense of which he was convicted was wholly committed in a county other than that in which the information against him was filed. The information upon which the defendant was tried and convicted charged, in substance, that on the 17th day of May, 1910, the defendant, in the city and county of San Francisco, embezzled the sum of $500 which had been intrusted to him as the agent of one Esther Hoover. The evidence in the case shows that at several different places and times the defendant was intrusted by the complaining witness with large sums of money, among which was the $500 mentioned in the information. The complaining witness testified that this money was to be returned to her by defendant upon demand. The case was tried apparently upon the theory that a demand upon the defendant for the return of the money was necessary, before he could be charged with the crime of embezzlement, and the people depended for a conviction solely upon proof of a demand, made in the city and county of San Francisco, and the refusal of the defendant to comply with the same. Such demand was made upon the defendant for the return of the money at the Von Dorn Hotel in the city of San Francisco, some time during the month of April, 1910. The defendant then refused, and ever since has refused, to return or account for the money. This demand, coupled with the refusal of the defendant to comply therewith, and all of the circumstances surrounding the demand and refusal, were sufficient evidence of the fraudulent appropriation by the defendant of the property which had been intrusted to him.

It is the contention of the defendant that a previous positive and unqualified demand for the return of the money had been made upon him by the complaining witness in Los Angeles county, and that by reason of his failure to comply with that demand the crime charged against him was then and there consummated, and that therefore the venue of the offense was in the county of Los Angeles, and not in the city and county of San Francisco. The record does not sustain the defendant's contention in this regard. It nowhere clearly appears in evidence that the complaining witness made a positive and unequivocal demand upon the defendant in the city of Los Angeles for the return of the money. The testimony referred to in support of the defendant's contention shows that some time in the month of January, 1908, the plaintiff and defendant, at the city of Los Angeles, had a general conversation concerning the status of the money; but it cannot be fairly said that the sum and substance of this conversation constituted an unequivocal demand for the return of the money, which was met by a positive refusal, and thereby evidenced the commission and completion of the crime at that precise time and place. That the defendant himself did not consider or construe this conversation to be in the nature of a full and final demand is best shown by his own testimony upon cross-examination, where he said: "I don't know whether it was a demand, but [she] requested me to send this money to her father. * * * This was the point: She wanted me to send it, and I said 'You will have send to Salt Lake City and get the drafts and send them back.' * * * She requested me to send her father the money."

[5] The evidence upon the whole case is sufficient to warrant the finding of the jury, implied from the verdict, that the only demand and refusal occurred at the city and county of San Francisco; and, even if the testimony of the complaining witness as to what occurred at Los Angeles could be construed as a complete, unqualified demand and refusal, this would do no more than create a conflict of evidence upon the point

involved. The question as to when and where a definite and final demand was made was exclusively for the jury to determine. They were fully and fairly instructed upon that phase of the case; and, as there is some evidence in the case which tends to support the verdict upon the point of proof here challenged, the verdict is conclusive, and must stand.

There is no merit in the suggestion, made in the closing brief of the defendant, that the evidence does not show that the defendant was in fact the agent of the complaining witness.

The order appealed from is affirmed.

We concur: HALL, J.; KERRIGAN, J.

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17 Cal. App. 280

STEVENSON v. SUN INS. OFFICE.

(Civ. 867.)

(District Court of Appeal, First District, California. Oct. 20, 1911. Rehearing Denied by Supreme Court Dec. 18, 1911.)

1. INSURANCE (§ 103*)—BROKERS—AUTHORITY—CANCELLATION OF POLICY.

Ordinarily the authority of an insurance broker terminates when he has placed insurance and delivered the policy to his principal, so that mere employment to secure insurance gives no authority to cancel the same.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 130; Dec. Dig. § 103.*]

2. INSURANCE (§ 238*)—BROKERS—AUTHORITY—CANCELLATION OF POLICY.

Authority to cancel a policy may be shown to have been conferred on an insurance broker, and, when shown, his acts or agreements in that behalf will be imputed to, and will be binding on, the insured.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 238.*]

3. INSURANCE (§ 665*)—CANCELLATION—AUTHORITY OF BROKER.

Evidence *held* to warrant a finding that insured in modifying an order given to an insurance broker for insurance, so as to reduce the amount from $30,000 to $25,000, authorized the broker to cancel a policy for $3,000, so as to effect the reduction.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 665.*]

4. INSURANCE (§ 236*)—CANCELLATION—SURRENDER OF POLICY.

Where an insurance broker was authorized to cancel $5,000 of plaintiff's insurance, and, pursuant to such authority, notified defendant of the cancellation of a $3,000 policy in which defendant acquiesced, the policy was canceled from the date of the notice, though the policy was not formally and physically surrendered until after a fire had occurred.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 236.*]

5. INSURANCE (§ 103*)—CANCELLATION—INSTRUCTIONS.

In an action on a policy claimed to have been canceled before loss, an instruction that, if plaintiff's insurance broker was directed to cancel any particular policy, he would be bound by the direction, but, if he was given a general and unqualified order to cancel so much of the insurance ordered as might be necessary to reduce the amount carried to $25,000, then the broker's designation of the policy or policies to be canceled would be binding on plaintiff, and, if the minds of the parties met on the subject of cancellation, it was not necessary that it be physically delivered and surrendered prior to the fire, was proper.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 103.*]

6. INSURANCE (§ 103*)—CANCELLATION—KNOWLEDGE OF INSURED.

Where plaintiff ordered her insurance broker to reduce plaintiff's insurance from $30,000 to $25,000, whether plaintiff knew that the original order to place $30,000 insurance had been executed before the order to reduce it to $25,000 was given was not material as a matter of law to plaintiff's right to recover on one of the policies which the broker attempted to cancel in order to comply with the modified order.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 103.*]

7. EVIDENCE (§ 243*)—DECLARATIONS OF AGENT—COMPETENCY.

Where an insurance broker attempted to cancel the policy sued on in order to effect a reduction of plaintiff's insurance, in accordance with plaintiff's direction, a conversation prior to loss between the broker and defendant's manager with reference to cancellation of the policy, indicating that it had been actually canceled before the fire, was admissible on the theory that the broker was plaintiff's agent to place, and, if necessary, to cancel a part of the insurance.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 908–915; Dec. Dig. § 243.*]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Rebina Longwill Stevenson against the Sun Insurance Office. Judgment for defendant, and plaintiff appeals. Affirmed.

A. P. Black and W. C. Sharpstein, for appellant. L. A. Redman, for respondent.

LENNON, P. J. The plaintiff brought this action to recover upon two policies of insurance. The case was tried with a jury, and this appeal is from the judgment rendered and entered upon a verdict which awarded the plaintiff the sum of $1,410.07 upon the first cause of action stated in her complaint, and in effect denied her the relief which she sought upon the facts stated in her second cause of action. The appeal, which was taken from the judgment only, is prosecuted under the provisions of section 941b, Code Civ. Proc. It was taken to the Supreme Court in the first instance, and by that court transferred here for hearing and determination. The record before us is the judgment roll and a bill of exceptions which purports to contain all of the evidence adduced at the trial.

The first cause of action stated in the plaintiff's complaint is founded upon a policy of fire insurance which called for $1,000 on the stock, and $1,000 on the furniture and fixtures of the plaintiff. To this cause of action the defendant interposed no defense.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The second cause of action was stated upon a policy of insurance for $3,000 on a stock of merchandise, which was destroyed by fire on the 29th day of February, 1908. While admitting the execution and delivery of the policy, the defendant, as a defense to this cause of action, pleaded that "on February 28, 1908, the plaintiff and defendant agreed to cancel said policy, and said policy was on said day, at the request of the plaintiff theretofore made, canceled by the defendant, and thereafter, in conformity with said agreement and cancellation, plaintiff surrendered said policy to the defendant."

The plaintiff excepted to the verdict at the time of its rendition, upon the ground of the insufficiency of the evidence to support it, and in that behalf clearly and succinctly specified the particulars in which it was claimed that the evidence was insufficient. Those particulars in the form in which they were originally specified are incorporated in and plainly made a part of the duly authenticated bill of exceptions, which purports to contain all the evidence; and, as the specifications of insufficiency fully notified opposing counsel and the trial court of the precise points relied upon to support the appeal, the evidence and its sufficiency to maintain the judgment must be reviewed and determined.

The circumstances surrounding the procurement of the policy in controversy were these: The plaintiff was the owner of a toy and notion store originally located in Post street in the city and county of San Francisco. The plaintiff was about to remove her business to a new location in Market street, and through her son and manager directed and authorized one Kenna, an insurance broker, to procure insurance upon incoming stock, which was to be installed in the plaintiff's store at the new location. In accordance with his instructions, Kenna placed a portion of the insurance with the defendant, and the policy in controversy, covering merchandise to the amount of $3,000, was issued and delivered to the plaintiff, and remained in her possession until after the building and its contents were destroyed by fire. When the plaintiff's stock of merchandise had been fully removed from the old to the new location, Kenna, by direction of the plaintiff's manager, did what was necessary to have this policy transferred to the new location. The plaintiff, in addition to the $3,000 policy sued on, had, through the agency of Kenna, placed and was carrying insurance in several other companies, aggregating the sum of $20,000. All of the various policies which covered the latter amount had not been written and delivered to plaintiff at the time the premises were destroyed by fire; but, shortly after the change of location was made, Kenna by letter informed plaintiff of the status of all of the insurance which she was carrying, and advised and notified her that he "was having the policies that were to be transferred canceled and reissued" so as to have all of the insurance expire at one time. After the receipt of this information, plaintiff's manager, while taking stock, concluded that it was not fully covered, and directed Kenna to increase the insurance to $30,000. Upon receipt of this order Kenna placed the additional insurance, but did not immediately notify plaintiff of that fact. Later, however, when plaintiff had concluded taking stock, she found that $25,000 insurance was all that was necessary to protect her from loss by fire. Thereupon plaintiff's manager called at the office of Kenna for the purpose of readjusting the amount of insurance originally ordered. Kenna was not at the office, and plaintiff's manager testified that he left an order with the clerk in charge to amend the previous order for insurance so as to have it read $25,000 on stock and $1,000 on furniture and office fixtures. However, the original order for insurance in the sum of $30,000, although not actually written in the form of policies, had been in fact executed by Kenna arranging for and securing covering notes, which bound the several companies undertaking the risks until such time as regular policies could be written and delivered. The order modifying the original request for insurance as given by the manager of plaintiff was taken down in writing by the clerk of Kenna, and subsequently verified by Kenna in a conversation over the telephone with Stevenson. As communicated to Kenna, he understood the modified order to mean that the plaintiff desired to cancel $5,000 of the $30,000 insurance already secured upon the stock of merchandise. In this behalf Kenna testified: "I had done this (procured the $30,000 on the stock) prior to February 27th, on which day I received an order through my assistant that Mr. Stevenson (plaintiff's manager) wanted $5,000 of insurance on the stock canceled, and to place $1,000 on furniture and fixtures. I got the order late on February 27th. On Saturday morning I went to the office of the office manager of the defendant, Mr. Henry, as was my practice at the end of the month, in regard to policies canceled. * * * I told Mr. Henry that Mr. Stevenson had ordered a part of their insurance canceled, and that the policy of $3,000, the policy in controversy, was canceled. Mr. Henry told me to obtain the policy and get it into the office to go along with the other cancellations before the books were closed for the month. I told him that I would. The fire occurred that night. * * * There was a policy of $2,000 in defendant, which is the policy described in the first cause of action. I did not discuss with Mr. Henry the changing of the $2,000, but it was fixed in my mind to change that policy. The actual change (on the $2,000) was made after the fire. I then indorsed the policy to cover $1,000 on stock and $1,000 on furniture and fixtures. I executed the order to give him $1,000 on furniture and fixtures by a rider on the $2,000 policy. I saw Mr. Stevenson on Monday after the fire. Before seeing him I arranged for an adjuster so that the loss could be adjusted without delay. I called upon Mr. Stevenson after I had arranged for the adjuster. I told him that I had canceled the $3,000 Sun policy and wanted it. * * * Mr. Stevenson obtained the policy and handed it to me. I told Mr. Stevenson that he was fortunate that the whole amount of $5,000 he had ordered canceled had not all been canceled, because I had only attended to the canceling of the Sun policy. I had not time after getting his order to order the cancellation of any other policy. He thanked me for the interest I had taken in his loss and looking after him. I told him that the adjustment was going along. He made not a bit of objection to turning over the Sun policy to me, and it has ever since been in the office of the defendant. * * * The order to cancel $5,000 on stock was never fully completed. There was not any cancellation of any policy except the Sun. Actually there was only a reduction to $26,000, so that they had $1,000 more than they would have had if their order had been completed." The defendant's manager, Mr. Henry, in response to Kenna's notification that the policy in controversy was canceled, clearly indicated his assent to the cancellation, and requested Kenna to procure the policy and include it in his report of cancellations for the month. Some time after the fire David B. Wilson, as the representative of the insurance companies, called upon the plaintiff's manager for the purpose of adjusting the loss. At the request of Wilson, Mr. Stevenson, plaintiff's manager, produced all the outstanding policies so that they might be adjusted. The policy in controversy, however, was not among them, and nothing was said about it by Stevenson. At that time Stevenson told Wilson that he had but $26,000 insurance upon the property at the date of the fire, and that he had produced all of the policies of every company that he was insured in.

It was conceded at the trial that Kenna was the agent of the plaintiff for the purpose of negotiating and placing the required insurance; but it is now urged upon behalf of the plaintiff that the evidence shows that Kenna's employment was only that of a broker, and as such his authority extended solely to the placing of insurance, and not to its cancellation. With this contention we cannot agree.

[1] It is undoubtedly the rule, as suggested by counsel for plaintiff, that ordinarily the authority of an insurance broker terminates when he has placed the insurance and delivered the policies to his principal, and that under a mere employment to secure insurance no authority to cancel the same is given or implied.

[2] Authority to cancel, however, may be shown to have been conferred upon the broker, and, when shown, his acts and agreements in that behalf will be imputed to and are binding upon the insured.

[3] The evidence in the case at bar is without conflict that the plaintiff's original order for insurance in the sum of $30,000 was in effect executed by Kenna before the modified order was given, and that Stevenson, the plaintiff's manager, did not know at the time he gave the modified order whether or not the original order had been executed. Stevenson, in giving the modified order, proceeded—so he testified—"just exactly as if it (the original order) had not been executed by sending in a new order for $25,000 instead of $30,000." In brief, all that was said, done, and understood by the plaintiff through her manager and Kenna, her agent and broker, warranted Kenna in the conclusion and belief that Stevenson, in the event that the original order had not been executed, wanted merchandise insurance only to the extent of $25,000; but if, on the other hand, the original order had been executed, he wanted the merchandise insurance reduced to that amount. It is obvious that in either event the result to the plaintiff was the same, and the conclusion is unavoidable, it seems to us, that, if Stevenson intended to withhold from Kenna authority to cancel any particular policy of the insurance already placed, the general and unqualified order for a reduction to $25,000 would not have been given. However that may be, it is clear that the plaintiff's modified order as conveyed to Kenna could not have been executed except by canceling one or more of the policies previously negotiated, and it necessarily follows that the modified order impliedly authorized and required Kenna to cancel so much of the insurance placed in the first instance not exceeding $5,000, and without regard to any particular policy or company, which, if cancellation was necessary, would bring the total insurance of the plaintiff within the desired limit of $25,000. That Stevenson so understood the situation, and fully recognized the fact that the policy in question had been actually canceled prior to the fire, may be fairly deduced from his acquiescence in the surrender of the policy after the fire for the express reason that it had been previously canceled. This deduction is strengthened by the further fact that Stevenson not only failed to include this particular policy in his list of adjustable insurance, but stated to the adjuster that at the time of the fire he had all told only $26,000 of insurance. It is true that Stevenson denied having surrendered the policy for the reason stated by Kenna; but Stevenson's explanation of what occurred in that connection evidently was not accepted by the jury, and, in so far as his evidence conflicts in this and other particulars with the testimony adduced upon behalf of the defendant, it must be ignored upon this appeal.

[4] There is no merit in the contention dis-

cussed and urged by plaintiff that the contract of insurance in the case at bar cannot be considered as canceled merely because the policy in controversy was not formally and physically surrendered into the possession of the defendant prior to the fire. A contract of insurance must be governed and interpreted by the same rules which ordinarily apply to other contracts, and it will be enforced only according to the manifest intention of the parties. It is a self-evident proposition that a contract of insurance may be as readily rescinded, as it was made, by the mutual agreement of the parties or their authorized representatives: and, while the surrender of a policy of insurance by the insured and its acceptance by the insurer is usually prima facie evidence of cancellation, yet a formal physical surrender is not absolutely necessary to a rescission and cancellation of the contract. The formal surrender and acceptance of the policy is at best a piece of evidence tending to show a cancellation, and, if the fact of rescission is established (as we think it was in this case) by the mutual agreement of the parties, the rescission is as complete and effectual as if the policy had been actually indorsed "canceled," and surrendered into the possession of the defendant.

[5] It is claimed that the trial court erred in its charge to the jury wherein it was in substance declared that, if the jury found from the evidence that Kenna was directed to cancel any particular policy, he would be bound by the direction; but, on the other hand, if the jury found that Kenna was given a general, unqualified order to cancel so much of the insurance ordered as might be necessary to reduce the amount thereof to $25,000, then his designation of the policy or policies to be canceled would be binding upon the plaintiff; and (2), if the minds of the parties had met upon the subject of cancellation, it was not necessary to a valid cancellation of the policy in suit that it be physically delivered and surrendered to the defendant prior to the fire.

The charge of the court upon these subjects is in harmony with our previously expressed understanding of the law of the case, and, as it accords with our conception of the evidence, we must hold that in these particulars the charge of the court was free from error.

As heretofore indicated, we are of the opinion that, upon the whole case, the evidence was sufficient to justify the finding of the jury, which must be implied from their verdict, that the plaintiff had empowered and authorized Kenna to effect and cancel her insurance; and, this being so, the trial court did not err in charging the jury that the plaintiff would be bound by anything done by Kenna within the scope of his authority as the broker and agent of plaintiff.

[6] Complaint is made of the refusal of the trial court to give, upon behalf of the plaintiff, a requested instruction which in effect required a verdict for the plaintiff if the jury found that, at the time the order to reduce was given, the plaintiff did not know that Kenna had already executed the order first given. The record does not disclose any dispute upon the question of Stevenson's knowledge as to whether or not the original order had been executed before the modified order was given. It seems to be conceded that Stevenson had no information upon the subject, and that he did not seek to be informed thereon. The order to reduce was absolute and unqualified, and, as it was to be executed in any event, we are unable to perceive how as a matter of law the knowledge or lack of knowledge on Stevenson's part, in the particular stated in the requested instruction, could alter the situation, or modify the duties and responsibilities of the parties to the transaction.

[7] The trial court did not err in admitting testimony as to the conversation had prior to the fire between Kenna and Henry, the defendant's manager, with reference to the cancellation of the policy in controversy. This testimony tended strongly to show that the policy had been actually canceled before the fire, and it was properly admitted upon the theory, amply sustained by the evidence, that Kenna was the agent of plaintiff for the purpose of placing, and, if necessary, canceling a part of the insurance in question.

The judgment appealed from is affirmed.

We concur: **HALL, J.; KERRIGAN, J.**

(17 Cal. App. 308)

ROSE v. LELANDE, County Clerk.

(Civ. 1,070.)

(District Court of Appeal, Second District, California. Oct. 24, 1911.)

1. APPEAL AND ERROR (§§ 612, 616*)—CERTIFICATION OF TRANSCRIPT.

The clerk of the superior court is not required to certify or attest the transcript containing the reporter's notes, or the papers desired to be included therein, not included in the judgment roll.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2694, 2714–2718; Dec. Dig. §§ 612, 616.*]

2. APPEAL AND ERROR (§ 113*)—ORDERS APPEALABLE—SETTING ASIDE DEFAULT.

An order setting aside a default is not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 766; Dec. Dig. § 113.*]

Application for a writ of mandate by Ruth M. Rose against J. Lelande, Clerk of Los Angeles County, Cal. Denied.

E. M. Barnes, for petitioner.

PER CURIAM. [1, 2] This application must be denied for two reasons: First, there is no duty devolving by law upon the clerk to certify or attest the transcript containing the reporter's notes, or the papers desired to be included therein, not included in the judgment roll. Second, the notice of appeal is from an order of court setting aside a default. This is not an appealable order.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The writ is denied.

161 Cal. 466

FIDELITY & CASUALTY CO. OF NEW YORK v. FRESNO FLUME & IRRIGATION CO. (S. F. 5,541.)

(Supreme Court of California. Dec. 4, 1911. Rehearing Denied Jan. 3, 1912.)

1. Insurance (§ 129*)—Varying Insurance Policy—Representation of an Agent.

Where a written insurance policy, accepted by the insured, expressly provided that no condition or provision could be altered, except by the written consent of the president or secretary, an insured cannot escape payment of premiums due on such policy, because the insured relied upon the representations of the agent.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 129.*]

2. Insurance (§ 142*)—Actions for Premium—Ratification—Oral Contract.

Where an insurance policy provided for the payment of a certain premium which the agent orally represented would not be collected, an action upon the written policy was no ratification of the agent's oral representations.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 263, 264; Dec. Dig. § 142.*]

3. Insurance (§ 136*)—Acceptance of Policy—Effect.

An insurance policy, though not signed by the insured, is, when accepted, conclusive as to its obligations upon both parties, for under Civ. Code, § 1589, providing that the acceptance by one party of a paper signed by another purporting to embody all the terms of the contract binds both parties.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 136.*]

4. Appeal and Error (§ 1175*)—Decisions—Rendition of Judgment.

In an action on an insurance policy, findings of fact by the trial court that the agent had represented that the premium would be much less than the amount stated in the written policy and that the contract was entered into upon faith of his representation will not, where a judgment for insured has been reversed on appeal, authorize the court on appeal to render judgment for the insurer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573-4587; Dec. Dig. § 1175.*]

In Bank. Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by the Fidelity & Casualty Company of New York against the Fresno Flume & Irrigation Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Chickering & Gregory, for appellant. L. L. Cory (Goodfellow, Eells & Orrick, of counsel), for respondent.

PER CURIAM. The appeal in this case was taken to the District Court of Appeal, which rendered a judgment of reversal. A rehearing was ordered, and, upon the second submission, two of the justices adhered to the views first announced, while the third wrote an opinion for affirmance. Upon this failure to agree the appeal was transferred to this court for hearing and determination.

Our own examination of the case has satisfied us of the correctness of the disposition first made by the Court of Appeal, and we adopt the following opinion of Hall, J., giving the reasons upon which that court based its judgment of reversal.

"This is an appeal from a judgment in favor of defendant taken within 60 days after the entry thereof. The action was brought to recover a balance of premiums unpaid upon two insurance policies executed and delivered by plaintiff to defendant and accepted by defendant, whereby plaintiff insured defendant against loss or damage resulting from liability for damages or injuries to employés of defendant during the period of one year from the date of the policies. At the time of the execution of the policies a certain sum was paid as premium, based on the amount of wages that defendant estimated that it would pay to its employés during the year. The policies are attached to and made a part of the complaint. The policies clearly and without ambiguity provide that the premium to be paid shall be a certain given per cent. of the wages actually paid during the year by the defendant to its employés, and provide that, if the wages actually paid exceed the estimated wages stated in the schedule contained in the policies, the assured shall pay the additional premium earned, and, if the wages actually paid shall be less than the estimated wages stated, the insurer shall return to the assured the unearned premium pro rata. As a defense to the two causes of action set forth in plaintiff's complaint, the defendant pleaded: 'That heretofore, and on or about the 14th day of April, 1902, the plaintiff made application to the defendant to insure and indemnify it for one year from April 14, 1902, against all loss from any of the matters and things set forth in the complaint of the plaintiff herein. That the defendant thereupon informed the plaintiff that as it was then insured in another company covering all the matters and things set forth in the complaint of plaintiff, and for all such insurance paid as a premium a flat rate of $850 per annum, and the plaintiff thereupon assured the defendant that it would insure the defendant for one year upon the same terms, and it was then and there agreed upon, by and between the plaintiff and defendant, that the plaintiff would issue and deliver to the defendant, and the defendant would thereupon accept, the policies of insurance set forth in plaintiff's complaint, and that the defendant would be charged therefor and would only be required to pay a flat rate of $850 per annum in lieu and stead of the sliding scale and rate as set forth in plaintiff's complaint, and each cause of action therein, and that thereupon, and in pursuance to said agreement, and not otherwise, the policies of insurance set forth in plaintiff's complaint were so issued and delivered to the defendant, and the defendant accepted the same. That the sole inducement to the defendant leading it to accept said policies of insurance from the plaintiff was the statement and agreement and representation of the plaintiff that it would accept from the defendant the sum of $850 in full for all premiums due, or to become due, upon said policies of insurance, covering said policy year, and that no other sum of premium of any kind would be required or demanded or exacted of the defendant by the plaintiff. That at the time said policies of insurance set forth in plaintiff's complaint were issued and delivered to the defendant, the plaintiff then and there stated, represented, and assured the defendant that, notwithstanding the rate and terms of said policies of insurance, all the premiums that the defendant would be required to pay for said policies of insurance was the flat rate of $850, and in consideration of said assurances and statements the defendant was induced to, and did actually, accept said policies of insurance.' The court found the facts to be in accordance with the above allegations of the answer, and gave judgment for defendant accordingly.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"The only evidence to support the above findings of fact consisted of testimony as to statements and agreements orally made by Mr. Shepherd, the local agent of plaintiff at Fresno, to and with Mr. Shaver as the president of the defendant, and oral statements and conversations between Mr. Bosworth, the general agent of the plaintiff at San Francisco and Mr. Shepherd. This testimony as to oral negotiations and conversations, both before and at the time of the delivery of the policies, was admitted over the objections and exceptions of plaintiff, and these rulings are now relied upon as grounds for reversing the judgment.

[1] "It is not claimed that according to the written terms of the policies accepted by defendant the amount sued for is not owing from defendant to plaintiff, but it is claimed by defendant that it is not bound by the terms of the written contracts.

"The theory of defendant, upon which it claims that this case is taken out of the general rule that, where the terms of a contract are reduced to writing, parol evidence is not admissible to vary or contradict the terms of the writing, is that it would be a fraud to allow one party to enforce the covenants of the writing contrary to his oral agreement by which the other party was induced to enter into the contract. In support of this contention respondent has cited a number of cases, among which are Murray v. Dake, 46 Cal. 644, Isenhoot v. Chamberlain, 59 Cal. 637, and Eva v. McMahon, 77 Cal. 472, 19 Pac. 872.

"But conceding that a court of equity will not permit one party to enforce a written contract contrary to his oral agreement, where to do so would work a fraud upon the other party to the contract, and that the same matter may be set up in defense of an action at law on such written contract, without seeking a reformation of the written contract (Eva v. McMahon, supra; Hoppough v. Struble, 60 N. Y. 430; Walker v. Brem, 67 Cal. 600, 8 Pac. 320), it is essential that such oral agreement be made by the party to the contract or by his agent, acting with authority, actual or ostensible.

"The policies delivered to and accepted by respondent were signed by the president and secretary of plaintiff, and countersigned by its general agent, Bosworth. No evidence of the authority of Bosworth was given other than that he was the general agent of the plaintiff, and none was given as to the authority of Shepherd other than that he was the local agent of Fresno, and by the terms of his employment had no authority to change a policy in any way.

"It may be conceded that this was sufficient to clothe the agents with ostensible authority coextensive with the business intrusted to them, in the absence of any notice of a limitation thereon. But the policies accepted and retained by defendant contained the provision that 'no condition or provision of this policy shall be varied or altered by any one unless by written consent of the president or secretary of the company.' This was a limitation upon the authority of agents of which defendant had notice. That such provisions in policies are valid has frequently been decided. The matter is discussed at great length in Northern Assurance Co. v. Grand View Building Association, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, and it was there held (syllabus) that 'it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered.'

"In Cleaver v. Traders' Ins. Co., 65 Mich. 527, 32 N. W. 660, 8 Am. St. Rep. 908, the Supreme Court of Michigan said: 'Where the policy of insurance, as in this case, contains an express limitation upon the power of the agent, such agent has no legal right to contract as agent of the company with the in sured, so as to change the conditions of the policy, or to dispense with the performance of any essential requisite contained therein, either by parol or writing; and the holder of the policy is estopped, by accepting the policy, from setting up or relying upon powers in the agent in opposition to limitations and restrictions in the policy.' To precisely the same effect are Catoir v. Am. Life Ins. & Trust Co., 33 N. J. Law, 487; Weidert v. State Ins. Co., 19 Or. 261, 24 Pac. 242, 20 Am. St. Rep. 809.

"The same rule is followed in Massachusetts. 'The company which has seen fit to prescribe that the terms and conditions of its policies shall only be waived by its written or printed assent has prescribed only a reasonable rule to guard against the uncertainties of oral evidence, and by this the assured has assented to be bound.' Kyte v. Commercial Union Assurance Co., 144 Mass. 43, 10 N. E. 518.

"To the same effect are Quinlan v. Providence Washington Ins. Co., 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645, and Hankins v. Rockford Ins. Co., 70 Wis. 1, 35 N. W. 34.

"Limitations upon the power, of agents contained in a policy, similar to the limitations contained in the policies sued on in this case, were held reasonable and binding on the assured in Westerfeld v. New York Life Ins. Co., 129 Cal. 68, 58 Pac. 92, 61 Pac. 667.

"Defendant in the case at bar accepted the policies and retained them until the expiration of the insurance year, with full knowledge of their terms. There is no pretense that any misrepresentations were made as to their actual terms, or that any trick or device was resorted to by which defendant was prevented from reading them, and under such circumstances defendant must be presumed to have known the contents of the policies. New York Life Ins. Co. v. McMaster, 87 Fed. 63, 30 C. C. A. 532.

"Defendant thus knew that the agent had no power to alter the provisions of the policies without the written consent of the president or secretary of the insuring company. If defendant chose to rely upon the oral agreement of the agent, it did so at its peril. The oral representations and agreement thus made were not the representations or agreement of the plaintiff, and for this reason the findings to that effect are not sustained by the evidence, and the evidence of such oral agreement and representations should not have been admitted in evidence.

[2] "We do not think the contention of respondent that plaintiff ratified the alleged oral modification of the contracts by bringing this action can be sustained. We are unable to assent to the proposition that by attempting to enforce a written contract according to its terms plaintiff ratifies unauthorized oral modifications thereof."

[3] Upon the second argument in the Court of Appeal, and in presenting the case here, the respondent has laid special stress upon the point that, because the policy was signed by the insurer alone, and not by the insured, it is conclusive with respect to its obligations alone, and not with respect to those of the party not signing. But we think there is no merit in this position. The receipt and acceptance by one party of a paper signed by the other, and purporting to embody all the terms of a contract between the two, binds the acceptor, as well as the signer, to the terms of the paper. 9 Cyc. 260, 391; Civ. Code, § 1589; Watkins v. Rymill, L. R. 10 Q. B. D. 178, 188. Under the common-law rules of pleading, the fact that one of the parties had not executed the writing, if it were a specialty, would have required that he be sued in assumpsit, rather than in covenant; but the binding force of his obligation and the extent of his liability would not have been affected by the mere form of action. Locke v. Homer, 131 Mass. 93, 41 Am. Rep. 199.

The respondent cites a number of cases in which, notwithstanding the existence of an agreement in writing (signed by one of the parties alone), the party not signing has been permitted to prove the real agreement by parol evidence. But none of these dealt with the situation here presented, i. e., that of a writing which was intended, when signed by one of the parties, and accepted by the other, to operate as a contract embodying all of the obligations on both sides. The authorities relied upon all fall within recognized exceptions to the parol evidence rule. Some of them deal with writings which were prepared for execution by both parties, but were signed by only one. The opinion in Cavanaugh v. Casselman, 88 Cal. 543, 26 Pac. 515, while generally favorable to the contentions of the appellant, contains some references bearing upon this point. See, also, Thomas v. Barnes, 156 Mass. 581, 31 N. E. 683. Other citations are to cases laying down the well-settled rule that recitals of consideration are not conclusive. Byers v. Locke, 93 Cal. 493, 29 Pac. 119, 27 Am. St. Rep. 212. This rule is not applicable here, where the clause relied upon is not a mere recital, but is a positive undertaking to pay premiums according to a specified mode of computation. The remaining authorities of respondent, so far as they have any bearing on the point under discussion, have to do with writings which were not intended to embody the entire agreement of the parties, but were either memoranda in the natureo f receipts or were silent with respect to some of the terms upon which the parties had agreed. Mobile R. R. Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527; Bank of Palmer, L. R. 1897 App. Cas. 540; Routledge v. Worthington Co., 119 N. Y. 592, 23 N. E. 1111; Rapp v. Giddings, 4 S. D. 492, 57 N. W. 237; Ames v. S. P. Co., 141 Cal. 728, 75 Pac. 310, 99 Am. St. Rep. 98.

On the other hand, the contention of appellant that a policy of insurance, when accepted by the insured, is conclusive evidence of the engagements of the parties with respect to the obligations declared in it, and may not be contradicted by evidence of previous verbal arrangements, is abundantly sustained. Ins. Co. v. Mowry, 96 U. S. 544, 24 L. Ed. 674; Thompson v. Ins. Co., 104 U. S. 252, 26 L. Ed. 765; Northern Assur. Co. v. Grand View Ass'n, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213; L. & L. & G. Ins. Co. v. Lumber Co., 11 Okl. 579, 69 Pac. 936; Niagara Fire Ins. Co. v. Johnson, 4 Kan. App. 16, 45 Pac. 789; Franklin F. Ins. Co. v. Martin, 40 N. J. Law, 568, 29 Am. Rep. 271; Moore v. State Ins. Co., 72 Iowa, 414, 34 N. W. 183; U. S. Cas. Co. v. Charleston, etc., Mfg. Co. (C. C.) 183 Fed. 238. The reasoning of these cases lends no support to the respondent's supposed distinction between the obligations of the party signing and those of the party not signing the policy. Indeed, the case last cited is, in this respect, precisely like the one before us.

[4] We cannot, however, give assent to appellant's claim that judgment in its favor should be ordered. The findings, as they stand, would not support such a judgment. Under such circumstances, it has been the usual practice of this court, where a reversal was found necessary, to send the case back for a new trial. There may be exceptional instances justifying a different procedure (see Finnell v. Goodman & Co. Bank, 156 Cal. 18, 26, 103 Pac. 483); but we see no reason, in the present appeal, for departing from the ordinary course.

The judgment is reversed.

161 Cal. 491

HAUGHAWOUT v. PERCIVAL.

(L. A. 2,768.)

(Supreme Court of California. Dec. 6, 1911.)

1. Municipal Corporations (§ 289*)—Street Assessments—Compliance with Statutes.

Proceedings for street assessments must be based on a compliance with the statute authorizing the assessment, especially in so far as the statute provides for the giving of notice or other steps precedent to jurisdiction to order the work done.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 762–765; Dec. Dig. § 289.*]

2. Municipal Corporations (§ 294*)—Street Assessments—Notice—"Near."

The word "near," in the Vrooman act (St. 1885, p. 147), as amended by St. 1891, p. 196, providing for the posting of notices in street assessment proceedings "on or near the chamber door of" the city council, etc., is a relative term, and its meaning must be determined by reference to the subject-matter, and the posting of the notices on a bulletin board in the city hall in which the council chamber was located was sufficient where such bulletin board was in plain view from the main entrance of the hall, and so placed as to be likely to bring the notices to the attention of persons visiting the council chamber, though the bulletin board was far removed from the council chamber.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 776–788; Dec. Dig. § 294.*

For other definitions, see Words and Phrases, vol. 5, pp. 4687–4690.]

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by W. J. Haughawout against Catherine A. Percival. From a judgment for plaintiff, defendant appeals. Affirmed.

Leslie R. Hewitt and Lee, Chase, Overton & Valentine, for appellant. Henry J. Stevens and O'Melveney, Stevens & Millikin, for respondent.

SLOSS, J. The defendant appeals from a judgment foreclosing the lien of a street assessment for sewer work done in the city of Los Angeles. The proceedings were had under the Vrooman act. St. 1885, p. 147. Section 3 of that act, as amended in 1891 (St. 1891, p. 196), provides that the resolution of intention passed by the city council shall be "posted conspicuously for two days on or near the chamber door of said council." Section 5 requires that the notice inviting sealed proposals shall be "posted conspicuously for five days on or near the council chamber door of said council," and that notice of award of contract shall be posted in the same manner. St. 1891, pp. 199, 200. The complaint alleged a posting of the various documents for the required time "conspicuously near the chamber door of the council." The answer denied such posting. The finding was in favor of the plaintiff. The appellant attacks this finding as unsupported, and the only question argued is whether the court was justified in determining that the various postings were made near the council chamber door.

The case was submitted on a stipulation of facts, which described with particularity the place where the resolution and notices were posted. The room or chamber in which the city council met is on the second floor of the city hall of the said city of Los Angeles. The city hall is situated on the easterly line of Broadway. The main entrance of the building is on the Broadway frontage, access to the interior being had through a door opening from a porch or portico, which runs for a length of some 55 feet in a northerly and southerly direction along the outer side of the front wall of the building. To reach the council chamber, it is necessary to enter the building through said door, and then, after proceeding to the stairs or elevator, ascend to the second floor, and walk to said chamber from the head of the stairs or the place where the elevator stops. By way of the stairs this would require a journey of about 40 feet from the main entrance door of the building to the foot of the stairs, 26 feet in mounting the stairway, and 30 feet on the second floor from the stairs to the door of the council chamber. One going by elevator would be required to walk 56 feet on the main floor, and, after ascending 18 feet in the elevator, he would land on the second floor at a point 12 feet from the council chamber door. Either route involves several turns or changes of direction. The resolution and notices were posted upon a bulletin board situated upon the portico above referred to at a point about 20 feet northerly from the main entrance door of the building. All notices required to be posted by city officials were during the time of these proceedings, and for several years theretofore, posted upon this board. Any paper so posted would be in plain view of any one entering the city hall through the main entrance door, but notices could not be read by one standing at said door. There is a side entrance to the city hall, which is occasionally used by some of the public, but mainly by city officers and employés. The bulletin board would not be visible from this side entrance door, but the Broadway entrance is the one generally used by the public, and the customary and usual way by which the public reached the room in which the city council met is to pass through said Broadway or front entrance, and thence by way of the stairs or the elevator, to the upper floor.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] Was a paper posted upon the bulletin board thus situated posted "near the chamber door of the council"? Proceedings for street assessments, being in invitum, must, in order to charge the property of the owner, be based upon a compliance with the provisions of the statute authorizing the assessment, in so far, at least, as those provisions have to do with the giving of notice or other steps precedent to the jurisdiction of the board to order the work done. Himmelmann v. Cahn, 49 Cal. 285; Brooks v. Satterlee, 49 Cal. 289; Dehail v. Morford, 95 Cal. 457, 30 Pac. 593. In the case last cited the court says that "it is a fundamental principle, in proceedings of this character, that every requirement of the statute which has a semblance of benefit to the owner must be observed, in order to give to the municipality jurisdiction in the premises." Accordingly, if the notice is required by the statute to be posted at a certain place, a posting at a different place will not support an attempt to create a lien. This proposition, which, as above suggested, is elementary, is conceded by the respondent.

But, in looking to the statute to see what its requirements are, we are not compelled to give its terms the most restricted and literal construction. Section 53 of the Vrooman act, as amended by Laws 1891, p. 466, provides that "the provisions of this act shall be liberally construed to promote the objects thereof." The provisions regarding the posting of notices, and the like, are, therefore, to be read in the light of the purposes sought to be accomplished.

[2] The statute directs that the posting shall be "on or near" the council chamber door. The word "near" does not signify any precise measure of distance. It is a relative term, and its meaning must be determined with reference to the subject-matter. Kirkbride v. Lafayette Co., 108 U. S. 211, 2 Sup. Ct. 501, 27 L. Ed. 705; Barrett v. Schuyler Co., 44 Mo. 202. In this case, the subject-matter is the action of the city council in initiating and carrying on proceedings for street improvements. The object of the posting is to give notice of the steps taken to owners of property to be affected by the work, and the Legislature has presumably prescribed a method which in its judgment, would be likely to bring notice to such owners. The theory underlying the requirement that the posting should be made "on or near" the door of the council chamber was, no doubt, that owners whose property might be subjected to liens would, in seeking to learn whether proceedings had been instituted, and what they were, naturally visit the place of meeting of the council, the body charged with the duty and power of ordering the improvement. Since no exact place for posting was prescribed, it is reasonable to interpret the language of the law as requiring a posting in such location, convenient to and in the vicinity of the council chamber, as would be likely to catch the eye of any one approaching the chamber. It cannot be said, as matter of law, that the location must be within 10, or 50, or 100 feet of the door of the council chamber. Whether the place be "near" such door or not is, in each case, a question of fact to be decided upon the considerations suggested.

In the present instance we think the conclusion of the trial court was not without fair support from the facts shown. The council chamber was in the city hall. The bulletin board upon which the papers were posted was in a part of said city hall, and in plain view from its main entrance. This entrance was the one generally used by those who had occasion to visit the council chamber, and it was the board upon which notices were customarily posted. It was therefore so placed as to be likely to bring notices affixed to it to the attention of persons having occasion to visit the council chamber. Of course, if this place was not "near the door of the council chamber," the mere fact that a notice there posted would be as likely to be seen by persons interested as one posted at the point designated by the statute would not save the proceedings from failure. But, as we have said, the use by the Legislature of the indefinite term "near" necessarily left to the officials conducting the posting a measure of latitude. This, we think, was not exceeded by the posting here made.

The authorities cited by the appellant are not, we think, in conflict with this conclusion. It would not be profitable to review them, since the holding, in each instance, is based upon statutory language differing from that before us, and upon a state of facts unlike that here presented. It may, however, be said that the reasoning of most of these cases is in harmony with the views we have announced.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

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161 Cal. 500

WRIGHT v. ANGLO-CALIFORNIAN BANK, Limited. (S. F. 5,620.)

(Supreme Court of California. Dec. 7, 1911.)

1. Pleading (§ 129*) — Cross-Complaint — Admissions.

The allegations of a cross-complaint in a suit to quiet title, when not denied, stand as admitted facts.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 270–275; Dec. Dig. § 129.*]

2. Taxation (§ 734*) — Sales — Notice to Owner.

Under Pol. Code, § 3897, requiring a tax collector, before selling for the state land sold to it for taxes, to mail a copy of notice of sale to the person to whom the land was last assessed next before the sale at his last known post office address, the mailing of the notice, where the address is known or shown on the assessment roll, is essential to the validity of a sale by the state of land purchased by it for delinquent taxes.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1470–1473; Dec. Dig. § 734.*]

Department 1. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by E. R. Wright against the Anglo-Californian Bank, Limited. From a judgment for defendant, plaintiff appeals. Affirmed.

Preston & Preston, for appellant. Thomas, Pemberton & Thomas and Jordan, Rowe & Brann, for respondent.

SHAW, J. The land in controversy was sold to the state on June 28, 1901, for nonpayment of taxes. No redemption was made, and on November 4, 1907, in pursuance of proceedings for that purpose, the tax collector of the county sold and conveyed the same to the plaintiff. The plaintiff then began this action to quiet title. The complaint was in the usual form alleging that plaintiff was the owner of the land, but not giving the details of his title. One Fechheimer was the owner of the land on January 19, 1901, and on that day he executed a deed purporting to convey the same to defendant. The defendant, by cross-complaint, set up the title thus acquired asking judgment that plaintiff is not the owner of the land and that defendant is the owner thereof. Judgment was given for defendant. Plaintiff appeals from the judgment and from an order denying a new trial.

The cross-complaint alleges that the defendant was the party to whom the land was last assessed next before the sale and deed by the collector to the plaintiff, that its address was then, is now, and for many years has been, San Francisco, Cal., that said address was well known to said tax collector, and that no copy of the notice of the proposed sale of the land by the state was mailed to the defendant prior to the sale, as required by section 3897 of the Political Code.

[1] These allegations are not denied, and they therefore stand as admitted facts of the case.

[2] This brings the case within the rule established by Smith v. Furlong, 117 Pac. 527, Campbell v. Moran, 119 Pac. 89, decided November 9, 1911, and Smith v. Boston, 119 Pac. 91, decided November 10, 1911. The mailing of this notice, where the address is known, or shown on the assessment roll so that it can be ascertained, is essential to the validity of a sale by the state of lands purchased by it for delinquent taxes. The judgment was therefore correct. It is not necessary to notice the other points presented.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

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161 Cal. 481

CLOPTON v. CLOPTON et al. (L. A. 2,912.)

(Supreme Court of California. Dec. 5, 1911.)

Husband and Wife (§ 299*) — Separate Maintenance—Decree—Notice.

Plaintiff recovered, in an action for separate maintenance, a decree against her husband for payment of a certain sum. Grantees of said defendant were made parties, and all the parties defendant appealed from an order denying a new trial. Pending the appeal, plaintiff obtained an order on an oral motion, requiring the defendant to pay a certain sum as attorney's fees. No notice was given to the grantees of the husband. *Held*, that an order granting the allowance and providing that it should be a lien on the property conveyed by the husband to his codefendants, entered without any notice to such codefendants, will be reversed.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 299.*]

Department 1. Appeal from Superior Court, Los Angeles County; Z. B. West, Judge.

Action by Jennie M. Clopton against Hoggatt Clopton, Pearl Clopton, and another. From a judgment for plaintiff, the last-named defendants appeal. Reversed.

Kendrick & Ardis, for appellants. H. T. Gordon and John E. Daly, for respondent.

ANGELLOTTI, J. Plaintiff recovered judgment in an action brought by her to obtain a decree requiring defendant Hoggatt Clopton, her husband, to pay monthly a certain sum for her maintenance and support. The judgment therein required said defendant to pay her $75 per month for maintenance, as well as $250 for her counsel fees. Pearl Clopton and Hugh Clopton were parties defendant in said action; they being the respective grantees of said Hoggatt Clopton of certain parcels of real property owned by him at the time of his marriage to plaintiff; the theory of plaintiff being that the conveyances to them by her husband were without consideration, and were made to enable him to escape her claim for support and maintenance. On July 1, 1910, the defendants' motion for a new trial was denied. An appeal was taken by all the defendants from the order denying the motion for a new trial, which appeal is still pending.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

During the pendency of this appeal, plaintiff gave to the defendants written notice of a motion, to be made November 14, 1910, for an order requiring defendant Hoggatt Clopton to pay plaintiff $500 as attorney's fees for prosecuting the suit on appeal, and $50 as suit money in preparing her brief and otherwise appearing in the Supreme Court.

On November 14, 1910, pursuant to such notice, plaintiff orally moved the court for an order requiring defendant Hoggatt Clopton to pay to plaintiff $500 for her attorney's fees on such appeal, and $100 per month for alimony and support of plaintiff pending such appeal, and $50 suit money for preparing her briefs and otherwise appearing in the Supreme Court. Nothing was said, either in the written notice or in the motion itself, about making the land conveyed to Pearl Clopton and Hugh Clopton liable for any of the amounts that might be ordered paid, or subjecting any of such land to a lien for the payment thereof.

Neither defendant Pearl Clopton nor Hugh Clopton is shown to have taken any part in the proceedings on the hearing of the motion, apparently assuming that no relief was asked against them or their property, which they were entirely warranted in doing, in view of the terms of both notice and oral motion. Defendant Hoggatt Clopton alone objected to the introduction of evidence offered by plaintiff, excepted to rulings made on such objections, and introduced evidence in opposition to the making of the order.

The motion being submitted for decision, the court made its order, directing the payment of certain amounts by Hoggatt Clopton to plaintiff for expenses of appeal, and counsel fees on appeal, and providing "that this allowance be, and the same is hereby, declared a lien upon all the property formerly standing in the name of said defendant, conveyed by him to his codefendants Pearl and Hugh Clopton, and which was released from the former judgment in favor of the plaintiff against said defendant, situate in the county of Orange." Pearl Clopton and Hugh Clopton alone appeal from this order, asking that it be reversed as to them.

No argument has been made or brief filed in support of the order, in so far as it purports to impose any lien for the allowance made upon the property conveyed to and standing in the name of either Pearl Clopton or Hugh Clopton.

It is unnecessary for the purposes of this appeal to consider whether, upon a motion of this character, property standing in the name of another than the husband, and claimed by such other, can be subjected, as against such other person, to a lien in favor of the wife for any allowance made thereon, or whether there was any legal evidence adduced on the hearing of the motion warranting the imposition of such a lien in this case. Certainly no such lien can be adjudicated without notice to such claimant that such relief is asked. An application for counsel fees, etc., pendente lite, "though it cannot be considered as a separate suit, is a proceeding for a separate judgment," and notice of the application and an opportunity to be heard thereon are essential (Baker v. Baker, 136 Cal. 302, 68 Pac. 971), and such an application must be determined upon the evidence introduced on the hearing thereof. The only notice afforded appellants as to the claim of plaintiff on this motion was such as was given them by the written notice of the motion, and possibly the motion itself, orally made in open court at the time fixed, if they were present in court at that time, in person or by their attorneys of record, and made no objection that no proper written notice thereof had been given. But there was no hint in either the notice or the motion itself that any such relief was asked, and there is nothing in the record on this appeal warranting the conclusion that appellants were at any time advised that plaintiff sought anything more than an order requiring Hoggatt Clopton to pay to plaintiff certain amounts of money. As said by their attorneys in their brief, "that part of the order (the part adjudicating a lien on the property they claim) does not appear to be on motion of plaintiff, but upon the court's own motion, and without any notice."

The portion of the order reading as follows, viz.: "That this allowance be, and the same is hereby, declared a lien upon all the property formerly standing in the name of said defendant, conveyed by him to his codefendants Pearl and Hugh Clopton, and which was released from the former judgment in favor of the plaintiff against said defendant, situate in the county of Orange"—is, as to the appellants Hugh Clopton and Pearl Clopton, reversed.

We concur: SHAW, J.; SLOSS, J.

161 Cal. 425

JACOBSON v. OAKLAND MEAT & PACKING CO. (S. F. 5,484.)

(Supreme Court of California. Dec. 1, 1911. Rehearing Denied Dec. 28, 1911.)

1. NEGLIGENCE (§ 136*)—JURY QUESTIONS—CONTRIBUTORY NEGLIGENCE.

The existence of contributory negligence is generally a jury question.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 333–336; Dec. Dig. § 136.*]

2. MASTER AND SERVANT (§ 236*)—INJURY TO EMPLOYÉ — CONTRIBUTORY NEGLIGENCE — MOMENTARY FORGETFULNESS.

Ordinarily an employer is not liable for injury sustained by an employé through the latter's momentary forgetfulness of danger, but, under particular circumstances, such forgetfulness may not constitute contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 681; Dec. Dig. § 236.*]

3. MASTER AND SERVANT (§ 261*)—INJURY TO EMPLOYÉ — COMPLAINT — SUFFICIENCY—CONTRIBUTORY NEGLIGENCE.

A complaint for personal injury to an employé caused by unguarded cogwheels did not show that he was guilty of contributory negligence, where it alleged that the wheels were dangerous to a vice principal's knowledge, that plaintiff was informed that a guard had been removed for repairs, but that he was led by the vice principal to believe that it would be replaced the same day and before it should be necessary for plaintiff to work near the cogwheels; that plaintiff did not know until after his injury that the guard was not replaced; that one hour was a reasonable time for replacement of the guard; that because of knowledge of such facts and of such assurance plaintiff did not tax his mind with the fact of the removal; and that absence of the guard was not apparent to plaintiff on account of dimness of the light, etc.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 849–854; Dec. Dig. § 261.*]

4. MASTER AND SERVANT (§ 258*)—INJURY TO EMPLOYÉ — COMPLAINT — SUFFICIENCY—NEGLIGENCE.

A complaint for personal injury to an employé caused by unguarded cogwheels, stating that the vice principal controlled plaintiff's services and led him to believe that a guard removed from the wheels would be promptly replaced, that the vice principal knew of the danger from the unprotected wheels, and failed to tell plaintiff that the guard was not replaced sufficiently, shows a breach of duty to plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816–836; Dec. Dig. § 258.*]

5. MASTER AND SERVANT (§ 121*)—NEGLIGENCE TOWARD EMPLOYÉ—UNGUARDED COGWHEELS.

A vice principal was negligent toward an employé in failing to either replace a guard over dangerous cogwheels or to warn him of the peril involved in working near them.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228–231; Dec. Dig. § 121.*]

6. MASTER AND SERVANT (§ 217*)—INJURY TO EMPLOYÉ—ASSUMPTION OF RISK.

To bar recovery by an employé for an injury caused by unguarded cogwheels, it must appear that he knew, not only the unsafe condition, but consented to work in the place of danger after fully comprehending the risks.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574–600; Dec. Dig. § 217.*]

7. MASTER AND SERVANT (§ 260*) — COMPLAINT—ASSUMPTION OF RISK—ANTICIPATION OF DEFENSE.

An employé suing for personal injury need not anticipate a defense of assumption of risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 844–848; Dec. Dig. § 260.*]

8. MASTER AND SERVANT (§ 121*) — COGWHEELS—DUTY TO GUARD.

An employer must adopt and keep in place a simple device constructed to guard dangerous cogwheels.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228–231; Dec. Dig. § 121.*]

9. MASTER AND SERVANT (§ 258*)—INJURY TO EMPLOYÉ—PLEADING—SUFFICIENCY.

A complaint for personal injury to an employé caused by unguarded cogwheels was not uncertain in stating that plaintiff was led by a vice principal to believe that a guard removed from the wheels would be replaced immediately.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 258.*]

Department 2. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Jacob Jacobson against the Oakland Meat & Packing Company. Judgment for defendant, and plaintiff appeals. Reversed, with instructions.

Fitzgerald & Abbott, for appellant. L. A. Redman, for respondent.

MELVIN, J. In this case, in which plaintiff sought damages for personal injuries, the court sustained the demurrer to the amended complaint, and, plaintiff not desiring further to amend, judgment of dismissal was entered accordingly. From said judgment this appeal is taken, and the only question presented to this court relates to the correctness or error of the trial court in the ruling on the demurrer.

The complaint, after alleging the corporate capacity of the defendant, asserts that on October 6, 1908, and for about one year prior thereto, plaintiff was and had been continuously employed by defendant as a night watchman; that one Howard Monson was defendant's chief engineer, having the right at all times to control and direct the services of plaintiff; that one of plaintiff's duties as night watchman was to operate a certain pump which was moved by a powerful electric motor; that plaintiff had performed this duty for about a year prior to October 6, 1908; that, in operating the pump, it was necessary for plaintiff to open a certain oil cup after he had turned on the power; "that, in order to open said oil cup, it was necessary for plaintiff to lean and reach over and across two cogwheels, one large and one small, which cogwheels, when said power was on, revolved each in and upon the other; that at the time plaintiff began to operate said pump as aforesaid, and up to and including the 2d day of October, 1908, or thereabouts, said cogwheels were completely covered and protected by an iron guard; that, when said cogwheels were so protected and guarded, there was no danger attendant upon leaning or reaching over or across said cogwheels, when the same were in motion, in order to open said oil cup, or at all; that on or about the said 2d day of October, 1908, said Howard Monson, acting in the course of his said employment, removed said iron guard from said cogwheels for the purpose of having said guard repaired, and that said Howard Monson did not, nor did any other person, replace said guard, or put any other guard over said cogwheels, or in any wise protect or guard said cogwheels until after the injury to plaintiff; * * * that said cogwheels, when they were not guarded, were dangerous to plaintiff's life and limb, and that said Howard Monson knew and was aware of said danger; that plaintiff was informed that said guard was removed at or about the time of said removal, and was informed that said guard was removed for the purpose of having the same repaired, and was led by said Howard Monson to believe that said guard would be repaired immediately and replaced on the same day it was removed, and before it should be necessary for plaintiff to again operate said pump, and plaintiff did not know until after the injury to plaintiff herein described that said guard was not replaced as plaintiff had been led by said Howard Monson to believe that it would be; that a reasonable time for repairing said guard and for replacing the same was one hour, and that plaintiff knew at the time said guard was removed that one hour was a reasonable time for said repair and replacing, and because of said knowledge, and because he was led to believe that said guard would be replaced before he should be required to again operate said pump, plaintiff did not tax his mind with the fact of said removal, and wholly forgot before the injury * * * that said guard had been removed; that plaintiff was not informed by said Howard Monson or at all that said guard was not replaced within one hour, or at any other time until after the injury to plaintiff; * * * that the light in said pumping house was dim, and that the fact that said guard was not replaced was not apparent to plaintiff because of the said dimness of the light in said pumping house; that said Howard Monson, acting in the course of his said employment, knew that said guard was not replaced, and knew that plaintiff relied upon him to replace said guard, and knew that the absence of said guard would not be apparent to plaintiff, and knew of the danger to which plaintiff was exposed, but that said Howard Monson wholly failed and neglected to replace said or any guard over said cogwheels, and wholly failed and neglected to warn plaintiff of his danger, and plaintiff was not warned of any danger by said Howard Monson or at all." Then follow averments that on the night of October 6, 1908, plaintiff entered the pumping house and turned on the power as usual; "that he was not aware of the fact that said guard had not been replaced, and the absence of said guard was not apparent to him; that, after turning on said power, he leaned and reached over and across said cogwheels as he had been accustomed to do for about one year for the purpose of opening said oil cup; that as he leaned and reached over and across said cogwheels his sleeve was caught by said cogwheels, and his right arm was drawn in and between said cogwheels and broken in many places; * * * that said injury to plaintiff was caused by and resulted from the fact that said cogwheels were not guarded, and by the fact that plaintiff was not warned of the absence of said guard, and was caused by and resulted from the negligence and carelessness of the said Howard Monson, acting in the course of his said employment." The complaint closes with allegations of the permanent and complete character of plaintiff's injuries and a prayer for damages in the sum of $50,000.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] The court's ruling in sustaining the demurrer is, in effect, a finding that as matter of law the complaint alleges contributory negligence on plaintiff's part. While a court must sustain a demurrer to a complaint when the facts stated show that in any view of the law the plaintiff is guilty of contributory negligence, appellant contends that he stated in his pleading a case sufficient, if all of his allegations were proven, to go to a jury. That the existence or absence of contributory negligence is in general a matter primarily for the jury there can be no doubt. The rule with reference to the respective functions of the court and jury in cases involving a determination whether contributory negligence appears from a given state of facts or not is thus stated in Wahlgren v. Market St. Ry. Co., 132 Cal. 663, 62 Pac. 310, 64 Pac. 993: "If but one conclusion can reasonably be reached from the evidence, it is a question of law for the court; but if one sensible and impartial man might decide that the plaintiff had exercised ordinary care, and another equally sensible and impartial man that he had not exercised such care, it must be left to the jury. McKune v. Santa Clara Co., 110 Cal. 480 [42 Pac. 980]." That the guard over the cogwheels had been removed was a fact of which plaintiff was aware, but he knew that the repairs would require only a short time, and relied upon Monson to keep his word to the effect that the guard should be replaced on the very day of its removal. Respondent's counsel insist that

this is a case of mere forgetfulness on the part of appellant. His only excuse for failure to observe the absence of the guard, they say, was that he had forgotten the circumstance of its removal. Forgetfulness, they insist, is as matter of law negligence which will defeat recovery.

[2] It is true that one employed in the vicinity of a known danger cannot ordinarily recover from his employer for injuries sustained by reason of a momentary forgetfulness of the danger, but it does not follow by any means that under all circumstances does failure to remember a source of peril constitute negligence. Appellant's counsel admit the force of the general rule announced in such cases as Towne v. United Electric Co., 146 Cal. 770, 81 Pac. 124, 70 L. R. A. 214, Brett v. S. H. Frank & Co., 153 Cal. 271, 94 Pac. 1051, Davis v. California St. Cable R. R. Co., 105 Cal. 135, 38 Pac. 647, McGraw v. Friend & Terry Lumber Co., 120 Cal. 575, 52 Pac. 1004, and Ergo v. Merced Falls G. & E. Co., Sac. No. 1751, 119 Pac. 101 (opinion filed November 9, 1911), but they contend that the circumstances of every one of those cases are vastly different from the facts pleaded and for the purposes of demurrer admitted in the case at bar. Undoubtedly there was one element in all of those cases which is missing in this one, and that is the plaintiff's familiarity with the danger which he forgot. Plaintiff in this case had relied on his understanding with Monson that the guard would be replaced, and lulled by his confidence in the performance of a clear duty by his superior had forgotten its removal. The rule with reference to forgetfulness of a known danger has been declared by this court in Giraudi v. Electric Imp. Co., 107 Cal. 125, 40 Pac. 110, 28 L. R. A. 596, 48 Am. St. Rep. 114, as follows: "It is said that, if one was aware of a fact which should have put him upon his guard, he cannot rebut the presumption of contributory negligence by showing that he momentarily forgot it. This is true as a general proposition, but, like all other rules upon this subject, it must have a reasonable construction. To forget is not negligence, unless it shows the want of ordinary care, and it is a question for the jury. Illustrations of this proposition are found in the cases of brakemen who are injured by obstructions over or near the track of the road. They have been allowed to recover, although it is shown that they knew of the obstruction, on the ground that they cannot be expected to retain at all times, a complete outline of the track, and because, in the hurry of their work, they would not be likely to keep these things in mind. That is, to forget, under the circumstances, did not prove absence of ordinary care. See Dorsey v. Phillips, etc., Co., 42 Wis. 583." In other jurisdictions mere forgetfulness of even a well-known danger or object which may cause injury is held not necessarily to be negligence. In Dwyer v. Salt Lake City, 19 Utah, 525, 57 Pac. 536, this question is discussed, and some of the leading authorities are cited. In that case the proof showed that on a dark night, in passing from his house to his buggy on the street, plaintiff was injured by falling over an embankment, the existence of which was well known to him, but had been forgotten. The court said: "Although the respondent had previous knowledge of the condition of the sidewalk and embankment, and undertook to cross the embankment on a dark night, and momentarily forgot about it, yet such knowledge, undertaking, and forgetfulness were not conclusive evidence of such contributory negligence as would bar a recovery. He was not bound to absolutely refrain from using the sidewalk and street in front of his premises merely because of his knowledge of its dangerous condition. Such knowledge, and the manner and time of using the sidewalk, had a very important bearing in determining whether or not the respondent was in the exercise of proper care when the accident occurred, but did not as matter of law establish contributory negligence. He was bound to exercise such care as a man of ordinary prudence and caution would, under similar circumstances, have exercised, and, there being evidence tending to show that the injured, just before falling over the embankment, had proceeded cautiously, whether or not he exercised due care, was, under all the circumstances, a question of fact to be submitted to the jury, under proper instructions, and not one of law for the court." While the rule announced in the opinion last quoted is perhaps somewhat more liberal than the one followed in California (McGraw v. Friend & Terry Co., supra; Davis v. Railroad Co., supra), the quotation illustrates the unwillingness of courts to declare that forgetting a known danger always amounts to negligence.

[3] The complaint before us, measured by California precedent, states a cause of action.

[4] It is insisted that the complaint contains no statement of Monson's duty to replace the guard over the cogwheels. There is a pleading to the effect that Monson directed and controlled plaintiff's services, and averments, also, that he led plaintiff to believe the guard would be promptly replaced; that Monson knew of the danger from the unprotected wheels; and that Monson failed to tell plaintiff that the guard was not replaced according to promise, within an hour of its removal. While these statements do not amount to a declaration of Monson's obligation to replace the guard, they are equivalent to a pleading that he was deficient in his duty to plaintiff.

[5] Representing, as he did, plaintiff's principal, it was his duty either to restore the protecting agency over the dangerous cogs

or to warn plaintiff of the peril involved in working near them. By failing to perform one of these duties he was guilty of negligence. Whether plaintiff knew the danger from the uncovered machinery or not (and the peril of such cogs is not necessarily obvious for it depends largely upon the direction in which the wheels revolve) Monson's failure to undeceive plaintiff with reference to the prompt restoration of the guard amounted, under the circumstances of this case, as pleaded, to a breach of duty in permitting Jacobson to work in a dim and dangerous place without warning of the risk incurred.

[6] And this becomes more emphatically apparent when we consider that, to charge plaintiff with such conduct as would bar recovery, it must appear that he knew not only the unsafe condition of the machine without the guard, but consented to work in the place of danger after full comprehension and appreciation of the risks which he thereby incurred. Section 1970, Civ. Code; Silveira v. Iversen, 128 Cal. 192, 60 Pac. 687; Morgan v. Robinson Co., 157 Cal. 354, 107 Pac. 695.

[7] It was not the pleader's duty to allege in the complaint the nonexistence of the circumstances which would prevent recovery under the Code section cited above. A plaintiff is not required to anticipate a defense. Woodroof v. Howes, 88 Cal. 194, 26 Pac. 111; Jaffe v. Lilienthal, 86 Cal. 92, 24 Pac. 835.

[8] Respondent argues that neither by contract nor by law was the corporation under any obligation to keep the cogwheels covered. On the contrary, it is the duty of one owning machinery to exercise reasonable care for the protection of employés who operate it. This complaint charges that there was no danger to the person oiling the machinery when the iron guard was in place, but that the risk incurred by him was very great when the wheels were exposed. Evidently there was a simple device for the complete protection of respondent's servants, and this it was the corporation's duty to adopt and keep in place. Larsen v. Bloemer, 156 Cal. 755, 106 Pac. 62; Quinn v. Electric L. Co., 155 Cal. 503, 101 Pac. 794; Skelton v. Pacific Lum. Co., 140 Cal. 511, 74 Pac. 13.

[9] We find no merit in respondent's special demurrer for uncertainty to that part of the complaint in which it is averred that appellant was "led by said Howard Monson to believe that said guard would be replaced immediately." This was an allegation of an ultimate fact quite sufficient to apprise defendant of the issue which it was called upon to meet. Greater particularity, which would probably involve the pleading of evidentiary matter, is not required. 2 Labatt on Master & Servant, § 863.

The complaint stated a case sufficient, if proven, to go to a jury, and in that pleading negligence on plaintiff's part sufficient to defeat recovery does not appear as matter of law from the facts alleged.

The judgment is reversed, with instructions to the court below to overrule the demurrer to the complaint.

We concur: HENSHAW, J.; LORIGAN, J.

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161 Cal. 511

GOSEWISCH v. DORAN et al. (L. A. 2,761.)

(Supreme Court of California. Dec. 9, 1911.)

1. LIBEL AND SLANDER (§ 38*)—"PRIVILEGED COMMUNICATION"—ALLEGATIONS IN PLEADINGS.

Civ. Code, § 45, defines libel as a false and unprivileged communication exposing a person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned and avoided, or which has a tendency to injure him in his occupation. Section 47 enumerates as a privileged publication one made in any legislative or judicial proceeding, or in any other official proceeding authorized by law. *Held* that, where minority stockholders in a corporation sued plaintiff as its president for alleged illegal management, an allegation in the complaint that plaintiff was guilty of misappropriation and embezzlement of the corporation's funds was relevant to the inquiry, and was therefore privileged, even if section 47 be construed as only making such allegations in a judicial proceeding privileged as are relevant to the inquiry.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 120; Dec. Dig. § 38.*

For other definitions, see Words and Phrases, vol. 6, pp. 5591–5598; vol. 8, p. 7764.]

2. LIBEL AND SLANDER (§ 51*)—PRIVILEGED PUBLICATION — JUDICIAL PROCEEDINGS — MALICE.

Where an alleged libelous allegation in a complaint charging the president of a corporation with misappropriation and embezzlement of the corporation's funds was absolutely privileged, it could not be rendered actionable because malicious; malice being irrelevant under such circumstances.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 149, 150; Dec. Dig. § 51.*]

3. CORPORATIONS (§ 320*)—ABATEMENT AND REVIVAL (§ 9*)—STOCKHOLDERS—RIGHT TO SUE—PERSONS IN CONTROL—ANOTHER ACTION PENDING.

A minority stockholder of a corporation may sue to enforce a claim of the corporation against one who is president of the corporation and who is in control of the board of directors, and can thus prevent an action in the name of the corporation itself.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1429–1430; Dec. Dig. § 320;* Abatement and Revival, Cent. Dig. §§ 73–75; Dec. Dig. § 9.*]

4. LIBEL AND SLANDER (§ 97*)—PRIVILEGE—PLEADING—COMPLAINT.

While ordinarily, privilege is a defense to an action for libel, which must be affirmatively pleaded, yet if the complaint shows on its face that the publication was privileged, the point may be raised by demurrer.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 234–236; Dec. Dig. § 97.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by W. R. Gosewisch against J. J. Doran and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Munson & Barclay and A. J. Mitchell, for appellant. William Fleet Palmer, Valentine & Newby, Frank James, Smith & Smith, and Williams, Goudge & Chandler, for respondents.

SLOSS, J. The plaintiff instituted this action to recover damages for libel. The defendants demurred to an amended complaint, and the court below sustained their demurrers and gave judgment in their favor. The plaintiff appeals.

The amended complaint charges that in January, 1909, the defendants, as plaintiffs, commenced an action in the superior court of Los Angeles county, against the plaintiff herein and others as defendants. In said action they "maliciously and without reasonable or probable cause" filed a complaint in which they charged plaintiff with the misappropriation and embezzlement of the funds of a corporation of which they were stockholders and the plaintiff was a director and president. A copy of the complaint in said action is annexed to and made a part of the amended complaint herein. The plaintiff alleges that the charges against him were published in a daily newspaper in the city of Los Angeles, but inasmuch as there is no suggestion that the defendants were in any way responsible for, or connected with, such newspaper publication, this averment has no relevancy to the cause of action attempted to be stated. It is alleged that "all of said publications were and are false, malicious, and defamatory, and wholly without justification or excuse, and were not pertinent or material or at all necessary to the proceedings instituted by the filing of said complaint."

[1] The claim of the respondents is that the publication of the charges against plaintiff by means of a pleading in an action was privileged. Section 45 of the Civil Code defines libel as "a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Section 47 of the same Code enumerates five classes of privileged publication. One of these is a publication made "(2) In any legislative or judicial proceeding, or in any other official proceeding authorized by law." This subdivision, in its present form, was added to the section by an amendment adopted in 1874.

The prevailing rule in England and in some of the American states has been that the privilege attaching to defamatory statements made in the course of judicial proceedings is absolute. Townshend, in his work on Slander and Libel, states, at section 221, that he believes the "better and prevailing rule to be that for any defamatory matter contained in a pleading in a court of civil jurisdiction no action for libel can be maintained." Cutler v. Dixon, 4 Coke, 12; Wilkins v. Hyde, 142 Ind. 260, 41 N. E. 536; Runge v. Franklin, 72 Tex. 585, 10 S. W. 721, 3 L. R. A. 417, 13 Am. St. Rep. 833; 25 Cyc. 376. On the other hand, many courts in this country have limited the privilege to declarations pertinent and material to the matter in controversy. Hoar v. Wood, 3 Metc. (Mass.) 193; McLaughlin v. Cowley, 127 Mass. 316; Moore v. M'f'rs. Nat. Bank, 123 N. Y. 420, 25 N. E. 1048, 11 L. R. A. 753; Wilson v. Sullivan, 81 Ga. 238, 7 S. E. 274; Ash v. Zwietusch, 159 Ill. 455, 42 N. E. 854; 25 Cyc. 377. And this limitation of the rule was applied in a case arising in this state prior to the amendment of 1874 to section 47 of the Civil Code. Wyatt v. Buell, 47 Cal. 624. The language of subdivision 2 of the amended section is, however, broad and unrestricted in its terms, and this court, in Hollis v. Meux, 69 Cal. 625, 11 Pac. 248, 58 Am. Rep. 574, suggested a doubt as to whether the Legislature, by enacting that subdivision, intended to change the rule announced in Wyatt v. Buell, so as to render communications made in a judicial proceeding absolutely privileged. The court concluded, in the Hollis Case, that the charges there made were relevant and material to the proceeding in which they were published, and therefore found it unnecessary to resolve this doubt. It may, however, be remarked that in Ball v. Rawles, 93 Cal. 222, 236, 28 Pac. 937, 27 Am. St. Rep. 174, the privilege is declared to be absolute, and Hollis v. Meux is cited as authority for the declaration. See, also, Duncan v. A., T. & S. F. Ry. Co., 72 Fed. 808, 19 C. C. A. 202. But if, notwithstanding the provision of our Code, and these utterances of the court, we take the view that the privilege is not absolute, the only limitation upon it is that the defamatory matter must be pertinent and material to the cause or subject of inquiry before the court.

[2] If it be pertinent, the defendant's malice or bad faith does not affect the privileged character of the publication. "Malice," says the court in Hollis v. Meux, "cannot be predicated of it. No one is permitted to allege that what was rightly done in a judicial proceeding was done with malice." That malice is not a subject of inquiry where a defamatory statement, relevant to the inquiry, is made in the course of a judicial proceediing, is not only established by the decided cases (Moore v. M. N. Bank, supra; Wilson v. Sullivan, supra; Hartung v. Shaw, 130 Mich. 177, 89 N. W. 701; Bartlett v. Christhilf, 69 Md. 219, 14 Atl. 518), but it is plainly shown by the

terms of section 47 of the Civil Code. Subdivisions 3, 4, and 5 of that section, dealing, respectively, with communications to a person interested therein, with reports in public journals of judicial, legislative or other public proceedings, and with reports of the proceedings of public meetings, make the privilege, in each case, dependent upon the want of malice. But subdivision 2 is not so qualified. All of the cases cited by appellant come within the terms of one or another of subdivisions 3, 4, and 5. What is said in these cases with reference to malice has no application to a case depending on the terms of subdivision 2. Subject to the possible limitation of relevancy and materiality, the privilege attaching to statements made in the course of judicial proceedings is absolute.

We are satisfied that the charges made against plaintiff in the complaint filed by the defendants were pertinent and material to the subject of the action in which such complaint was filed, and hence could not be the foundation of an action for libel, even if the more limited rule of privilege be applied. The complaint in question undertook to set forth a cause of action by minority stockholders of a corporation, on behalf of themselves and such other stockholders as might come in, against the corporation and its directors, of whom the plaintiff herein was one, to compel the said plaintiff, who, as was alleged, held the majority of the stock and controlled the board of directors, to account to the corporation for moneys collected under invalid assessments and appropriated by him to his own use, and for other moneys of the corporation so appropriated. An injunction and other relief was also asked.

[3] That any stockholder may bring an action to enforce a claim of the corporation against one who is in control of the board of directors and can thus prevent an action in the name of the corporation itself is well settled. 2 Cook, Corp. § 645; Dodge v. Woolsey, 18 How. 331, 15 L. Ed. 401. And it is equally clear that the alleged misappropriations of corporate funds by one occupying a fiduciary relation to the corporation were the very gist of the cause of action asserted, and that the averments of which the plaintiff here complains were relevant and material to that cause of action. As against the showing of the exact contents of the pleading which was thus filed against the plaintiff, his allegation in his complaint for libel that the publications charging him with misconduct were not pertinent or material is a mere conclusion of law, which is not admitted by the demurrer (Glide v. Dwyer, 83 Cal. 477, 23 Pac. 706; Burling v. Newlands, 112 Cal. 476, 44 Pac. 810), and must be disregarded as contrary to the facts alleged.

[4] While it is ordinarily true that privilege is to be pleaded as affirmative matter of defense to an action for libel (Gilman v. McClatchy, 111 Cal. 606, 44 Pac. 241), yet where the complaint shows on its face that the publication was privileged, the point may be raised on general demurrer. In each of the cases of Hollis v. Meux, supra, and Ball v. Rawles, supra, a demurrer to the complaint had been sustained, and the action of the court below was upheld on appeal.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

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161 Cal. 475

CORDLER v. KEFFEL. (L. A. 2,752.)

(Supreme Court of California. Dec. 5, 1911.)

1. Master and Servant (§ 289*)—Actions for Injuries—Question for Jury.

In an action by plaintiff, who was employed as a gardener about defendant's premises, for personal injuries resulting from falling into a well, alleged to have been negligently covered by the defendant, *held*, that the question of plaintiff's contributory negligence in walking across the cover was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1106; Dec. Dig. § 289.*]

2. Appeal and Error (§ 999*) — Review — Verdict—Conclusiveness.

On appeal to the Supreme Court, the decision of the jury on a question of fact is conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912–3924; Dec. Dig. § 999.*]

3. Master and Servant (§ 89*)—Master's Liability—Scope of Employment.

Plaintiff, who was employed by defendant to work as a gardener, had walked to his place of work, obtained a rake from the toolhouse, and then went to hang his coat on a standpipe near a covered well, and to get a drink of water therefrom, during which he crossed the covering of an old well which lay in his way, and by reason of the decayed condition of the covering fell into the well, and was injured. *Held* that, in crossing the covered well, he was acting within the scope of his employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 153–156; Dec. Dig. § 89.*]

4. Master and Servant (§ 124*) — Safe Place to Work—Inspection.

Where the covering to an old well located on defendant's premises became dangerous through gradual decay, the defendant, on employing one to work about the premises, was not bound to make reasonable inspection of the premises at the time he set the employé to work, nor to continuously fulfill the duty of inspection.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 237; Dec. Dig. § 124.*]

5. Master and Servant (§ 124*) — Safe Place to Work—Failure of Master to Inspect.

Where an owner of premises on which an old well 125 feet deep, covered with boards, was located did not examine the covering, which had been on the well for 11 years, but once, 4 years before the time an employé on the premises fell through the covering, and was injured,

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

his failure to inspect the covering would, under the circumstances, be negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235–242; Dec. Dig. § 124.*]

6. APPEAL AND ERROR (§ 1064*) — HARMLESS ERROR—INSTRUCTIONS.

In an action for personal injuries resulting from falling through a board covering of a well located on premises where plaintiff was employed, error in an instruction as to defendant's duty of inspection is harmless, where his failure to inspect was shown to be negligent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219–4224; Dec. Dig. § 1064.*]

7. MASTER AND SERVANT (§ 124*) — SAFE PLACE TO WORK — INSPECTION — HIDDEN DANGERS.

The duty of a master to his servant requires him to make a reasonably careful inspection to enable him to learn of dangers, not apparent to the eye, to which the servant may be exposed while engaged at the place where he is directed to work; and this duty applies where the master sets a servant to work on premises in which a deep well is located, covered only with boards, damp and subject to decay.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235–242; Dec. Dig. § 124.*]

8. MASTER AND SERVANT (§ 219*)—ASSUMPTION OF RISK—NATURE AND EXTENT.

Where an employé, acting in the scope of his employment, voluntarily takes a place which he is not required to take, he assumes the risk which may attach to such place, which is obvious to him by the use of ordinary care, and which is greater than the risk which he may have taken by reason of his employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610–624; Dec. Dig. § 219.*]

9. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for personal injuries resulting to plaintiff from falling through a covering of a deep well located on premises where he was employed, a witness, who had at least glanced at the under surface of the cover, was asked whether he noticed anything decayed about the covering at that time, and subsequently testified that he saw nothing peculiar about the covering, and in effect answered the question. *Held*, that the exclusion of the question was harmless error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4200–4206; Dec. Dig. § 1058.*]

Department 1. Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by Fred Cordler against Max E. H. Keffel. Judgment for plaintiff, and defendant appeals. Affirmed.

H. T. Morrow, for appellant. Gray, Barker, Bowen, Allen, Van Dyke & Jutten, for respondent.

SHAW, J. Appeals are here presented from the judgment and from an order refusing a new trial.

Plaintiff sued for damages alleged to have been caused by the negligence of the defendant. The verdict was in favor of the plaintiff, and judgment followed. The points presented upon this appeal arise upon the ruling upon the motion for a new trial, consisting entirely of alleged insufficiency of the evidence and errors of law occurring at the trial.

1. It is first contended that the evidence shows that the plaintiff's injury was in part caused by his own negligence. He was employed by the defendant to work as a gardener in a nursery belonging to the defendant. In the nursery grounds was a well 125 feet deep, 30 feet of which was filled with water. It was dug many years before, and was not in use. It was covered with boards lying flat a little above the natural surface of the earth. By reason of age and decay, they had become weak and insufficient to support the plaintiff's weight. Plaintiff did not know of the existence of the well, defendant did not inform him thereof, and the appearance of the boards did not indicate to him that there was a well or excavation beneath them. He had been working about the premises for some time. The ground around and near the well had been spaded the day before the accident. The plaintiff had been directed to rake and pulverize the soil turned up by the spading. On the morning of the injury, he walked 2½ miles to the nursery, and got his rake out of the toolhouse in the nursery to go to work. He had been in the habit, while at work, of taking off his coat and hanging it upon a standpipe near this well, and also in the habit of obtaining water to drink from said standpipe. Feeling thirsty from his walk, he went to the standpipe to get a drink and hang his coat thereon. In doing so, the covering of this well lay directly in his way, and he walked over it, whereupon it broke with his weight, and he fell into the well. It is alleged that the defendant was negligent in permitting the boards to remain upon the well until they had become weak from decay, and in failing to inform the plaintiff of the existence of the well and the condition of the boards.

The plaintiff's testimony is to the effect that he did not know of the existence of the well until he fell into it, that the defendant did not tell him of it, and that there was nothing in the appearance of the boards to indicate that there was a well under them; that it was about five or six inches above the level of the ground and all level; and that the boards looked all right when he stepped upon them. He had seen them the day before, but had paid no particular attention to them. There was other testimony to the effect that the boards were supported by stringers or crosspieces, which were in a condition of dry rot on the underside, and that from an inspection of the upper surface they did not look decayed. There was a trapdoor, about two feet square, framed in the middle of the covering and flush with the other boards, fastened with hinges and latch, but the plaintiff did not observe it. There was some other evidence contrary to some of these facts, and tending to show that the platform was raised somewhat higher than the plaintiff's testimony indicated.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1, 2] We see nothing here to compel the conclusion that the plaintiff failed to use due care in walking across the covering. It was obviously laid so that persons walking across it would not fall into the well. Under the circumstances, it was for the jury to determine whether or not a reasonably prudent man would walk across it or around it. The decision of the jury in such a case can be vacated only by the trial court on motion for a new trial. On appeal, it is conclusive.

[3] 2. There is no just basis for the claim that the plaintiff was not engaged in the service for which he was employed while walking over the boards. He had reached the place of work and the time was at hand; he had obtained the rake from the toolhouse, and was proceeding to hang his coat at the usual place, when the accident occurred. He was clearly within the general scope of his employment, was going where he had a right to go, and where he might reasonably be expected to go, if occasion arose. He was, therefore, not a mere licensee or trespasser, and he did not assume the risk of injury from the rotten condition of the boards, of which he was unaware.

[4-6] 3. The court instructed the jury that the duty of the employer to furnish the employé a safe place in which to work, and see to it that there are no concealed dangers to the employé, requires the employer to "make reasonable inspection of the premises at the time he sets the servant to work"; that "the duty of inspection must be continuously fulfilled and positively performed." This is assigned as error. We do not agree to the proposition that in a case such as this, where the defect arises from the gradual processes of decay, the employer is required to examine the condition of the boards and the supporting timbers every day. Reasonable care would scarcely demand such diligence. If the question of the exact time of inspection was at all important, or could have had any effect upon the verdict, and the instruction is to be so understood, a reversal would be necessary. But the defendant's testimony was that the covering had been on the well 11 years, and that he had examined it but once, about 4 years before the accident. He did not say or claim that the examination then was for the purpose of discovering decay. The failure to examine such a covering over a well of that depth for that length of time, if the well were situated where persons might be expected to go upon it, would be unreasonable and negligent, under the circumstances of this case. The instruction could not have prejudiced the defendant.

[7] 4. There was no error in the instruction that if the defect in the platform was secret and unknown, and was incident to ordinary wear and tear, and could not have been discovered by reasonable inspection, the jury should find for the defendant. The supposed error was in the insertion of the phrase "and could not have been discovered by a reasonably careful inspection." The duty of a master to his servant requires him to make a reasonably careful inspection at reasonable intervals to learn of dangers, not apparent to the eye, to which the servant may be exposed while engaged at the place where he is directed to work. Each case of this sort depends largely upon its own peculiar circumstances. This well was very deep. A fall into it would be attended with great danger and probably cause death. The water below would tend to keep the undersurface of the boards damp, and this would cause decay. They had been in place 11 years without any careful inspection. Under these circumstances, a reasonably careful man would not have been content to allow them to remain without some inspection, or something more than a passing glance at the upper surface. It being defendant's duty, therefore, to make a reasonably careful inspection and discover the defects reasonably to be apprehended after such a lapse of time, but not obvious without inspection, the qualification was a proper one. The decision in Baddeley v. Shea, 114 Cal. 1, 45 Pac. 990, 33 L. R. A. 747, 55 Am. St. Rep. 56, is not in conflict with this conclusion. The circumstances were different. The front steps there involved had not been in place so long; they were in daily use, and the danger to be apprehended from their breaking down would not be so great.

[8] 5. Another instruction excepted to is as follows: "The court instructs you that, if an employé in the discharge of his duties voluntarily takes a place which he is not required to take, he assumes the risk which may attach to such place which is obvious to him by the use of ordinary care, and which is greater than the risk attached to the place he may have taken by reason of his employment." This instruction was asked by the defendant, except the phrase "which is obvious to him by the use of ordinary care," the insertion of which clause is claimed to be error. If the plaintiff had been going beyond the scope of his duty, the insertion of this clause may have been unwarranted by the law. As to this, we need not decide. As we have seen, he was engaged in the work at which he was set, and in that case he would only be required to use ordinary care to avoid danger. The instruction, as applied to this case, was correct.

[9] 6. A witness who had looked into the well two weeks before the accident was asked the question: "Did you notice anything rotten about the wood or covering at that time?" An objection that this was

incompetent, irrelevant, and immaterial was sustained. Counsel are frequently too much given to such objections, and the trial courts are too ready to sustain them. They interrupt the orderly introduction of the evidence and produce no benefit. The question was proper, though unimportant. The witness had at least glanced at the covering on its undersurface at that time. If that glance, although he was not looking for decay, had not caused him to notice such decay, the fact would have been evidence in favor of the defendant that no decay was obvious. But in his subseqent testimony he said that he saw nothing peculiar about these boards. In substance, therefore, he did answer the question, and the ruling caused no injury.

These appear to be all the points urged in favor of reversal. We find no prejudicial error in the record.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

161 Cal. 495

FLORA v. BIMINI WATER CO.

(L. A. 2,748.)

(Supreme Court of California. Dec. 7, 1911.)

1. THEATERS AND SHOWS (§ 6*)—INJURIES—FINDINGS—CONSTRUCTION.

In an action for the alleged drowning of plaintiff's intestate in defendant's natatorium, the court found for defendant on the averment of negligence. Two other findings as to contributory negligence, however, recited that "if plaintiff sustained the injuries set forth in the complaint the same were not caused wholly and entirely by his fault and negligence, and without any fault, carelessness or negligence on defendant's part," and that the injuries were not caused without any fault, carelessness, or negligence on the part of defendant. *Held* that, though as a mere matter of grammatical construction such findings indicated that the injuries were caused by defendant's negligence, the findings were not to be so construed under the rule that all the findings are to be read as a whole and so interpreted as to uphold the judgment.

[Ed. Note.—For other cases, see Theaters and Shows, Dec. Dig. § 6.*]

2. THEATERS AND SHOWS (§ 6*)—DANGEROUS PREMISES—NATATORIUM—GUARDS.

In an action for the drowning of plaintiff's intestate in defendant's natatorium, evidence *held* to sustain a finding that defendant was not negligent in failing to provide sufficient life guards, experienced in life saving to rescue persons exposed to drowning.

[Ed. Note.—For other cases, see Theaters and Shows, Dec. Dig. § 6.*]

Department 1. Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by Mary Flora against the Bimini Water Company. Judgment for defendant, and plaintiff appeals. Affirmed.

E. B. Drake, for appellant. John Murray Marshall and Wilbur Bassett, for respondent.

SLOSS, J. This action was brought to recover damages for the death of plaintiff's 12 year old son, Veach Criswell. The defendant is the proprietor of a bathing establishment in the city of Los Angeles. On February 26, 1909, young Criswell visited said establishment, and, entering a swimming tank or plunge therein, was drowned. The complaint alleges that his death was due to the negligent failure of defendant "to provide a person or persons experienced in life-saving to be then and there present for the purpose of rescuing the deceased, or anyone else, who was liable then and there to drown." It further alleged that defendant had knowledge of the dangerous character of the plunge when used without a proper life guard stationed at or near the place where the boy was drowned, but that, notwithstanding such knowledge it negligently failed to provide any such life guard. The answer denied the allegations of negligence, and set up, as an affirmative defense, that plaintiff was guilty of contributory negligence, and that if he sustained any of the injuries set forth in said complaint, "the same were caused wholly and entirely by the fault, carelessness, and negligence of plaintiff, and without any fault, carelessness or negligence upon the part of this defendant." The contributory negligence of the infant himself is alleged in similar terms.

The cause was tried by the court without a jury. The findings were against the plaintiff on her averments of negligence, and judgment went in favor of the defendant. The plaintiff appeals from the judgment, bringing up the evidence by means of a bill of exceptions.

[1] The principal contention on this appeal is that the evidence is insufficient to sustain the findings negativing negligence on the part of the defendant. Before considering this question, we may, however, briefly notice the claim of appellant that the findings themselves do not support the judgment. This claim is based upon the language used by the court in making its findings in response to the issue of contributory negligence. It found, in finding No. 10, that the plaintiff was not guilty of contributory negligence, and that "if the plaintiff sustained the injuries set forth in said complaint, the same were not caused wholly and entirely by the fault, carelessness, and negligence of plaintiff and without any fault, carelessness, and negligence on the part of the defendant." A similar finding (No. 11) was made with respect to the plea of contributory negligence on the part of Veach Criswell himself. It is said that these findings declare that the injuries were not caused "without any fault, carelessness, or negligence on the part of the defendant"; that they therefore find, in effect, that the injuries *were* caused by the

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

defendant's negligence, and that they are so directly in conflict with the findings in favor of defendant on the issue of its negligence that the judgment cannot be supported. But it seems clear that findings 10 and 11 were not intended to declare, as a fact found, that the defendant had been guilty of negligence. As a mere matter of grammatical construction they may bear such meaning. But the findings of the court are to be read as a whole, and are, if possible, to be so interpreted as to uphold the judgment entered upon them. Krasky v. Wollpert, 134 Cal. 338, 66 Pac. 309; Paine v. San B. V. T. Co., 143 Cal. 654, 77 Pac. 659. Findings 10 and 11 were evidently intended to meet the issue of contributory negligence, and that alone. They follow the exact form of the defenses averring such contributory negligence, and traverse every element of that defense. The court might have stopped with a finding that the injuries were not caused by the negligence of the plaintiff or of Veach Criswell. In going on and finding, further, that such injuries were not caused "without the fault, carelessness, or negligence of the defendant," it sought to find on everything stated in the attempted defense, and it inadvertently used language which was not entirely appropriate to convey the idea in its mind. But it certainly cannot have intended, in finding against the plea of contributory negligence, to make a finding which should be directly contradictory to what it had already found on the main issue of defendant's negligence. Reading the findings as thus suggested, they may readily be harmonized, and in such manner as to give effect to the apparent intention of the court making them.

[2] On the question of the sufficiency of the evidence, the only question is whether there was enough to justify the finding that the defendant provided and caused to be present persons experienced in life-saving for the purpose of rescuing any person who was liable to drown; and did provide proper life guards at said time and place. We need not enter into any discussion concerning the rules of law governing the duty of one maintaining a swimming or bathing establishment frequented by the public. Since the court found in this case that the defendant did have present persons experienced in life-saving and did provide proper life guards, it is immaterial whether it be said that the duty of furnishing such protection arises, as matter of law, or that the necessity for such provision is, in each case, a question of fact for the trial court or jury. See Larkin v. Saltair Beach Co., 30 Utah, 86, 83 Pac. 686, 3 L. R. A. (N. S.) 982, 116 Am. St. Rep. 818; Brotherton v. Manhattan Beach Imp. Co., 48 Neb. 563, 67 N. W. 479, 33 L. R. A. 598, 58 Am. St. Rep. 709, s. c. 50 Neb. 214, 69 N. W. 757.

The defendant's establishment was in a building containing three pools or tanks. Two of these were situated side by side, running for a distance of 92 feet along the longer axis of the building. They were separated by a tile wall 21 inches in width. One of them, the one in which the plaintiff's son met his death, was 40 feet wide, the other 30. The first was graded in depth, beginning with 3 feet of water at one end, and increasing to 7 at the other. The third pool ran across the building, opposite the ends of the two first mentioned. It was 70 feet in length, and was separated from the others by a cement deck 8 feet wide. The deep water in the first pool was at the end farthest removed from this deck. The depth of the tank at various points was plainly indicated by signs painted on the sides.

The accident resulting in Criswell's death occurred at about 8 o'clock in the evening. There were some 25 or 30 bathers in the tank at the time. Criswell had gone to the baths with another boy, Harold Rampe. Both, it appears, were able to swim. Criswell jumped in at the deep end. He failed to rise above the surface. Rampe, observing this, dove in and attempted a rescue. Failing, he got out of the pool, and ran to the cement deck at the other end, where he found a life guard, upon whom he called for help. The guard at once ran (or "trotted") along the dividing wall of the two tanks toward the scene of the trouble. When he reached a point opposite the spot where the boy had sunk, having taken, as he said, about 15 seconds to get there, the body had already been taken out of the water by other bathers. Every possible effort to resuscitate the boy was made, but in vain. Rampe testified that he had repeatedly shouted for help while he was in the water with the drowning boy, but there was ample evidence to justify the court below in discrediting this statement. So, too, the testimony was such as to warrant the conclusion that any struggle on the part of either boy took place under the surface of the water.

The life guard who responded to the call for help was an expert swimmer and life-saver. He was employed at the baths as a teacher of swimming, and it was his duty to act as life guard. He was so acting on the evening in question, and had taken his station on the deck opposite the shallow end of the first pool, at a point from which he could watch the three pools, and he was watching them. At the moment of the drowning, he was facing in such manner that his side was turned toward the tank in which the boys were. He heard no cry for help, and observed no struggle in the water. He testified that, from the point at which he was standing, he could not have seen Criswell struggling below the surface. The first intimation of trouble came to him with the appeal of the other boy for help. There were other employés, stationed at various points about the tank. Three of them were women, who had various duties to perform, but each had instructions to watch the pool. One of them, who testified that she was about 30 feet from the place of drowning, had been trained in the use of the life buoys and life poles which were at hand for use near the deep water. A foreman was also on duty watching the pool. At the time of the occurrence in question he was with the swimming teacher.

On this state of facts there is no foundation for the claim that the finding that the defendant had not been guilty of negligence was unsustained by the evidence. The showing was that a rather elaborate and complete system for the vigilant supervision of the pools had been established, and there was nothing to compel the inference that the persons charged with the duty of watching the pools were not giving proper attention to this duty. The mere fact that a drowning occurred, regrettable though it be, is not, of course, conclusive proof of negligence. Nor can it be said that the defendant was, as matter of law, bound to have a guard stationed in immediate proximity to the deep water end of the pool. It was possible that bathers at other points might get into positions of danger, and it was for the court below to determine, under all the facts, whether the arrangements made were reasonably adapted to the end of protecting the defendant's patrons, and were such as an ordinarily prudent person, situated as defendant was, would have made.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

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161 Cal. 502

STEIN v. LEEMAN. (Sac. 1,863.)

(Supreme Court of California. Dec. 8, 1911.)

1. INTEREST (§ 50*)—EFFECT OF TENDER.

On specific performance of a contract to convey, the purchaser should not be required to pay interest from the date of a refused tender of payment.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 114; Dec. Dig. § 50.*]

2. APPEAL AND ERROR (§ 1177*)—REVERSAL—EFFECT.

Reversal of a judgment for plaintiff and an order refusing a new trial, remanded the cause to the lower court for new trial on all the issues made by the pleadings, judgment for defendant without trial on going down of remittitur being improper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4597–4620; Dec. Dig. § 1177.*]

3. ESTOPPEL (§ 68*)—CLAIM IN JUDICIAL PROCEEDING.

One holding an option to purchase an undivided half interest in land at $4 an acre, by claiming on a former trial of a suit for specific performance, that the option was an offer to sell the vendor's interest at $2 an acre and that a tender made in the language of the option was a tender of that amount, was not estopped to claim on a subsequent trial, and after the Supreme Court decided on appeal that the price was $4 an acre and not $2 as found by the trial court, to present his offer as a sufficient tender at $4 an acre and as an acceptance of the option; he not having been put in default by any demand by the vendor for payment.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165–169; Dec. Dig. § 68.*]

4. ESTOPPEL (§ 68*)—EQUITABLE ESTOPPEL—ESSENTIALS.

An equitable estoppel is not raised by conduct of one party to a suit unless, by reason thereof, the other party has been so placed as to make it unjust to him to allow the first party to change position.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165–169; Dec. Dig. § 68.*]

5. ESTOPPEL (§ 68*)—CLAIM IN JUDICIAL PROCEEDING.

One suing on a contract can claim a construction unjustly favorable to him and ask for a larger judgment than he is entitled to without being estopped to claim his lawful right before the cause is determined, if the other party will not be prejudiced by the change of claim.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165–169; Dec. Dig. § 68.*]

6. ESTOPPEL (§§ 54, 58*)—ESSENTIALS—PREJUDICE.

To constitute estoppel, the condition caused by the conduct of him to be estopped, must be such that the other party will be prejudiced, if the first party is permitted to pursue another course, and claimant of the estoppel must himself have been ignorant of the truth of the matter or of the extent of his rights concerning the same.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 128, 144; Dec. Dig. §§ 54, 58.*]

7. VENDOR AND PURCHASER (§ 170*)—TENDER OF PRICE—SUFFICIENCY.

Under Civ. Code, § 1489, permitting a tender to be made at a creditor's residence if he evades the debtor, where a vendor evades the purchaser to prevent a tender of performance, the tender may be made at the vendor's residence.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 344; Dec. Dig. § 170.*]

8. VENDOR AND PURCHASER (§ 170*)—TENDER—EVASION—EVIDENCE—SUFFICIENCY.

Evidence *held* to show evasion by the vendor under a contract to convey, of a tender of performance by the purchaser, permitting a tender at the vendor's residence under Civ. Code, § 1489.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 170.*]

9. VENDOR AND PURCHASER (§ 18*)—OPTION—CONSIDERATION—SUFFICIENCY.

An agreement by the grantee of an option to purchase land to bear a share of the expense of farming the land during the term of the option is sufficient consideration to support the option.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. § 18.*]

10. VENDOR AND PURCHASER (§ 18*)—OPTION — EXTENSION — CONSIDERATION — SUFFICIENCY.

Under Civ. Code, § 1605, making any benefit to which one is not lawfully entitled, sufficient consideration for a promise, an agreement to extend an option to purchase land, is sustained by the grantee extending the time for settlement by the grantor of an account arising under the original contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. § 18.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

In Bank. Appeal from Superior Court, Madero County; J. J. Trabucco, Judge.

Action by M. P. Stein against Letitia A. Leeman, administratrix of the estate of J. F. Archibald. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Affirmed in department, and, on rehearing, affirmed by the Supreme Court.

Robert L. Hargrove and Frank H. Farrar, for appellant. Nicol & Orr and Francis A. Fee (Bert Schlesinger, of counsel), for respondent.

PER CURIAM. A re-examination of the questions involved in this case convinces the court of the soundness of the opinion and judgment rendered in department.

[1] To the contention, for the first time advanced in the petition for a rehearing, that Stein should be compelled to pay interest from the date of his tender, a complete answer is found in Ferrea v. Tubbs, 125 Cal. 687, 58 Pac. 308, and Wadleigh v. Phelps, 149 Cal. 642, 87 Pac. 93. For the reasons given in the department opinion, hereto appended, the judgment and order are affirmed.

"Shaw, J.: This is an appeal from the judgment, and from an order denying defendant's motion for a new trial.

[2] "The cause was heretofore considered by this court upon an appeal by the defendant from a judgment given upon a previous trial and from an order denying defendant's motion for a new trial. The judgment and order then appealed from were reversed. Stein v. Archibald, 151 Cal. 220, 90 Pac. 536. After the first trial J. F. Archibald, the original defendant, died, and the present defendant, as administratrix of his estate, was substituted. The effect of the reversal was that the cause was remanded to the lower court for a new trial of all the issues made by the pleadings. There is no force in the defendant's contention that the decision of that appeal by this court required the lower court, upon the going down of the remittitur, to enter judgment for the defendant without trial, and no merit in the motion of defendant to enter such judgment. Davis v. Le Mesnager, 155 Cal. 520, 101 Pac. 910. Upon the new trial which took place judgment was again given for plaintiff.

[3] "The action was to compel specific performance of an alleged agreement to sell and convey real estate, and for an accounting of the income therefrom. The agreement is set forth in the opinion upon the former appeal and it is not necessary to repeat it in full. It covered 9,680 acres of land. Its date was October 9, 1897. By its terms Archibald agreed to sell to Stein, 'an undivided one-half interest' in the tract, at any time within three years from its date, if, within that time, Stein should pay him '$4 per acre for the undivided one-half of all of said described land.' The time was afterwards extended to October 9, 1902. Upon the first trial the lower court construed the above quoted language to mean that Stein was to pay only at the rate of $2 for the entire area of land, which it then found to be only 9,640 acres. It adjudged performance by Archibald upon payment to him of $19,280. The only point decided by this court, upon the appeal from that judgment, was that this interpretation was erroneous, and that Stein was bound to pay, in performance of the contract, at the rate of $4 per acre for the entire area, for an undivided one-half interest therein.

"Before beginning the action Stein made a written offer of performance, following therein the exact language of the agreement with respect to the price, but not stating the sum total. It stated, 'You will please take notice that I am now able, ready, and willing and hereby offer to pay you the sum of $4 per acre for an undivided one-half of all those certain lands,' describing them, upon the execution of a deed thereof, and it demanded a conveyance of said interest in said lands. The complaint, in substantially the same language, averred the making of the offer and the ability and readiness of plaintiff to pay upon the making of the proper deed. It did not allege the total sum or otherwise state the price of the land. The answer denied that the plaintiff had at any time offered to pay $4 per acre, or any other sum, for a conveyance of the land, or that plaintiff was able or ready to pay said sum, or any sum for such conveyance. Upon the first trial, the amount of money called for by the contract and covered by the offer was not mentioned or discussed. The written offer was produced as evidence and the plaintiff then in open court declared that he offered to 'pay to the defendant the sum of $4 per acre for an undivided one-half of the land,' and to bring the money into court; but no computation of the amount was made or demanded, nor was anything said to indicate whether plaintiff thereby intended to offer to pay $4 per acre for half the area, or $4 per acre for the entire area. The only place in the record of that trial in which the total price of the land appears to have been mentioned or considered was in the conclusions of law and judgment filed and rendered on February 8, 1905, each of which declared that the plaintiff was entitled to a deed upon payment of $19,280.

"Thereafter the plaintiff insisted that this sum was the price fixed by the contract, and in opposing the appeal he claimed the full benefit of the judgment upon that construction until it was finally reversed and the cause remanded for a new trial. Upon the last trial plaintiff again relied upon the original written offer, presenting it at that time as a sufficient tender of the entire sum of $38,720, and he then formally offered to bring that sum of money, naming it, into court. The court, upon the last trial, found that the area was 9,680 acres. The appellant claims that the plaintiff, by his conduct, while obtaining the first judgment and upon the appeal therefrom, in claiming that the agreement was an offer to sell the undivided one-half of the land for $19,360 and that the written offer was a tender of that amount, only, was estopped, on the second trial, to present the offer as a tender of $38,720, or to assert that it was sufficient as an offer of performance, or as an acceptance of the option.

"In the opinion upon the former appeal it was said that the language of the option referred to the area and not to the interest, and that it called for the payment of $38,720 as the price of the undivided one-half interest to be sold. If the option had this legal effect, it necessarily follows that the several offers to perform made in the written tender, repeated in the complaint, and again stated in court, being couched in the same language, would have the same legal effect. Therefore the tender was sufficient to convert the option into an enforceable agreement to buy and sell, and the complaint stated a good cause of action for specific performance. It does not appear that the defendant, at any time prior to the conclusion of the first trial and the filing of the findings and conclusions of law, made any objection to the language of the offer, or suggested that the sum offered was less than the price agreed to or that the offer did not specify the total amount of money offered, or that it was in any wise uncertain or ambiguous. Upon the written offer, according to its true meaning, the plaintiff was entitled to a decree of specific performance, at the time the cause was submitted upon the first trial, upon payment by him of $38,720. No demand of that sum, or offer to accept it, had been made by the defendant to put the plaintiff in default, and the plaintiff's offer, by its legal effect, was a good offer of performance for that amount. The plaintiff did not succeed in maintaining the judgment declaring him entitled to receive a conveyance upon the payment of half that sum. He failed in that contention and he gained nothing thereby. Neither did the defendant lose anything by reason thereof. His position was not changed for the worse by the erroneous judgment or by the unsuccessful effort of plaintiff to maintain the same upon the appeal. It is true that he incurred costs in prosecuting that appeal, but that outlay was recovered by the judgment. Defendant had the right, at any time before or after that decision, to offer a deed and demand the full sum of $38,720 as a condition of its delivery, and if, upon such demand, the plaintiff had failed to pay, he would have been in default, and the contract would have been at an end thenceforth. Defendant did not see fit to make any such offer or demand. His situation is substantially the same now as it was prior to the first judgment.

[4] "The case lacks some of the essential elements of an estoppel. An equitable estoppel is not raised by the conduct of one party in the course of a lawsuit, unless, by reason thereof, the other party has done some act or has been placed in a position that would render it unjust to him to allow the first party to change his own position in regard to the matter. Speaking of estoppels in the course of proceedings in court, Mr. Bigelow says: 'Where, then, no wrong would be done to the court or to the other parties to a cause by permitting a change of position, a change should in principle and will in fact be allowed.' Bigelow on Estoppel, 723.

[5] "A party suing upon a contract has a right to claim a construction thereof more favorable to him than it will bear and ask for a larger judgment than he is entitled to, and if he is refused such relief before the cause is determined, and the other party will not be prejudiced by a change of plaintiff's claim, plaintiff will still be at liberty to contend for that which is his lawful right.

[6] "In order to constitute an estoppel, the condition brought about by the conduct of the party to be estopped must be such that the other party will be injured or placed in a worse position if the first party is allowed to pursue another course or assert the fact to be contrary to his first statement, and the party claiming the estoppel must himself have been ignorant of the truth of the matter, or of the extent of his rights concerning the same. Boggs v. Merced M. Co., 14 Cal. 368; Davis v. Davis, 26 Cal. 40, 85 Am. Dec. 157; Dean v. Parker, 88 Cal. 287, 26 Pac. 91. These elements of estoppel, as we have seen, did not exist. The defendant may still preserve the rights he has under the contract, notwithstanding the unfounded claim of the plaintiff as to the price. The defendant was not at any time during the litigation ignorant of the terms of the contract, or of his rights under it. He was, in fact, insisting that the option had expired, and was unwilling to sell at the price he agreed to take by the terms of the option, namely, $38,720. We hold that the plaintiff is not estopped to insist now that his offer of performance was an offer to pay the true amount fixed by the contract as construed upon the former appeal.

[7, 8] "The appellant further contends that the written offer was insufficient because it was not made to Archibald in person. Stein resided at Stockton; Archibald resided near Madera on the land. On September 20, 1902, Stein sent a letter by registered mail addressed to Archibald at Madera, which was his post office address, stating therein his intention to settle with Archibald, and close the deal. Archibald was in Madera on that day, and again on September 25th. The letter was delivered to his sister, on September 24th, and Archibald did not receive it until October 13th. About the 1st of October,

Archibald left his house in a wagon and traveled to Alameda county, and from thence to Santa Cruz and Watsonville, staying but a short time in one place, and remained away from Madera until October 13th. This and other evidence, which we need not state in detail, shows clearly that he was endeavoring to evade the making of any offer by Stein. On the 6th of October, 1902, Stein went to Madera and made fruitless inquiries there for Archibald. From thence he went to Archibald's residence and inquired of his sister as to his whereabouts, and was informed that he was away from his home and that she did not know where he was. Thereupon, at Archibald's said residence, Stein delivered to her for Archibald the written tender in question. He also deposited a copy thereof in the post office at Madera, addressed to Archibald. The action was begun on October 8, 1902. These facts we think are sufficient to show that the tender was properly made. 'An offer of performance must be made to the creditor, * * * if such creditor is present at the place where the offer may be made; and if not, wherever the creditor may be found.' Civ. Code, § 1488. If this were the only provision of law upon the subject, the tender might be insufficient, but section 1489 of the Civil Code is as follows:

" 'In the absence of an express provision to the contrary an offer of performance may be made, at the option of the debtor:

" '(1) At any place appointed by the creditor; or,

" '(2) Wherever the person to whom the offer ought to be made can be found; or,

" '(3) If such person cannot, with reasonable diligence, be found within this state, and within a reasonable distance from his residence or place of business, or if he evades the debtor, then at his residence or place of business, if the same can, with reasonable diligence, be found within the state; or,

" '(4) If this cannot be done, then at any place within this state.'

"It appears from this provision that where the seller of land evades the buyer for the purpose of preventing a due offer of performance, the offer may be made at his place of residence. As we have said, the evidence shows that Archibald absented himself in order to evade the making of such offer. In that event it could have been made at his residence, and as it was made at that place on the 6th of October, 1902, two days before the suit was begun, the tender was complete.

[9, 10] "Appellant also claims that the agreement is merely an option and that it was without any consideration. This contention cannot be maintained. It is true that the agreement was a mere option, but a sufficient consideration therefor appears from the terms of the instrument itself. It recites that 'such party of the first part, in consideration of the agreements hereinafter expressed, to be performed by the party of the second part' (Stein), agrees to sell and convey the land, within three years. Another clause in the agreement provides that, during the terms of years therein specified, Stein would bear equally with Archibald all the expenses incurred in farming the land, and that Stein was to have one-half of the gross income arising therefrom. This agreement of Stein to assist in the farming operation was a sufficient consideration for the option. It was further contended that the two years' extension of the term of the agreement was without consideration. This claim also is without foundation. There is evidence to show that Stein and Archibald had farmed the land together for the first two years of the term of the contract, that Stein had paid out about $5,000 to assist therein, that Archibald had received and retained all the income therefrom, and that the account of these transactions required a settlement before it could be ascertained how much Stein should pay if he desired to purchase the land. The original contract expired on October 9, 1900. On that day Stein told Archibald that he was ready to settle the account and find out what was owing, and wanted to pay him whatever was due and receive a deed for half the land. Archibald then said he was not ready to make a settlement, but would try to get up the account as soon as possible, and upon Stein's objection that the contract was about to expire, Archibald said that he would renew it, and thereupon he executed a written contract extending the time for two years. Any benefit received by the maker of a promise to which he is not lawfully entitled is a sufficient consideration for its execution. Civ. Code, § 1605. Archibald by this promise obtained an extension of the time within which to get his account ready. The benefit may have been trifling, but he was not otherwise lawfully entitled to it, and it was sufficient to sustain the contract, as a matter of law. Smith v. Bangham, 156 Cal. 364, 104 Pac. 689, 28 L. R. A. (N. S.) 522.

"These comprise all the points which we deem it necessary to discuss."

BEATTY, C. J., does not participate in the foregoing decision.

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17 Cal. App. 301

KRISTE et al. v. INTERNATIONAL SAVINGS & EXCHANGE BANK.

(Civ. 967.)

(District Court of Appeal, Second District, California. Oct. 24, 1911.)

1. Evidence (§ 340*)—Evidence of Judgment as Defense—Parol Evidence.

Code Civ. Proc. § 911, prescribes the entries to be made in a justice's docket, including the statement of the title of the action, the amount of the claim, a minute of the pleadings, and the judgment of the court, and section 912 makes such entries or a certified transcript thereof prima facie evidence of the facts stated. *Held*, that defendant, a banking corporation, in an action to recover a deposit, was entitled to introduce in evidence the docket record of a justice of the peace showing a judgment against plaintiff, and an execution against defendant, as garnishee; defendant claiming that the amount due plaintiff was paid to the constable in satisfaction of such execution.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 340.*]

2. JUSTICES OF THE PEACE (§ 58*)—JURISDICTION.

Until proof of service of summons, the record of a justice's docket not showing summons does not furnish complete proof in support of the judgment rendered.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 58.*]

3. EVIDENCE (§ 178*)—BEST EVIDENCE—LOSS OF RECORD.

Where it was shown, in an action where defendant had set up a payment of a former judgment against plaintiffs as a defense, that the summons in the justice court had been lost, it was competent to prove by the justice's clerk that summons was issued and served.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 580–594; Dec. Dig. § 178.*]

4. NAMES (§ 16*)—IDEM SONANS.

The surnames "Christe" and "Prkachin" as defendants against whom judgment was entered in a justice's court are idem sonans with the surnames "Kriste" and "Perkacin" in an action in which the justice's judgment is pleaded as a defense.

[Ed. Note.—For other cases, see Names, Dec. Dig. § 16.*]

5. NAMES (§ 18*)—IDENTITY OF PARTIES.

Where a justice's judgment against "Christe" and "Prkachin" has been set up as a defense to an action by "Kriste" and "Perkacin," the record of the justice's court becomes prima facie evidence under Code Civ. Proc. § 1963, subd. 25, which presumes identity of persons from identity of names, and, in the absence of evidence to the contrary, a finding that the parties were not identical was unsupported.

[Ed. Note.—For other cases, see Names, Dec. Dig. § 18.*]

6. JUDGMENT (§ 949*)—PLEADING JUDGMENT AS DEFENSE—ALLEGATIONS.

The allegations in an answer, attempting to set up a judgment against plaintiffs as a defense, "that such proceedings were had thereafter as provided by law, that on the 14th day of March, 1910, judgment was rendered by said justice's court," do not comply with Code Civ. Proc. § 456, which permits a judgment of an inferior court to be pleaded merely as having been "duly given or made."

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1795–1803; Dec. Dig. § 949.*]

7. APPEAL AND ERROR (§ 192*)—NECESSITY OF OBJECTIONS—DEFECT IN PLEADING.

A defect in a pleading, setting up a judgment of an inferior court as a defense, cannot be raised for the first time on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1221–1225; Dec. Dig. § 192.*]

8. BANKS AND BANKING (§ 171*)—FAILURE TO COLLECT—NOTICE OF NONPAYMENT—LIABILITY.

Plaintiffs had deposited with defendant bank for collection certain time checks, due thereafter on March 5, 1910, and defendant failed to collect the notes, and gave no notice of nonpayment to plaintiffs until more than a month after the bills were payable, and plaintiffs lost their right to proceed against their indorser and were damaged. Civ. Code, § 3149, provides that, where the holder of a negotiable instrument at the time of its dishonor is a mere agent for the owner, it is sufficient for him to give notice to his principal in the same way as to an indorser. *Held*, in an action for damages for defendant's failure to give seasonable notice of nonpayment, that defendant was liable.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 171.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Geo. Kriste and G. Perkacin, copartners, doing business under the firm name of Geo. Kriste & Company, against the International Savings & Exchange Bank. Judgment for plaintiffs, and defendant appeals. Reversed.

Robert A. Todd, for appellant. Leonard B. Slosson, for respondents.

JAMES, J. This action was brought by plaintiffs upon two alleged demands against defendant; the first being to recover the sum of $306.50, money alleged to have been deposited with defendant bank and which the latter had refused to repay the plaintiffs; the second being for the sum of $126 as damages alleged to have been suffered by plaintiffs because of the failure of defendant to give seasonable notice to the plaintiffs of the dishonor of certain negotiable instruments in the form of time checks, which had been indorsed to defendant for the purpose of collection. The judgment was in favor of the plaintiffs on both counts of their complaint, and this appeal is taken from that judgment, and also from an order denying a motion for a new trial.

In answering the first cause of action alleged by the plaintiffs, defendant admitted that the sum of money first claimed had been deposited with it in the usual course of its banking business and placed to the credit of plaintiffs. It was then set out by way of special defense that this credit had been levied upon under writ of execution issued on a judgment of the justice's court of Los Angeles township in an action brought by one Brodzevich against the plaintiffs, and that the full amount deposited had been paid to the constable holding such writ, upon his demand. At the trial, for the purpose of establishing this defense, the defendant called the clerk of the justice's court as a witness, who produced the docket of the justice and the files in the justice court action. The docket record was then offered in evidence;

but upon a general objection being made by plaintiffs that this offered record was incompetent, irrelevant, and immaterial, the court refused to allow the evidence to be received. The bill of exceptions shows that, after the offer had been made, the trial judge examined the record. The bill of exceptions then proceeds: "The Court: I find no summons here. Defendant's Attorney: The summons is not there, Judge; it's gone. The Court: There is a complaint and execution. Thereupon the court sustained the plaintiffs' objection to the question aforesaid propounded to the witness and as corrected by the court, to wit: 'Q. Now, you have the docket. Will you please read the court the docket in the case?' And refused to permit the justice's docket to be introduced and read in evidence." The witness was allowed to testify that he knew that a summons in the justice court case had been returned, and that since its return it had been lost; that he had made a diligent search, but could not find it. This witness was asked several questions to which objections were made and sustained by the court. Among these questions was the following: "Now, Mr. Clerk, what day was that summons issued?" The court, after sustaining an objection to this question, remarked: "If you are going to prove a lost summons, you will have to prove its contents by somebody who saw it and remembers its contents." Counsel for defendant then proceeded with the following questions: "Well, do you know whether on the 7th day of March of this year, in the case of Mike Brodzevich against George Christe and Prkachin, a summons was issued?" "Do you know what the contents of that summons was, if one was issued?" To each question objection made by the plaintiffs was sustained. The writ of execution as issued on the justice court judgment was allowed in evidence by the trial judge, and, so far as the bill of exceptions shows, this writ was the only document of the files of the justice's court which was permitted to be introduced in evidence, and there was no testimony, other than that stated, which referred to that action. Such was the state of the evidence with reference to the first cause of action when defendant rested, and the plaintiffs offered no testimony of any sort in rebuttal.

[1] If it appeared from the docket record of the justice referred to that the action in which judgment was rendered and the execution mentioned had issued was an action in which the plaintiffs here were defendants, then such record was admissible in evidence. Section 911 of the Code of Civil Procedure prescribes what entries shall be made in a justice's docket, and section 912 of the same Code provides that such entries, or a transcript thereof, certified by the justice, are prima facie evidence of the facts stated. In the entries required to be made in a justice's court docket is a statement of the title of the action, the amount of the claim, a minute of the pleadings, and the judgment of the court. As a part of its preliminary proof, defendant was entitled to have the docket record received in evidence.

[2] Of course, this record would not furnish complete proof in support of the judgment rendered by the justice until proof had been made of service of summons. Rowley v. Howard, 23 Cal. 401; Fisk v. Mitchell, 124 Cal. 359, 57 Pac. 149; Kane v. Desmond, 63 Cal. 464, and cases therein cited.

[3] It having appeared that the summons in the justice court action had been lost, the justice's clerk was a competent witness by whom to prove the issuance and service thereof. The questions asked of this witness, to which objection was sustained by the court, tended to that end. The witness was asked to state whether he knew that a summons was issued, also what the contents of the summons was; but these questions he was not permitted to answer. In the findings of the court, however, it is determined that an action was brought in the justice's court against Geo. Christe and Geo. Perkochin; that judgment was rendered therein and execution issued; and that the defendant paid to the constable holding the execution, upon his demand, the amount of plaintiffs' deposit. It is further found that the defendants in that action were not the plaintiffs in this suit.

Appellant argues, and very properly, we think, that it having been found by the court in accordance with the allegations of the answer that a judgment was rendered in the justice's court upon which the execution was issued, the further finding of the court that the plaintiffs in this action are not the same as the defendants in the justice court action is not sustained by the evidence.

[4] In the justice's court action the names of the defendants there were spelled "Christe" and "Prkachin," while the true names of plaintiffs were spelled "Kriste" and "Perkacin." These names as so differently spelled were of such similar sound as to make the rule of idem sonans clearly applicable. Donohoe-Kelly Banking Co. v. S. P. Co., 138 Cal. 183, 71 Pac. 93, 94 Am. St. Rep. 28.

[5] Identity of persons is presumed from identity of names. Section 1963, Code Civ. Proc. subd. 25. Therefore, the record of the justice's court would have furnished prima facie evidence of the identity of the defendants in that action with the plaintiffs here. As before noted, the plaintiffs did not, on their own behalf, attempt to show that in fact they were not the persons designated as defendants in the action brought in the justice's court. There was, therefore, no sufficient evidence upon which to base the finding made by the trial judge that the identity of the parties was not the same. Counsel for respondents, however, argues that the finding of the court, wherein it is determined

that there was an action and judgment in the justice's court against Christe and Prkachin, is not a sufficient finding that there was a valid judgment there rendered. This argument does not come with much force; but, even though we concede that the finding is not as complete as it might have been upon that subject, the same result must follow when we refer to the rulings of the court made upon the admission of testimony. The defendant did attempt to prove the fact that an action had been brought, resulting in a judgment against the plaintiffs in the justice's court; but all of its offered testimony, both as to the record of the justice showing the proceedings had in the justice's court, and as to the issuance of a summons, was excluded. In our opinion, by these rulings the trial court erred.

[6,7] So far as the record on appeal discloses, no objection was raised in the superior court as to the sufficiency of the answer of the defendant, wherein the judgment of the justice's court upon which the execution hereinbefore referred to was issued, was attempted to be pleaded. It seems to have been treated by all parties and the court as a sufficient statement of the facts therein purporting to be set out. Respondents now for the first time make the objection that this plea was insufficiently alleged; but it is too late for such an objection to be presented. While the allegation appearing in the answer, "that such proceedings were had thereafter as provided by law, that on the 14th day of March, 1910, judgment was rendered by said justice's court," cannot be said to be a compliance with the provisions of section 456 of the Code of Civil Procedure, which permit a judgment of an inferior court to be pleaded merely as having been "duly given or made," still there was not a total absence of averment, and the pleading, as we have stated, was treated by the parties at the trial as being sufficient. That under such conditions advantage cannot be taken of a defect by objection made for the first time in an appellate court is held in the cases of White v. S. R. & S. Q. R. R. Co., 50 Cal. 417; Alhambra Addition Water Co. v. Richardson, 72 Cal. 599, 14 Pac. 379; Ortega v. Cordero, 88 Cal. 221, 26 Pac. 80; Sauer v. Eagle Brewing Co., 3 Cal. App. 127, 84 Pac. 425.

[8] While it necessarily follows from the conclusions expressed in the foregoing that the judgment must be reversed and a new trial had of the action, brief consideration may be given the questions argued affecting the correctness of the conclusions of the trial court made as to the cause of action which related to the negotiable instruments called time checks which were transferred to defendant for the purpose of collection. On this branch of the case we agree with the determination as made by the trial judge. It appears that the Patillo Contracting Company drew certain orders, 11 in number, against itself, payable to the persons whose names appeared therein as payees, or their order, and that several of the payees indorsed these time checks over to the plaintiffs, who in turn deposited them with defendant for collection. These time checks were payable at the office of the contracting company on March 5, 1910, and were deposited with the defendant bank prior to that date. Defendant bank failed to secure payment of these orders and gave no notice of nonpayment to plaintiffs until April 6, 1910, more than one month after the several bills became payable. No excuse for the delay in giving notice of dishonor of these negotiable instruments was offered by defendant, except the plea was made that the bank had handled the time checks in the manner it was accustomed to handle such matters; and further it was pleaded in defense that the Patillo Contracting Company had on the 5th day of March, 1910, become insolvent. It was not shown in evidence that plaintiffs had notice of the custom of the bank as to the time of giving notice of nonpayment, or that, by any condition of agreement made with the bank at the time the checks were deposited for collection, plaintiffs excused defendant from the duty of giving prompt notice of nonpayment of such checks. Section 3149, Civil Code, provides that "when the holder of a negotiable instrument, at the time of its dishonor, is a mere agent for the owner, it is sufficient for him to give notice to his principal in the same manner as to an indorser, and his principal may give notice to any other party to be charged, as if he were himself an indorser." Plaintiffs, in order to protect themselves in their right of recourse against their immediate indorser, were required to give notice to the latter promptly upon payment of the checks being refused by the maker, failing in which the indorser would be discharged from liability. Under the facts shown in this case, because of the delay of defendant bank in giving such a notice to the plaintiffs, they lost their right to proceed against their indorser, and were for that reason damaged because of defendant's negligence. We quote from Bolles' Modern Law of Banking, p. 573: "In an action on an indorsed note, check, or other instrument whereby, through the bank's negligence, the indorser is discharged, prima facie the owner of the paper has been injured to the amount of the face of it. This rule is founded on the presumption that the indorser was solvent. If the fact is otherwise, this may be shown in reducing the damages." In our opinion, the liability of defendant for the amount claimed in the last cause of action alleged in plaintiffs' complaint was clearly made out by the evidence.

The judgment and order are reversed.

We concur: ALLEN, P. J.; SHAW, J.

17 Cal. App. 327

In re JONES' ESTATE.

JONES v. DENROCHE. (Civ. 1,030.)

(District Court of Appeal, First District, California. Oct. 30, 1911. Rehearing Denied by Supreme Court, Dec. 28, 1911.)

1. RECORDS (§ 17*)—RESTORATION.

A court has the right of its own motion to restore its own records.

[Ed. Note.—For other cases, see Records, Cent. Dig. § 28; Dec. Dig. § 17.*]

2. RECORDS (§ 17*)—RESTORING DESTROYED RECORDS—STATUTORY PROVISIONS.

The sole object of St. 1906, p. 73, providing for the restoration of court records which have been destroyed by conflagration, is to restore the record as it existed, regardless of its regularity or legal effect.

[Ed. Note.—For other cases, see Records, Cent. Dig. § 35; Dec. Dig. § 17.*]

3. RECORDS (§ 17*)—RESTORING DESTROYED RECORDS—PARTIES ENTITLED TO REMEDY.

A final decree was made following the terms of a will and distributing certain real property to the testator's son as sole heir for the period of his natural life with a disposition on his death, "provided, however, that in case of the death of the son before his wife she should have during her natural life and while she remained his widow, the sum of $300 per month and one-half of the income given to her children under the will." Thereafter the wife obtained a divorce from the son, and was awarded permanent alimony, and the son thereafter married again, and at his death left a will providing that the divorced wife should receive alimony as agreed. *Held*, that the wife was a party entitled to have the probate records restored under St. 1906, p. 73.

[Ed. Note.—For other cases, see Records, Cent. Dig. § 25; Dec. Dig. § 17.*]

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of Simon L. Jones, deceased. Petition by Eugenia J. Jones for the restoration of destroyed records, opposed by Elsie P. Denroche. Judgment for plaintiff, and defendant appeals. Affirmed.

Powell & Dow, for appellant. Charles L. James, for respondent.

KERRIGAN, J. This is an appeal from an order made after final judgment, restoring certain lost and destroyed records.

In 1890 Simon L. Jones died, leaving a will. About a year later, the estate having been duly administered, a final decree of distribution was made therein which, following the terms of the will, distributed certain real property to the son and sole heir of the deceased, Everitt D. Jones, for the period of his natural life, and decreed that upon his death said real property should vest in equal shares in Elsie P. Denroche, the appellant, and Sidney Lloyd Jones, children of Everitt D. Jones, "provided, however, that in case of the death of said Everitt before his wife Eugenia, she should have during her natural life and while she remained his widow, the sum of three hundred ($300) dollars per month and one-half of the income given to the children of Everitt under this will." Thereafter, in 1899, in an action which had been instituted by Eugenia, she was granted a final decree of divorce from Everitt, and was awarded $160 per month permanent alimony. In March, 1907, Everitt, on his deathbed, married Bertha Grace Turner, and a few hours later died, leaving a will, which, among other things, provided that his former wife, Eugenia, should receive during the term of her natural life the sum of $160 per month as provided in the decree of divorce. In the conflagration of April, 1906, in San Francisco, all the papers and records in the estate of Simon L. Jones were destroyed. Two years later Eugenia Jones filed for the restoration of that record, which petition was opposed by Elsie P. Denroche, principally upon the ground that Eugenia was not a party or person interested in the record sought to be restored within the terms of the statute relating to the restoration of lost or destroyed records. Stat. 1906, p. 73. After full hearing the trial court held with petitioner, and accordingly ordered the records and papers restored.

The appellant argues that the petitioner, having divorced her husband, has no interest in the record, and consequently it should not have been restored at her instance.

We cannot agree with this position. The obvious purpose of the proceeding permitted by the statute in question is to have conclusive evidence of the contents of the record, and thus to dispense with the necessity of resorting to secondary evidence in any litigation that may arise to enforce rights or obligations established by such record, or in other cases where resort to it is usual or necessary. It is perfectly clear, we think, from the provisions of the decree of distribution in the record sought to be restored above recited that the petitioner has such an interest in said record as to entitle her to have it restored. She is directly mentioned in said decree of distribution, and substantial rights given to her under certain contingencies. The evidence introduced by the appellant upon the hearing of the petition in the court below certainly fails to show that the petitioner is a mere interloper, with no possible or debatable interest in the record, in which event only should she be denied the restoration of the record sought. Even if an examination of the authorities would show, as claimed by appellant, that the petitioner having divorced Everitt D. Jones prior to his death, she is not entitled to the provision made for her under the will of Simon L. Jones (upon which question we express no opinion); still that is not a question to be determined in a proceeding to restore a record, especially where upon the face of the record itself her interest is undisputed. We think it entirely proper that in such a case the record should be restored, and the parties be put into a position to litigate their differences precisely as if the record had not been destroyed. In the language of the court in the case of Vail v. Iglehart, 69 Ill. 332: "The sole object of this proceeding is to restore a record; and we do not conceive that the ends of justice would be promoted by complicating it with other issues."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

There is nothing in the case of Garwood v. Garwood, 29 Cal. 514, in conflict with this view. In that case in a certain estate a petition for letters of administration by Henrietta M. Garwood was resisted by Joseph Garwood, and, after a hearing it was ordered that the objections to her appointment be held for naught. Thereupon, when the first annual account of the administratrix came up for settlement, Joseph Garwood applied to the court for permission to contest the same, but the court found that he had no interest in the estate, and denied his petition. There the question of interest did not arise, as here, in an independent proceeding; but even in that case, notwithstanding that the superior court had just previously gone fully into the subject of Garwood's interest in the estate, the Supreme Court plainly intimated that it would have been a proper exercise of discretion to have allowed Garwood to contest the account. In that case the views of the court are stated in the syllabus as follows: "However remote or contingent the interest of a person may be who asks to be allowed to contest an administrator's account, his right to contest should not be denied."

[1] Under the circumstances of this case, and in view of the fact that the court had the power of its own motion to restore its own records (34 Cyc. 606), we are at a loss to understand upon what reasonable theory it can be said that the trial court in restoring the record abused its discretion.

[2] The authorities are numerous to the effect that the sole object of statutes like the one here under consideration is to restore the record as it existed, and that as a rule the regularity or legal effect of the record will not be considered. Kanke v. Herrum, 48 Iowa, 276; Whitney v. Jasper Land Co., 119 Ala. 497, 500, 24 South. 259; 19 Am. & Eng. Ency. of Law, 558; 34 Cyc. 610. This principle was applied in Vail v. Iglehart, 69 Ill. 332, 336, where it was held improper to allow a person opposing a motion to restore a lost record to show that the attorney who confessed the judgment had no power to do so, the court observing that questions affecting the judgment, other than those which appear on the face of the record sought to be substituted, should not be investigated in such a proceeding. Continuing the court said that the record should be restored substantially as it was, even if voidable, and the other party left to make whatever defenses not appearing from the face of the record that might exist, precisely as he could had the record not been destroyed.

[3] So, in the present case, it appears from the face of the record that the petitioner is a beneficiary under the terms of the will of Simon L. Jones; and under the doctrine of the cases just referred to the record should be restored, and the appellant left to such defenses as she may have just as though the record had not been lost or destroyed.

The order appealed from is affirmed.

We concur: LENNON, P. J.; HALL, J.

17 Cal. App. 317

VALENTINE v. GRAND LODGE, A. O. U. W., OF CALIFORNIA.

(Civ. 868.)

(District Court of Appeal, First District, California. Oct. 27, 1911.)

1. INSURANCE (§ 756*)—FRATERNAL INSURANCE—FORFEITURE OF CERTIFICATE.

Where a member of a fraternal benefit society, operated under the lodge system, applied for an indorsement of his certificate as a paid-up certificate pursuant to the laws of the society, and agreed in his application that the failure to pay any amount required by the laws of the society should forfeit all claims under the certificate as provided by the laws of the society, declaring that where a member fails to pay dues within the time specified he shall stand suspended and no action on the part of the lodge or any officer thereof shall be essential to effect his suspension, his failure to pay dues called for by the laws of the society operated as a forfeiture of the certificate without action by the society or subordinate lodge.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1917; Dec. Dig. § 756.*]

2. INSURANCE (§ 756*)—FRATERNAL INSURANCE — SUSPENSION FROM ORDER—FORFEITURE OF CERTIFICATE.

A member of a fraternal benefit society may forfeit his rights under a certificate without being suspended from the society, and the laws of the society for suspension for nonpayment of dues do not control special provisions of the contract for forfeiture of the certificate for nonpayment of dues.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 756.*]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Mathilde Valentine against the Grand Lodge of Ancient Order of United Workmen of California. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

D. S. Hirshberg, for appellant. Edmund Tauszky, for respondent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

HALL, J. This is an appeal from a judgment in favor of plaintiff and against defendant for the sum of $1,247.20, being the amount of the principal and interest of a beneficiary certificate issued by defendant to Jacob Valentine in his lifetime, and payable on his death to plaintiff. The appeal comes to this court upon the judgment roll, and the appellant contends that on the facts found the judgment should have been for defendant.

From the facts found it appears, among other things, that defendant is, and for more than 30 years last past has been, a fraternal, charitable, beneficial, and benevolent society, having for its objects, among other things, to pledge the members to the payment of a stipulated sum to such beneficiary as a deceased member may have designated, while living, under such restrictions and upon such conditions as the laws of the order may prescribe. The defendant is a corporation organized as such under the laws of the state of California, and ever since the incorporation of defendant San Francisco Lodge No. 4 has been a subordinate lodge thereof under and within its jurisdiction. Jacob Valentine became a member of the said lodge and the order in 1876, and the usual beneficiary certificate was issued to him, in the sum of $2,000, payable to L. Meyerstein. In his application for membership in said lodge said Jacob Valentine agreed "that compliance on my part with all the laws, regulations and requirements which are or may be enacted by said order is the express condition upon which I am to be entitled to participate in the beneficiary fund, and to have and enjoy all the other rights, benefits and privileges of said order." Subsequently said Jacob Valentine surrendered this certificate and took out another, in which he designated the plaintiff, Mathilde Valentine, as the person to whom the $2,000 should be paid at his death. Subsequently, in 1903, defendant adopted certain amendments to its constitution, whereby the assessments to be paid to the beneficiary fund, by members holding beneficiary certificates, were increased, and in and by said amendments members 55 years of age and over were given the option or surrendering their certificates and taking out one of several different sorts of beneficiary certificates. Among these was one designated as option No. 2, under which such members had the right: "To surrender their certificate to be indorsed 'Paid up' for the amount of the reserve, if any (including the deficiency specified in these laws, if any), payable to the designated beneficiaries upon the death of the member, provided he remains in good standing to the time of his death, by the payment of such special assessments, lodge dues (monthly), per capita taxes and extension funds of the order as may be levied." Jacob Valentine, being about 73 years of age, on the 1st of January, 1904, made written application for the indorsement of his certificate in accordance with option No. 2.

This application contained the following provision: "And the failure by me to pay interest on any loans heretofore made, or any amounts required of me either by this option or by the laws of the order shall in such case forfeit all of my claims or those of my beneficiary on account of said certificate, the same as is provided by the laws of the said Grand Lodge for failure to pay any assessment for the beneficiary fund." His certificate was thereupon indorsed by the proper officers of defendant as follows: "The amount payable at death as stated in this certificate is hereby reduced to $1,044.00 and indorsed for such amount (to be paid from the guarantee fund) in accordance with the provisions of indorsed certificate option as defined in option No. 2, and the application therefor of the member herein dated January 1, 1904"—and duly returned to said Valentine.

The laws of the Grand Lodge (section 63) provided that: "The beneficiary certificate of each member who has not paid his assessment to the financier of his lodge, the only authorized officer to receive and receipt for all assessments and dues, on or before the 28th day of each month, shall by the fact of such nonpayment to said financier stand suspended, and no action upon the part of the lodge or any officer thereof shall be required as essential to such suspension." The said Jacob Valentine, under his reduced and indorsed certificate, was not required to pay any assessments until the 1st of October, 1906. In August, 1906, defendant, by certain amendments to its constitution, in terms provided that each holder of a certificate such as was then held by said Jacob Valentine should pay to the financier of the lodge, on or before the 28th day of each month, a special assessment at the rate fixed for the holders of the ordinary certificates, based upon his attained age January 1, 1906, for a $1,000 beneficiary certificate, increased or diminished in the ratio that the indorsed value of his beneficiary certificate shall bear to the sum of $1,000. The laws of the order and of the lodge to which said Jacob Valentine belonged required each member to pay into the funds of the lodge the sum of $1 per month. The constitution of the defendant in this connection provided that: "Any member who neglects or refuses to pay the dues as fixed by the by-laws of the lodge for the period of three months shall not be entitled to vote, nor to the S. A. Password, and shall be disqualified from holding office. Any member neglecting or refusing to pay for the period of six months shall be reported to the lodge by the financier, and the master workman shall, unless otherwise directed by the lodge, thereupon declare such member suspended from the order." The said Jacob Valentine paid none of the so-called special assessments required by the amendments to the constitution of defendant adopted August, 1906, and paid no lodge dues for any month subsequent to March, 1906. He died November 5, 1906.

The contention of appellant is that all rights under the beneficiary certificate held by Jacob Valentine were lost: (1) By his failure to pay the special assessment required by the amendments to the constitution of August, 1906, to be paid monthly by him; and (2) by his failure to pay the dues for each month subsequent to March, 1906, up to the time of his death.

In answer to the first contention respondent contends that the so-called special assessment was not in fact a special assessment; that, as it was required to be paid monthly, it was in fact and in law a regular assessment, and as such was not such an assessment as could be exacted of said Jacob Valentine under the terms of his contract with defendant, which it is claimed subjected him only to the payment of such "special assessments * * * as may be levied."

[1] We do not think it necessary to determine this point, for we are of the opinion that all rights under the certificate held by Jacob Valentine were forfeited by his failure to pay lodge dues. Section 63 of the constitution of defendant provided that: "The beneficiary certificate of each member who has not paid his assessment to the financier of his lodge, the only authorized officer to receive and receipt for all assessments and dues, on or before the 28th day of each month, shall by the fact of such nonpayment to said financier stand suspended, and no action upon the part of the lodge or any officer thereof shall be required as essential to such suspension." Under this law of the defendant the failure to pay assessments on or before the designated day ipso facto forfeited all rights under the beneficiary certificate. Butler v. Grand Lodge of Ancient Order of United Workmen of California, 146 Cal. 172, 79 Pac. 861; Marshall v. Grand Lodge, A. O. U. W., 133 Cal. 686, 66 Pac. 25; Carlson v. Supreme Council, etc., 115 Cal. 468, 47 Pac. 375, 35 L. R. A. 643. The written application for the reduced certificate made by said Jacob Valentine, and dated January 1, 1905, provided that "the failure by me to pay interest on any loans heretofore made, or any of the amounts required of me either by this option or by the laws of the order, shall in such case forfeit all of my claims or those of my beneficiary on account of said certificate the same as is provided by the laws of the said Grand Lodge for failure to pay any assessment for the beneficiary fund." The certificate was thereupon indorsed and the amount reduced to $1,044 "in accordance with the provisions of indorsed certificate option as defined in option No. 2, and the application therefor of the member herein named, dated January 1, 1904." The application for the indorsed certificate was a part of the contract. Both option No. 2 and the laws of the order required the member to pay monthly lodge dues. His contract with the defendant provided that his failure to pay any of the amounts required of him either by option No. 2, or by the laws of the order, should in such case forfeit all his claims or those of his beneficiary on account of his certificate, *the same as is provided by the laws of the said Grand Lodge for failure to pay any assessment for the beneficiary fund.* In other words, the forfeiture occurred upon the failure to make the payments when due, and no action upon the part of the lodge, or of any officer thereof, was required as essential to such suspension. In any aspect of this case the monthly dues for the months of April, May, June, July, August, September, and October had become due and payable before the death of the member, and he had failed and neglected to pay the same or any part thereof, though all were delinquent before he died.

[2] On October 3, 1906, the financier of the lodge reported to the lodge that said Jacob Valentine had neglected to pay dues for the period of six months, and the master workman thereupon declared said Jacob Valentine suspended from the order. The validity of this order of suspension from the order is attacked by respondent for various reasons which we do not deem necessary to discuss, for, as we view the contract involved in this case, the forfeiture of rights under the certificate is quite a different matter from suspension from the order. A member may forfeit his rights under his beneficiary certificate without being suspended from the order. The provisions for suspension from the order for nonpayment of dues do not control the special provisions of the contract hereinbefore adverted to relating to the forfeiture of rights under the beneficiary certificate involved in this case.

The facts of this case differ materially from the facts in the case of Scheufler v. Grand Lodge, etc., 45 Minn. 256, 47 N. W. 799, cited by respondent. In that case there was no provision of the contract making the provisions for forfeiture of rights under the beneficiary certificate applicable to the case of failure to pay dues. The case is not in point.

Under the contract invoked in this case the failure to pay lodge dues operated a forfeiture of rights under the certificate the same as would a failure to pay assessments without any action upon the part of the lodge or any officer thereof.

On the facts found the plaintiff was not entitled to recover.

The judgment is reversed, and the court directed to enter judgment on the findings for defendant.

We concur: LENNON, P. J.; KERRIGAN, J.

17 Cal. App. 365

PEOPLE v. MERLE. (Cr. 346.)

(District Court of Appeal, First District, California. Nov. 1, 1911.)

CRIMINAL LAW (§§ 1130, 1178*)—APPEAL—FAILURE TO ARGUE OR FILE BRIEF.

Where on appeal in a criminal case counsel for the defendant was granted time to prepare and present his points and authorities, but no further extension was requested or granted, on a failure to orally argue the points or file briefs within the time allowed by the court, there is nothing for review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2970, 3012; Dec. Dig. §§ 1130, 1178.*]

Appeal from Superior Court, City and County of San Francisco; Geo. H. Cabaniss, Judge.

Alphonse Merle was convicted of murder in the second degree, and appeals. Affirmed.

Nathan C. Coghlan, for appellant. Attorney General Webb, for the People.

LENNON, P. J. The defendant was charged with the crime of murder, and found guilty of murder in the second degree. He was sentenced to serve 30 years in the state prison at San Quentin. An appeal was taken from the judgment and the order denying defendant's motion for a new trial.

The appeal came on regularly to be heard by this court on the 22d day of August, 1911, whereupon counsel for defendant requested and was granted 15 days within which to prepare and present his points and authorities in support of the appeal. No further extension of time for this purpose has been granted or even requested, and the case now stands before us upon the bare record of the proceedings and testimony had in the trial court.

No oral argument having been made when the case was regularly called upon the calendar, and no briefs having been filed within the time allowed by the court, or at all, it is ordered that the judgment and order appealed from be affirmed.

Incidentally we will state that, although not required to do so, we have made an examination of the record, and find that the defendant was fairly tried and properly convicted.

We concur: KERRIGAN, J.; HALL, J.

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17 Cal. App. 309

In re BURT. (Civ. 1,071.)

(District Court of Appeal, Second District, California. Oct. 25, 1911.)

1. PROHIBITION (§ 3*)—JURISDICTION—ORIGINAL JURISDICTION.

A District Court of Appeal, though having original as well as appellate jurisdiction in prohibition, will not exercise original jurisdiction where the petitioner has the right of appeal from a judgment in the court where the original proceeding was commenced.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4–19; Dec. Dig. § 3.*]

2. PROHIBITION (§ 3*)—ORIGINAL JURISDICTION.

Under Supreme Court rule 26 (78 Pac. xi), requiring an applicant for prohibition to show facts rendering it proper that the writ should issue originally from the court of appeal, where a party filed in the superior court a petition for prohibition, and the court after hearing denied the writ, and the judgment has not become final because the time for appeal has not elapsed, a District Court of Appeal will not, on the party's petition, exercise its original jurisdiction to issue the writ.

[Ed. Note.—For other cases, see Prohibition, Dec. Dig. § 3.*]

Application of W. J. Burt for a writ of prohibition. Denied.

R. J. Adcock and Kendrick & Ardie, for petitioner.

PER CURIAM. It affirmatively appears from the petition filed that a proceeding in prohibition involving the same matter was instituted in the superior court of Los Angeles county, a hearing had therein, and writ denied, which judgment has not yet become final; the time for appeal not having elapsed.

[1] Under the Constitution of this state, this court has appellate jurisdiction in prohibition, and, while it also has original jurisdiction in such proceedings, it will not exercise the same where the petitioner possesses the right of appeal from a judgment had in the court where the original proceeding was commenced.

[2] Under rule 26 of the Supreme Court (78 Pac. xi), this court will not issue writs of the character herein prayed for, in the absence of some showing rendering it proper that the writ should issue from this court. Here petitioner elected to proceed in the superior court, and the action of this court can only be had by a review on appeal from the judgment there rendered. It is apparent, therefore, considering the Constitution and the rule above referred to, that this court should, under the circumstances of this case, exercise its authority in refusing to issue the original writ.

Writ denied.

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17 Cal. App. 310

BLACK v. BOARD OF POLICE & FIRE COM'RS OF CITY OF SAN JOSE et al. (Civ. 787.)

(District Court of Appeal, First District, California. May 13, 1911. On Rehearing, Oct. 26, 1911. Rehearing Denied by Supreme Court Dec. 23, 1911.)

1. OFFICERS (§ 95*)—WRONGFUL DISCHARGE—RECOVERY OF SALARY—MANDAMUS.

Where there is an actual incumbent of an office from which petitioner was discharged, holding his position and exercising the functions thereof under color of right, mandamus will not lie to compel payment of the salary attached to the office to relator until the title to the office has been determined by an appropriate proceeding.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 134, 139; Dec. Dig. § 95.*]

2. MANDAMUS (§ 77*)—TITLE TO OFFICE.

Mandamus will not lie to try title to an office.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 161–169; Dec. Dig. § 77.*]

3. MANDAMUS (§ 174*)—TRIAL—FINDINGS.

Where in mandamus to compel payment of the salary attached to the office of captain of police, which relator had held prior to his alleged unlawful discharge, defendant pleaded occupancy of the office by relator's successor, and that he had since discharged the duties thereof and received the salary, and that at no time had relator rendered any services since he was superseded, such allegations having been sustained by proof, it was error to omit to find in accordance therewith; it appearing that the title to the office had not been determined.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 386, 387; Dec. Dig. § 174.*]

Appeal from Superior Court, Santa Clara County; John E. Richards, Judge.

Mandamus, on the relation of John N. Black, against the Board of Police and Fire Commissioners of the City of San Jose and others. Judgment for plaintiff, and defendants appeal. Reversed.

H. L. Partridge, for appellants. J. C. Black, for respondent.

HALL, J. Plaintiff brought a proceeding against the board of police and fire commissioners of the city of San Jose for a writ of mandate to compel said board to audit and allow his claim, in the sum of $724.50, as captain of police of said city, from the 23d day of July, 1908, to the 1st of February, 1909. The trial court gave judgment for plaintiff against said board as prayed for, and denied the motion of said board for a new trial. The board in due time appealed both from the judgment and the order.

Plaintiff was appointed a member of the police force of said city in the year 1904, and in December, 1906, he was appointed a captain of police of said city. On July 22, 1908, certain charges of violating certain provisions of the charter of said city made by the chief of police of said city against plaintiff were filed with the said board (appellant). The board thereupon, on said day, made an order suspending plaintiff from his position, and appointed one Elton R. Bailey thereto, who at once entered into the occupation of the office, and has ever since occupied said office and discharged the duties thereof, and claimed and been paid by the city of San Jose the salary thereof, as successor of plaintiff, who at no time since said 22d day of July, 1908, has rendered any service to the city of San Jose, or discharged any duty of said office, though he has each month made a demand for the salary attached to said office. On the 26th day of August, 1908, the board made another order, reorganizing the police force of said city, and reducing the number thereof from 25 to 19. This order named and designated all the members of said police force, and did not contain the name of plaintiff, but did contain the name of Elton R. Bailey, as captain of police, in his place. Ever since said date, as well as since the 22d day of July, 1908, said Elton R. Bailey has occupied and discharged the duties of the office formerly held and still claimed by plaintiff, and has claimed and been paid the salary thereof, while plaintiff, as before stated, has discharged no duty thereof, but upon his suspension turned over to the proper authorities all property in his possession as said captain of police. Bailey is not a party to this proceeding. Appellant, as a defense to this proceeding in mandamus, pleaded the facts as to the occupancy by Bailey under claim of right of the office for which plaintiff seeks in this proceeding to compel payment to him of the salary attached thereto. Although the evidence clearly and without dispute proved the facts thus pleaded, the court made no finding thereon, and this was and is assigned as an error requiring a new trial.

[1] The contention of appellant in this regard is that mandamus will not lie to compel the payment to a plaintiff of the salary attached to an office in the actual occupation and possession of another person, under color of right, until by appropriate proceedings the title to the office has been first determined. And this we think to be the correct rule, amply supported in reason and by authority. The rule is thus stated in High's Extraordinary Legal Remedies (3d Ed.) § 103: "When there is an actual incumbent of an office, holding his position and exercising its functions under color of right, mandamus will not lie to a State Auditor to compel him to audit the claim of another person for the salary of the office. In such case it is sufficient objection to relief by mandamus that a conflict of title is presented, which can be determined only by proceedings in quo warranto, and the Auditor himself has no power to inquire into the regularity of the commission issued for the office, or to determine the disputed title. And the title to an office will not be determined in a proceeding by mandamus to compel payment of its salary to a claimant of the office."

The question was very carefully considered in Selby v. City of Portland, 14 Or. 243, 12 Pac. 377, 58 Am. Rep. 307, where, as the court indicated, certain police officers had probably been improperly removed, and successors appointed in their places. After reviewing many cases upon the subject the court said: "None of the cases referred to indicate that an action to recover the salary of an office could be maintained while occupied by a de facto officer, until the right to the office has been determined by proper adjudication. Such a determination could not properly be had in this case, as it would determine the rights of parties not before the court. It would be a determination that the incumbents who succeeded the appellant and his assignors were intruders and usurpers, when they were not before the court." The court directed the trial court to dismiss the proceeding.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The Court of Errors and Appeals of Delaware, in Lee v. Mayor, etc., 1 Marv. 65, 40 Atl. 663, lays down the same rule, and distinctly holds that a de jure officer out of possession cannot recover the salary of an office in the possession of a de facto officer until he has had his right to the office established in an appropriate action, in which the de facto officer is made a party. This case cites with approval the Oregon case above cited.

The case of Gorley v. City of Louisville, 104 Ky. 372, 47 S. W. 263, decided by the Court of Appeals of Kentucky, lays down the same rule, and quotes with approval from Selby v. City of Portland, supra. This was also the case of a removed police officer seeking to recover his salary.

Goodnow v. Police Commissioners, 80 Mo. App. 207, was, like the case at bar, a proceeding in mandamus by a discharged policeman to compel payment of his salary. The court said: "But if it should be granted that the discharge was not for the purpose of reducing the force, and that the place was filled by another appointee, there would still be a barrier to the relief claimed by the relator. He is asking for the payment of salary for a period when he was not in possession of the office occupied by another, before his right to the office has been adjudicated by a judgment of reinstatement. It has been and is an unsettled question whether an officer can recover unearned fees or salary. But it ought to be clear that an action for the salary cannot be maintained by the party out of possession of the office before his right to the office has been judicially ascertained, and that it cannot be ascertained by the mere action for the salary, where the occupant of the office cannot be a party. The question has recently undergone a thorough discussion in the Supreme Courts of Delaware, Kentucky, and Oregon, the two latter being cases of discharged policemen, and the first being the case of discharged register of births and secretary to the board of health. The cases are logically and ably reasoned and the conclusion reached that such action cannot be maintained."

[2] It was held in Meredith v. Board of Supervisors, 50 Cal. 433, that a writ of mandate does not lie to try the title to an office, and that in such an action the right to the fees cannot be determined until the title to the office, occupied by a de facto officer, has been determined.

None of the cases cited by respondent are in conflict with the rule as laid down in the cases above cited. In all of the cases cited by respondent, where a plaintiff was allowed to compel payment of salary in mandamus, he had either first established his title to the office in an appropriate proceeding, in which the occupant had been made a party, or was found to be both the de jure and de facto officer. In making this statement we have not overlooked McKannay v. Horton, 151 Cal. 711, 91 Pac. 598, 13 L. R. A. (N. S.) 661, 121 Am. St. Rep. 146. There two persons were claiming to be de jure and de facto secretaries of the mayor of San Francisco. McKannay claimed under an appointment from Dr. Taylor, who claimed to be both the de facto and de jure mayor; while the other, Boyle, claimed under appointment from Schmitz, who, though recently convicted of a felony, claimed to be both de facto and de jure mayor. The Supreme Court required the petition and the alternative writ to be served both upon Boyle and Schmitz. Both Schmitz and Dr. Taylor were exercising some of the functions of the office of mayor. Boyle was acting as secretary to Schmitz, and McKannay was acting as secretary to Dr. Taylor. The court said: "There cannot be two de facto incumbents of one office at the same time; and where two are acting simultaneously, each under claim of right, that one alone will be recognized who appears to have the better legal title." The court then proceeded to determine that Dr. Taylor was the de jure mayor, and therefore the de facto mayor. From this it necessarily followed that McKannay, his appointee, was both the de jure and de facto secretary. We cannot consider the McKannay Case as holding that one wholly out of possession of an office may compel payment of the salary without first establishing his title thereto by the usual and appropriate proceeding against the person in the actual and complete possession of the office under claim and color of office. This is what plaintiff in the case at bar has attempted to do, and which we are of the opinion may not be done.

[3] The court therefore erred in a most material matter in failing to find upon the issue presented as to the occupancy of the office.

Under the views we entertain upon the point discussed, it is not necessary to pass upon the other questions raised by counsel as to the legality of the action of the board in discharging plaintiff and appointing another to his position. Especially is this true in view of the fact that the actual occupant of the office, whose rights will be vitally affected by the determination of the other questions discussed, is not before the court.

The order denying the motion for a new trial is reversed.

We concur: LENNON, P. J.; KERRIGAN, J.

On Rehearing.

HALL, J. This court on the 13th day of May last rendered a decision in this case, but afterwards granted a rehearing, principally that the court might give the matter further consideration in the light of what was said in the case of Bannerman v. Boyle, 116 Pac. 732, decided by the Supreme Court, June 8th last.

Upon further consideration we adhere to the views expressed in the opinion filed May 13th last, and readopt the same as the views of this court. Unlike the case at bar, in Bannerman v. Boyle, supra, the petitioner for the writ of mandate was in exclusive possession of the office as a de facto officer, and performed all the duties of the office during the time for which he claimed his salary. At the very outset of the opinion it is stated that this was conceded. The Supreme Court also determined that he was the de jure officer as well. Being both the de facto and the de jure officer, there is no doubt but that he could compel, by writ of mandate, the fiscal officer of the city to audit his salary demand. But in the case at bar petitioner was not in possession of the office, and performed no duties thereof during the time for which he claimed his salary, but another person was in possession of the office, under claim and color of right, and had performed and was still performing all the duties thereof under such claim and color of right, and had claimed and been paid the salary therefor. Under such circumstances the authorities cited in our former opinion expressly and pointedly hold that one out of possession of the office and performing no duties thereof cannot enforce the payment of his salary until he has had his right to the office adjudicated in an appropriate action to which the person in possession must be a party. See to the same effect Dillon on Municipal Corp. § 831.

The judgment and order are therefore reversed.

We concur: LENNON, P. J.; KERRIGAN, J.

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17 Cal. App. 290

CITY OF LONG BEACH v. BOYNTON, City Clerk. (Civ. 1,046.)

(District Court of Appeal, Second District, California. Oct. 20, 1911.)

1. MUNICIPAL CORPORATIONS (§ 918*) — BONDS—AUTHORITY TO ISSUE.

Long Beach City Charter, § 3, subd. 8, authorizes the issue of bonds to acquire waterworks, etc., on a two-thirds vote of the electors voting on such question. Subdivision 11 authorizes the construction and repair of wharves and piers, but does not authorize bonds therefor. Section 21 of article 11 authorizes incurring debt for public improvements on proceedings conforming to the general laws of the state. St. 1901, p. 28, § 3, requires two-thirds of all the votes cast at the election to issue bonds. *Held*, that subdivision 8 is limited to the improvements authorized by it, and does not authorize bonds for a pier improvement under subdivision 11; such improvements being governed by section 21.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1919–1923; Dec. Dig. § 918.*]

2. MUNICIPAL CORPORATIONS (§ 935*) — BONDS—CURATIVE STATUTES—APPLICATION.

St. 1911, p. 421, legalizing municipal bonds authorized by a vote of not less than two-thirds of the qualified electors voting at an election, does not legalize bonds on an affirmative vote of two-thirds of the electors voting on the proposition, but less than two-thirds of those voting at the election.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 935.*]

3. MUNICIPAL CORPORATIONS (§ 935*)—CURATIVE ACTS—VALIDITY — MUNICIPAL CORPORATIONS.

A curative act, to be effective, must refer to proceedings which the Legislature might in the first instance regulate and control; and hence St. 1911, p. 421, legalizing municipal bonds, does not validate bonds insufficiently voted under a municipal charter, the issue of such bonds being a municipal affair over which the Legislature has no control.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 935.*]

4. WORDS AND PHRASES—"ORDINARY."

"Ordinary" means methodical, regular, according to established order, common, usual, often recurring.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, p. 5027.]

5. MUNICIPAL CORPORATIONS (§ 911*) — BONDS—AUTHORITY TO ISSUE.

Long Beach City Charter, § 3, subd. 11, authorizes construction and repair of wharves and piers, but does not authorize bonds therefor. Section 21 of article 11 authorizes incurrence of debt for public improvements on proceedings conforming to general laws. *Held*, that there is authority to issue bonds to construct a pier, but not to repair one.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 911.*]

6. MUNICIPAL CORPORATIONS (§ 910*) — BONDS—AUTHORITY TO ISSUE.

Specific charter authority to issue municipal bonds excludes the right to issue for purposes not specified.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 910.*]

Application by the City of Long Beach for writ of mandate against C. O. Boynton, city clerk of the city of Long Beach. Writ denied.

Stephen G. Long and Percy Hight, for petitioner. H. J. Stevens and O'Melveney, Stevens & Millikin, for respondent.

ALLEN, P. J. It appears from the petition: That Long Beach is, and was at all times mentioned in the petition, a charter city. That in February of 1910 the council of such city duly adopted resolutions determining that the public interest and necessity demanded the acquisition, construction, and completion by the city of the following named public improvements: (1) The acquisition, construction, and completion of certain repairs upon a double-deck, cylinder pier belonging to the city; and (2) the acquisition, construction, and completion of a new pier one thousand feet in length at a point designated in said city. That at a subsequent meeting of the council an ordinance was duly adopted giving notice of a special election to be held in said city, submitting to the qualified voters the proposition of incurring an indebtedness in the amount of $75,000 for the first and $50,000 for the second improvement named, and further, that both of the issues did not exceed 15 per cent. of the assessed value of the real and personal property in said city, and that the cost of the acquisition, construction, and completion of said public improvements is and will be too great to be paid out of the ordinary annual income and revenue of said municipality. That by said ordinance it was further provided that bonds be issued for each of the said improvements, one-fortieth of the principal and the interest at the specified rate to be paid annually, and providing further for a tax levy to meet such payments, and further providing for all of the matters provided by the charter or by the general law for the holding of an election pursuant to such ordinance. It is further made to appear that, with reference to the first-mentioned improvement, more than two-thirds of the electors voting at said election voted "Yes"; that, as to the second proposition, less than two-thirds of those voting at such election, but more than two-thirds of those voting upon the proposition, voted, "Yes"; that the first levy necessary for the annual payment of the principal and interest upon the bonds has been made and collected without protest by the taxpayers; that, subsequent to the passage of the ordinance, another ordinance was passed providing for the issuance of city bonds to cover the amount so voted at such election: that the city clerk refuses to attest said bonds and declines so to do, and this writ is sought to compel the attestation thereof.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] Section 3 of the charter of the city of Long Beach, defining the general powers of the city, contains 28 subdivisions. In the eighth subdivision thereof, with reference to supplying the city and its inhabitants with water and gas, electricity, conduits, or railroads, or with either, it is provided that bonds may be issued for the acquisition of such public improvements, and that two-thirds of the votes cast on the question of such issue of bonds, if in the affirmative, shall be sufficient. Subsequently, in the eleventh subdivision, the power to construct and keep in repair wharves and piers is provided for, no reference being there made as to issue of bonds, or the number of votes requisite in the event of the issuance of bonds therefor. In section 21, art. 11, of the charter it is provided: "Whenever the council shall determine that the public necessity requires the construction, or acquisition, or completion of any permanent municipal building, * * * or other public improvement or utility, the cost of which, in addition to the other expenditures of the city, will exceed the income and revenue provided for in any one year, they may, by ordinance, submit a proposition to incur a debt for that purpose, and proceed therein as provided in section 18, article xi, of the Constitution of this state, and general law or laws thereof." The general law of the state (St. 1901, p. 27) in section 3 provides: "* * * It shall require the votes of two-thirds of all the voters voting at such special election to authorize the issuance of the bonds herein provided." This section has received a construction by the Supreme Court of this state in the case of Law v. San Francisco, 144 Cal. 384, 77 Pac. 1014, wherein it is determined that where two propositions were submitted that each, in order to carry, must receive two-thirds of all the votes cast at the election, and that the failure of one to carry does not affect the validity of the other which has received the requisite number of votes. We are of opinion that a fair construction of the charter of the city of Long Beach requires us to say that subdivision 8 of section 3 of the charter, wherein it specifies the number of affirmative votes requisite to carry an election, applies only to the matters referred to in said subdivision 8. To say that subdivision 8, with reference to the requisite number of votes, applies to the improvements specified in subdivision 11 and section 21, art. 11, would be to establish a conflict between sections 3 and 21 of the charter. This should not be done, if both sections can be given operative effect through a different construction. We hold, therefore, that as to the power to incur indebtedness and to issue bonds for the character of improvements under consideration, section 21 of the charter applies, and the proceedings in connection with such bond issue must be in pursuance to the general law.

[2] Nor do we regard the curative act of 1911 (St. 1911, p. 421) as applicable to the matter under consideration. That act provides that it shall not operate to legalize any bonds of any municipality that have not been at the time of the passage of that act authorized by a vote of not less than two-thirds of the qualified electors of such municipality voting at any such election. It being conceded that less than two-thirds of the voters voting at such special election voted in favor of the $50,000 bond issue, such defect was not cured by the legalizing act last above referred to. We are of opin-

ion, therefore, that the clerk properly refused to attest the issue of bonds for the $50,000 so attempted to be authorized for the construction of the new pier.

[3] As to the first proposition involving the issuance of bonds in the amount of $75,000 for the completion and repairs of an existing wharf, it is urged by respondent that, such improvement being a municipal affair, the provisions of the charter with reference thereto are controlling, and that it is not within the province of the Legislature to legalize, through the curative act before mentioned, a bond issue not authorized by the charter. With this we agree. It is well-settled law that a curative act to be effective must be with reference to proceedings which the Legislature might in the first instance regulate and control. The charter in this instance has treated fully of the power of the corporation to issue bonds in connection with the wharves of the city, and of the conditions and emergencies controlling the issuance thereof. This being a municipal affair, the provisions of the charter must control, and, unless such charter provisions authorize the issuance of bonds for such purposes, the Legislature may not legalize bonds which are violative of the provisions of the charter. This leads us, then, to determine whether or not, under the charter, authority is given for the issuance of bonds to complete repairs upon wharves of the city. It is insisted by respondent that section 21 of the charter, authorizing the acquisition, construction, or completion of any permanent public building, or other public improvement, and the issuance of bonds therefor, does not comprehend repairs incident to such improvements, and, it affirmatively appearing that this bond issue of $75,000 was sought for the purpose of completing repairs only, no authority is conferred by section 21 to issue bonds therefor, but that the funds requisite for such repairs must be realized from a general tax levy. While the general power to repair muncipal public property is conferred by the charter, the power to issue bonds for the cost thereof is not so expressly conferred. "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: (1) Those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied." Hyatt v. Williams, 148 Cal. 587, 84 Pac. 42, and authorities cited. We are of opinion that it cannot be said from the language of the ordinances adopted relative to these bond issues that the issue of bonds for such repairs is indispensable; the language of the ordinance being, "the cost of the improvements will be too great to be paid out of the ordinary annual income and revenue of the city." This is far from a declaration of matters required in section 21 of the charter, which provides that bonds may be issued only in the event that the cost of the improvement contemplated, in addition to the other expenditures of the city will exceed the income and revenue provided for in any one year. The charter fixes the limit and extent of the income provided in any one year as being $1 upon each hundred of the valuation of assessed property. The language of the ordinances is open to the construction that the city council have declared that, in their opinion, the cost is too heavy to be borne out of the ordinary revenue; in other words, that it is inexpedient or inconvenient to so increase the tax levy as to cover the cost of these repairs.

[4] The word "ordinary" is defined by Webster as "methodical, regular, according to established order." "Ordinary" is defined as "common, usual, often recurring." Chicago & A. R. Co. v. House, 172 Ill. 601, 50 N. E. 151. For aught that appears, the ordinary, or, in other words, the usual, income of Long Beach may be far below the amount which could be realized under a general tax levy. We cannot, therefore, say that from the whole record it appears that a necessity did exist for the issuance of bonds to pay for such repairs. Assuming, without deciding, that the repairs necessarily entailed in caring for a public improvement may be said to be essential and incidental to the power of construction, acquisition, and completion, and that to deny the right to issue bonds for repairs in all instances might render nugatory the general power to keep such property in repair, nevertheless, we are satisfied that no power is vested by the charter in the city of Long Beach to issue bonds for repairs to public property, unless it is made to appear that the same is absolutely necessary for the preservation of such public property. Under this view, we are compelled to hold that the $75,000 bond issue here involved for repairs was not authorized by the charter, and that no duty devolved upon respondent to attest either series of bonds so presented and sought to be issued by petitioner.

Peremptory writ denied.

JAMES and SHAW, JJ. [5] We concur in the judgment and in all that is said by the presiding justice referring to the bonds proposed to be issued to secure money with which to build a new pier; i. e., the $50,000 issue. As to the bond issue proposed to be made for the purpose of securing $75,000 to cover cost of repairs on the pier already constructed by the city of Long Beach, we are of the opinion that the provisions of the charter do not expressly, or by any reasonable implication, authorize the municipality to issue bonds for such a purpose, and that any necessity which may render the making of such repairs imperative is immaterial, and cannot be considered.

[6] Where it is provided that a bonded indebtedness may be created for specified purposes, the permission and authority so given is exclusive of every purpose not expressly so named. The municipality of Long Beach may lawfully issue bonds to obtain funds with which to construct a wharf or pier, but, when such wharf or pier is once constructed, the cost of maintenance thereof and repairs thereon must be paid from the ordinary revenue of the city, which is the revenue obtained by the exercise of the power to raise funds for general municipal purposes by annual tax levy within the maximum rate fixed by law as the limit of such levy.

17 Cal. App. 324

CALKINS et al. v. MONROE, Superior Judge. (Civ. 1,025.)

(District Court of Appeal, Second District, California. Oct. 27, 1911.)

1. JUDGMENT (§ 303*)—AMENDMENT AND CORRECTION — MATTERS AMENDABLE — "MATERIALLY."

A court may at any time correct a judgment as to immaterial matters occasioned by inadvertence; but this right does not exist where such amendment materially affects the rights of litigants objecting thereto, using the word "materially" to mean affecting the rights of objecting litigants.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 594; Dec. Dig. § 303.*

For other definitions, see Words and Phrases, vol. 5, pp. 4408–4409.]

2. EXCEPTIONS, BILL OF (§ 53*) — PROCEEDINGS TO COMPEL SIGNATURE.

Applicants for mandamus to compel the judge of a trial court to sign a bill of exceptions averred that after judgment the court amended the judgment, and decreed certain rights to a party substituted at trial in lieu of one of the litigants; that the applicants applied in due time for settlement of a bill of exceptions involving the right to amend the judgment, and the return of the trial judge showed that he had refused to sign it; but neither the application nor return showed whether the amendment was material to the applicants' rights. *Held*, that the rights of all parties would be best subserved by a signature to the bill of exceptions, so that the whole matter might be submitted on appeal, and that a peremptory writ issue.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 80–88; Dec. Dig. § 53.*]

Mandamus by C. C. Calkins and another against Charles Monroe, Judge of the Superior Court in and for the County of Los Angeles. Peremptory writ to issue.

Willis & Robinson and W. W. Kaye, for petitioners. Wm. Chambers, for respondent.

PER CURIAM. It is averred by petitioners that a certain judgment was rendered by the superior court, in an action and proceeding to which petitioners were parties, in August, 1910; that thereafter, in February, 1911, the court amended the judgment in certain respects, notably in that it decreed and adjudged certain rights to a party substituted in lieu of one of the litigants at the time of the trial, and within due time after the amendment petitioners, after notice of appeal, applied to the court to settle a bill of exceptions involving the right of the court, under the circumstances of the case, to amend the judgment. This bill of exceptions the court refused to sign, upon the theory, as appears from the return of the judge, that the amendment to the judgment was not such as in any wise affected the rights of petitioners, and that the effect of the decree was to cast upon petitioners, or their property, no burden, other than that imposed by the original decree, which, it is claimed, settled and determined petitioners' rights to the property.

[1] It may be assumed that the court may at any time correct a judgment as to immaterial matters occasioned by inadvertence, but that this right does not exist, should such amendment materially affect the rights of litigants objecting to such amendment. The question, therefore, for determination upon this application is as to the materiality of the matters involved in the amendment to the judgment; and when we say "materiality" we mean to say, as affecting the rights of objecting litgants. It is not made clear, either by the petition or by the return, whether or not this amendment was made on account of any inadvertence, and was immaterial, in so far as petitioners' rights were concerned. Nor can the same be determined without a careful examination of the pleadings, report of the referee, and the original judgment, in connection with the amendment. These matters are not presented to the court upon this application; nor has the respondent made it clear to us that in the ordering of the amendment he was within the rule permitting such an amendment as to immaterial matters.

[2] Our Supreme Court has said that when a trial court is in doubt as to the right of a party to have a bill of exceptions or statement of the case settled, because the same has not been presented within time, the better practice is for the trial court to sign the bill of exceptions or statement, subject to objections thereto, the evidence in support of which should be incorporated in a bill of exceptions, so that the appellate court upon appeal will be in a position to determine whether or not such statement or bill was presented for signature within time. Gay v. Torrance, 143 Cal. 17, 18, 76 Pac. 717. This rule is no doubt based upon the theory that it is the policy of the law to

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

protect the right of appeal, which might in certain cases be materially affected or destroyed by a refusal of the court to sign bills or statements, and that if, upon the appeal, it is made to appear that the bill or statement was not within the time required it is within the province of the appellate court to dismiss the appeal, or to refuse to entertain questions involved in such bill or statement. For this reason, it appears to us that the rights of all parties are best subserved by the trial court signing the bill of exceptions presented, under the rule above stated, to the end that the whole matter may be submitted to this court upon the appeal, in which will be presented and before us all of the pleadings, reports, and judgment, an inspection of which will enable us the better to understand and determine correctly the questions involved.

It is therefore ordered that the peremptory writ issue as prayed for.

161 Cal. 484

PRICE et al. v. DE REYES et al.

(L. A. 2,765.)

(Supreme Court of California. Dec. 5, 1911.)

1. Boundaries (§ 48*)—Location by Parties—Effect.

Where adjoining owners, being uncertain as to the true line, agree by parol upon its true location, and fence along the line agreed, and build up to and occupy to the line as thus fixed, and acquiesce in such location for a period equal to the statute of limitations or under such circumstances that substantial loss would be caused by a change in its position, such line becomes the true line, regardless of the accuracy of the agreed location.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 232–242; Dec. Dig. § 48.*]

2. Frauds, Statute of (§ 70*)—Conveyance of Land—Establishment of Boundary.

A parol agreement by the owners of adjoining lands, effective to establish the true boundary line between the lands, whether coinciding with the description of the parties' deeds or not, does not operate to convey title to the land which may lie between the agreed line and the true line, but fixes the line itself, and the description carries title up to the agreed line; and hence such agreement is not in violation of the statute of frauds as a parol conveyance of lands.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 112; Dec. Dig. § 70.*]

3. Boundaries (§ 48*)—Location by Parties—Building and Acquiescence.

Defendant in 1899 took land by deed describing it by metes and bounds and referring to a map, his grantor pointed out to him the four corners of the land so conveyed, and defendant thereupon placed an iron pipe to mark each of the corners, built a fence along the lines of the land as pointed out by the grantor, occupied and possessed the entire area inclosed, and erected a building along the line of the fence with the knowledge of and without objection by the grantor, and his grantees of the contiguous lot took with knowledge of the defendants' possession and acquiesced therein for more than five years. *Held*, in an action to establish the boundary line, that the line had been fixed by the agreement and acquiescence of parties.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 232–242; Dec. Dig. § 48.*]

4. Boundaries (§ 48*)—Location by Parties—When Effective—Dispute.

The rule that a boundary line between adjoining lands may be fixed by agreement and acquiescence of the parties applies where the location of the line is merely uncertain, and it is not necessary that it be unascertainable, nor is it necessary that there should have been a dispute as to the boundary prior to the agreement as to its location.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 232–242; Dec. Dig. § 48.*]

5. Adverse Possession (§ 90*)—Payment of Taxes—Property Assessed.

Where parties by agreement establish a boundary line between adjoining lands differing from the description found in their deeds, and thereafter pay taxes thereon according to the descriptions in their deeds, such payment is a payment on land in possession of parties, and, if continued for a sufficient time, establishes title by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 517–519; Dec. Dig. § 90.*]

6. Boundaries (§ 36*)—Admissibility of Evidence—Surveyor's Map.

In an action to quiet title to lands fronting upon certain streets, the county surveyor's map was admissible for the purpose of showing the difference, if any, between the location of one of the streets at the time of the trial and the location of the south line of one of the blocks as established by a previously recorded map.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 166, 167; Dec. Dig. § 36.*]

7. Boundaries (§ 35*)—Admissibility of Evidence—Acquiescence and Knowledge.

In an action to quiet title, evidence on the part of the defendants to prove the acquiescence of the respective owners of the property adjoining in the location of the boundary line, and that, at the time plaintiff purchased the adjoining lot, it was pointed out as the lot lying north of defendants' property, was admissible.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 163–165; Dec. Dig. § 35.*]

Department 1. Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action to quiet title by T. W. Price and another against A. C. L. De Reyes and husband. Judgment for plaintiffs, and defendants appeal. Reversed.

Geo. L. McKeeby, for appellants. M. W. Conkling and Cyril H. Bretherton, for respondents.

SHAW, J. This is an action to quiet title to a strip of land 18 inches in width lying within the inclosure of the defendants, extending along the north line thereof. The real object of the action is to ascertain and adjudge the location of the boundary line between the land of plaintiffs and that of the defendants. The judgment went for the plaintiffs, the defendants' motion for a new trial was denied, and from this ruling the defendants appeal.

The decision of the court below, upon the facts appearing in evidence, was contrary to a long line of decisions of the Supreme Court of this state establishing the rule applying to the location of boundary lines between coterminus landowners, beginning with Sneed v. Osborn, 25 Cal. 619, and ending with Dundas v. Lankershim S. Dist., 155 Cal. 692, 102 Pac. 925. The other cases are the following: Columbet v. Pacheco, 48 Cal. 397; Cooper v. Vierra, 59 Cal. 282; Biggins v. Champlin, 59 Cal. 116; Johnson v. Brown, 63 Cal. 393; Truett v. Adams, 66 Cal. 223, 5 Pac. 96; White v. Spreckels, 75 Cal. 616, 17 Pac. 715; Burris v. Fitch, 76 Cal. 398, 18 Pac. 864; Helm v. Wilson, 76 Cal. 485, 18 Pac. 604; Cavanaugh v. Jackson, 91 Cal. 583, 27 Pac. 931; Dierssen v. Nelson, 138 Cal.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

398, 71 Pac. 456; Lewis v. Ogram, 149 Cal. 508, 87 Pac. 60, 10 L. R. A. (N. S.) 610, 117 Am. St. Rep. 151; Young v. Blakeman, 153 Cal. 481, 95 Pac. 888.

[1] The rule is thus stated in Young v. Blakeman, supra: "When such owners, being uncertain of the true position of the boundary so described, agree upon its true location, mark it upon the ground, or build up to it, occupy on each side up to the place thus fixed and acquiesce in such location for a period equal to the statute of limitations, or under such circumstances that substantial loss would be caused by a change of its position, such line becomes, in law, the true line called for by the respective descriptions, regardless of the accuracy of the agreed location, as it may appear by subsequent measurements."

[2] And, again, to this effect: "The line so agreed on becomes in legal effect the true line, the agreement as to the line may be in parol, and it does not operate to convey title to the land which may lie between the agreed line and the true line, but it fixes the line itself and the description carries title up to the agreed line regardless of its accuracy; the agreement as to the line is not in violation of the statute of frauds, because it does not transfer title; the parties hold up to the agreed line by virtue of their original deeds and not by virtue of the parol agreement; 'the division line when thus established attaches itself to the deeds of the respective parties and simply defines, not adds to, the lands described in the deeds,' and, if more is thus given to one than the calls of his deed actually require, he 'holds the excess by the same tenure that he holds the main body of his land.'"

[3] The facts, which appear from the evidence without substantial contradiction, may be briefly stated. In 1888 a map was filed in the office of the recorder of the county showing a subdivision of land into lots and blocks, known as the map of Hollywood. Upon this map was delineated a block numbered 4 consisting of several acres of land. On the westerly side of this block Cahuenga avenue was located, and upon its southerly side a street now known as Sunset boulevard, the intersection of the two streets forming the southwest corner of the block. In 1896 the street known as Sunset boulevard was widened and straightened so that the lines, as then established, included some of the property situated northerly thereof. The owners of the property, among them the owner of said block 4, executed a deed granting to the county the portions of their property lying within the lines of the street as thus widened. In the year 1899 Joseph R. Bennett had become the owner in fee of a portion of block 4 fronting upon Cahuenga avenue, including the lot of the plaintiffs and that of the defendants. On December 2, 1899, he conveyed to the defendant A. C. L. De Reyes, who is the wife of her codefendant, a part of this block fronting 103 feet on the easterly line of Cahuenga avenue. The description in the deed declared that the southwest corner of this lot was a point situated 207.5 feet north of the southwest corner of block 4, according to the map of Hollywood recorded in 1888 as aforesaid. The lot conveyed had a depth of 393 feet. Immediately after the deed was executed, Bennett pointed out to defendants the four corners of the lot so conveyed, and thereupon defendants placed on each corner an iron pipe to mark the corners. Immediately afterward the defendants built a fence along the lines of the lot as thus pointed out by Bennett, and they have ever since maintained the same, occupying and possessing the entire area inclosed therein. Shortly after the fence was built, they erected a building at the northwest corner, the north side of which was placed on the line previously occupied by the north fence. It extended some distance to the rear from Cahuenga avenue. This building has ever since been occupied by M. L. Reyes as an office. Bennett at that time, and for three years afterwards, lived on the opposite side of Cahuenga avenue and was fully aware of these improvements and of the possession and claim of the defendants. He made no objection whatever to the claim or possession of Reyes up to the line of the fence so established. On March 25, 1901, Bennett conveyed to Daniel F. Bacon a lot fronting 51.5 feet on the easterly line of Cahuenga avenue lying directly north of the premises of the defendants. This deed declared that the southwesterly corner of the tract conveyed was situated 310.5 feet north of the intersection of Cahuenga avenue and Sunset boulevard, and that the line ran thence north along Cahuenga avenue 51.5 feet. Thus, according to the respective descriptions, and assuming that the corner of block 4 by the map, recorded in 1888, was the same as the intersection of the avenue and the boulevard, as changed in 1896, this lot would be contiguous to and north of the defendants' lot. Bacon afterwards conveyed this tract to Johnson, Johnson conveyed it to Fry, and on October 15, 1902, Fry conveyed to the plaintiffs, each deed having the same description as that given in the conveyance by Bennett to Bacon. Plaintiffs had their lines surveyed, and in 1903 they put up a building the north line of which was 51.5 feet north of the Reyes fence leaving space for a driveway between the building and said fence. None of the parties ever disputed the right, title, or possession of the defendants to the property within their fences and occupied by the building thereon until more than five years after the defendants' fences and buildings were erected. The exact time of the beginning of this action does not appear. The amended complaint was filed in September, 1907. It is conceded, however, that it was begun shortly before that date. The

dispute concerning the location of the boundary line arose a short time before the action was begun. Thereupon a new survey was made, and it appears to have been discovered, at least it was proven to the satisfaction of the lower court upon the trial, that the fence was situated 18 inches north of the true location of the boundary as fixed by the distances stated in the deed executed by Bennett to Reyes in 1899, and that the inclosure of the defendants included a strip of land 18 inches wide lying immediately north of the lot described in defendants' deed, said strip being also included in the conveyance by Bennett to Bacon aforesaid and to which by the succession of deeds above mentioned, the defendants had apparently acquired title. These facts bring the case directly within the rule above stated and the findings and judgment should have been in favor of the defendants.

[4] The plaintiffs claim that this rule does not apply where the location of the boundary is merely uncertain, but that it must have been absolutely unascertainable. We find no such qualification of the rule stated in any of the authorities. Obviously it could not be thus qualified. It is only where the true location is subsequently ascertained that actions of this kind arise. Consequently the rule could not apply if the location was unascertainable. But, according to all the authorities, it is sufficient if the true location is uncertain and the parties fix the boundary because of its uncertainty and afterwards occupy up to it and make improvements thereon. At the time this boundary was fixed Bennett and Reyes were the owners of the respective adjoining lots. The position of the division line had not been marked and was uncertain. Bennett, as the original owner of both tracts, would presumably have knowledge of the location of the lines superior to that of defendants. He pointed them out to Reyes, who desired at that time to know their position. Reyes accepted the location thus fixed. This constituted an agreement as to the location. Reyes acted upon it by building the fence and buildings with the full knowledge and under the observation of Bennett. The succeeding owners took with knowledge of the possession of Reyes up to the fence. Their acquiescence has the same effect as that of Bennett would have had if he had continued to own the lot. It is not necessary for the application of this rule that there should have been a dispute as to the boundary prior to the agreement as to the location. This was expressly decided in Helm v. Wilson, supra.

[5] Title was also established in the defendants by adverse possession. Plaintiffs claim that defendants paid no taxes on the strip in dispute. It is conceded that both parties paid taxes each year assessed according to the descriptions in the respective deeds. As we have seen, a division line thus established "attaches itself to the deeds of the respective parties," and defines the lands described in each deed, so that the one in the possession of the overlap holds the title thereto by the same tenure as he holds the lands technically embraced in the description. Sneed v. Osborn, supra; Young v. Blakeman, supra; White v. Spreckels, supra. The consequence is that under such circumstances the payment of taxes assessed in this manner is a payment on the land in the possession of the parties. Furthermore, the natural inference would be that the assessor put the value on the land and improvements of each party as disclosed by the visible possession, rather than that he ascertained the true line by a careful survey and assessed to one a part of the possessions of the other. We see no ground upon which the decision of the court below can be sustained.

In view of this conclusion as to the merits of the case, we do not find it necessary to discuss the various rulings of the court below upon the introduction of the evidence.

[6] We think it proper to state, however, that the county surveyor's map was properly admissible for the purpose of showing the difference, if any, between the location of the line of Sunset boulevard at the time of the trial and the location of the south line of block 4 as established by the recorded map of Hollywood.

[7] The defendants were entitled to introduce evidence to prove the acquiescence of the respective owners of the property adjoining in the location of the line to their fences. They were also entitled to prove that at the time the plaintiffs and each of their predecessors in interest purchased, the lot to be sold to them was pointed out to them as the lot lying to the north of defendants' property. The rulings of the court upon questions directed to this point seem to have been based chiefly upon the form of the question, which apparently called for the conclusion of the witnesses, and not for facts.

The order is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

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161 Cal. 453

WILSON et al. v. WHITE. (L. A. 2,771.)

(Supreme Court of California. Dec. 2, 1911. Rehearing Denied Dec. 30, 1911.)

1. BROKERS (§ 94*)—REAL ESTATE BROKERS —AUTHORITY.

Plaintiffs' rights under a contract to purchase land from defendant are unaffected by defendant's brokers' act in agreeing to sell to a third person, where they were not authorized to sell, defendant did not ratify their agreement, and was not estopped to deny their authority before plaintiffs communicated their acceptance of defendant's offer.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 136; Dec. Dig. § 94.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. VENDOR AND PURCHASER (§ 194*)—GROWING CROPS—RIGHT TO.

As between vendor and purchaser, the growing crop constitutes a part of the realty, unless there has been a constructive severance, and passes under a voluntary conveyance unless specially reserved by the grantor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 403; Dec. Dig. § 194.*]

3. EVIDENCE (§ 441*)—PAROL EVIDENCE—DEEDS—RESERVATIONS.

Where a writing is essential to the transfer of land, a reservation of crops cannot be established by parol to impair the effect of a deed conveying the land without reservation.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2032; Dec. Dig. § 441.*]

4. BROKERS (§ 91*)—RECEIPT OF PROPOSALS—EFFECT.

Where real estate brokers conducted negotiations between plaintiffs and defendant for the sale of land, receipt by them of a proposal from defendant was in legal effect a receipt thereof by plaintiffs.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 134; Dec. Dig. § 91.*]

5. VENDOR AND PURCHASER (§ 17*)—CONTRACT TO CONVEY—EXISTENCE.

Real estate brokers sent defendant an offer of $14,000 cash for land. Defendant wired acceptance for conveyance "without crops." Next day plaintiffs tendered to brokers the $14,000 and demanded a conveyance, but the tender was rejected. *Held*, that there was a completed contract between the parties for the sale of the land without crops.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 21; Dec. Dig. § 17.*]

6. SPECIFIC PERFORMANCE (§ 49*)—RIGHT TO RELIEF—INADEQUATE CONSIDERATION.

Under the provision of Civ. Code, § 3391, that a contract cannot be specifically performed if the obligor has not received an adequate consideration or if the contract is not as to him just and reasonable, specific performance of a contract to convey land for $14,000 was properly denied, where the land was found to be worth $15,000 and where the vendor, who resided at a great distance from the property, had no personal knowledge as to the condition and value of the property, while the purchasers were well informed.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 140–151; Dec. Dig. § 49.*]

7. SPECIFIC PERFORMANCE (§ 49*)—ADEQUACY OF CONSIDERATION—DETERMINATION.

In determining the adequacy of consideration under a contract sought to be specifically performed as affecting plaintiffs' right to such relief, the question is, not whether the price was the highest obtainable, but whether it was fair and adequate under the circumstances.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 140–151; Dec. Dig. § 49.*]

8. APPEAL AND ERROR (§ 1009*)—REVIEW—FINDINGS—CONCLUSIVENESS.

In a suit to specifically perform a contract to convey, the trial court's finding that relief should be denied for inadequacy of the consideration should not be disturbed on appeal unless clearly unsupported by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970–3978; Dec. Dig. § 1009.*]

9. VENDOR AND PURCHASER (§ 351*)—CONTRACT TO CONVEY—DAMAGES.

Under Civ. Code, § 3306, fixing the measure of damage for breach of a contract to convey, where no bad faith of the vendor is shown, at the price paid and expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon, plaintiffs were not entitled to damages for defendant's breach of an agreement to convey, where there was no evidence to show any expenditure by them.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1047–1058; Dec. Dig. § 351.*]

Department 1. Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by A. J. Wilson and another against J. L. Owell White. From a judgment for defendant and from an order denying a new trial, plaintiffs appeal. Affirmed.

Eugene C. Campbell, for appellants. Halsey W. Allen, for respondent.

ANGELLOTTI, J. This is an appeal by plaintiffs from a judgment in favor of defendant and from an order denying their motion for a new trial in an action brought by them for the specific performance of an alleged contract for the sale to them by defendant, for $14,000 cash, of certain real property in San Bernardino county, Cal., described in the complaint as being subdivision lot 1 in block 35, East Redlands, according to the plat thereof on record in the office of the county recorder of said county, together with 10 shares of the capital stock of the East Redlands Water Company, a corporation; said property containing 10 acres more or less and being planted to orange trees.

Defendant, the owner of the property, was a resident of the state of Texas, and during the whole period of the negotiations for a sale of the property was in that state. The plaintiffs during all of said period, were in the city of Redlands, Cal., as were also John W. Gill and W. E. Rabbeth, the real estate brokers through whom the negotiations were had. Said Gill and Rabbeth had received a letter written by defendant to them on April 6, 1909, in reply to an inquiry on their part asking for a selling price on the property, in which he said he would sell this property for $15,000 without the crop. Plaintiffs' negotiations with defendant for the purchase were entirely by means of letters and telegrams which will hereinafter be set forth. To these letters and telegrams we are confined in determining whether there was any contract between plaintiffs and defendant for the sale and purchase of the property.

During the whole period of the negotiations there was on the orange trees on said property about one-third of the annual crop of oranges; the remainder having been harvested. This third of the crop was of the value, according to a finding of the trial court which is sufficiently sustained by the evidence of $1,200, and the same was not harvested until some time in May, 1909. The evidence was also sufficient to sustain the conclusion of the trial court that these oranges so remaining on the trees had not been theretofore sold by defendant, and that he was then the owner thereof.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

On April 13, 1909, at the request of plaintiffs, who within a day or two thereof had been shown the property by Gill and Rabbeth and solicited to make an offer for the same, the following telegram was sent to defendant: "4-13-09, Redlands, Cal. To J. Lowell White, Kingsville, Texas. Have offer 14,000 net to you half cash lower ten advise sale. Much scale in grove. Gill & Rabbeth."

On April 15, 1909, defendant answered this telegram by both telegram and letter. The telegram was as follows: "Kingsville, Tex. Apr. 15-09. Gill & Rabbeth, Redlands, Cal. On terms named will not sell for less than fifteen thousand. J. Lowell White."

The letter was simply a confirmation of the telegram. This telegram was shown to plaintiffs, and on the same day, at their request, another telegram was sent to defendant. It was as follows: "Redlands, Cal. Apr. 15 '09. J. Lowell White, Kingsville, Texas. Cannot get fifteen. Client offers fourteen cash. Gill & Rabbeth."

On April 16th defendant replied by telegram as follows: "Kingsville, Texas, Apr. 16. Gill & Rabbeth, I accept fourteen thousand net cash to me for lower ten without crop. J. Lowell White."

On the same day defendant mailed a letter to Gill & Rabbeth confirming the telegram, and saying he would be glad to hear further in regard to details of the sale, asking that they have their client deposit the money in First National Bank at Redlands for delivery on presentation of a satisfactory deed, and suggesting that the transfer be made on May 1st.

Before the receipt of the last-named telegram, and on April 16th, one W. D. Bethell offered Gill & Rabbeth for the defendant $15,000 net cash for the property, without the crop, he (Bethell) to pay Gill & Rabbeth the commission on the sale, and Gill & Rabbeth accepted such offer, and received from Bethell $3,000 on account of such purchase price. Thereafter, on the same day, the telegram last quoted was received, and they showed the same to plaintiffs, and at the same time informed them that prior to its receipt they had sold the property to Bethell, without the crop, for $15,000 net cash to defendant.

On April 17th plaintiffs tendered to Gill & Rabbeth $14,000 and demanded a conveyance of the property, and this tender was rejected by said brokers.

On the same day plaintiffs sent directly to defendant, this being the first time they had communicated directly with him and the first time that the names of the proposed purchasers were communicated to him, the following telegram, viz.: "Ar. 17. Mr. Joseph L. White, Kingsville, Texas. On April 15 last, we offered by telegram sent through Gill & Rabbeth to pay you fourteen thousand dollars cash for your sub. lot one, block thirty-five, East Redlands, San Bernardino county, California, and on April sixteenth last through Gill & Rabbeth received your acceptance. Will you carry out and perform said contract of sale? If so, wire instructions concerning delivery of deed and payment of money. Wire answer. A. J. Wilson. R. C. Willis."

On the same day Gill & Rabbeth telegraphed to defendant as follows: "Redlands, Cal. April 17, 1909. J. Lowell White, Kingsville, Texas. Before last telegram came we sold grove another party fifteen thousand. First party claims grove at fourteen. Full explanation by letter. Gill & Rabbeth"—and at the same time wrote to him an explanation of the situation.

On April 19th plaintiffs again telegraphed defendant as follows: "Redlands, Cal. April 19, 1909. J. Lowell White, Kingsville, Texas. Have deposited in your name $14,400, with Citizens National Bank of Redlands, California, and demand deed of sub. lot one, block 35, East Redlands. Letter follows. Wilson & Willis."

On the same day defendant telegraphed plaintiffs that, having had no negotiations with them, he regretted that he was unable to answer their message of the 17th, and on April 23d he telegraphed the Citizens' National Bank of Redlands not to accept for his account the money deposited by plaintiffs. This telegram of April 19th was apparently sent in reply to plaintiffs' telegram of April 17th, and, so far as appears, before plaintiffs sent their telegram of April 19th.

One of the questions presented is whether, in view of these facts, a contract in writing for the sale of the property by defendant to plaintiffs was created.

The trial court, among other things, found that there was no understanding or agreement between plaintiffs and defendant as to the sale of the orange crop on the trees by defendant, or as to any disposition of said crop; that plaintiffs never accepted the counter proposition of defendant as contained in his telegram of April 16th as to the sale of the property "without crop," or agreed with defendant for the purchase of the property for $14,000 net cash, without crop. It further found that plaintiffs never offered $14,000, or any sum, for the property here sought, and that defendant never accepted in writing any offer of plaintiffs, and that the tender and demand of plaintiffs was for a conveyance of the premises "including the crop of oranges then growing on said property."

In determining the question thus presented it is necessary to consider certain additional facts which must be taken as established on this appeal in view of the record before us.

The trial court found, in response to an allegation of the complaint to that effect, which was denied by the answer, "that said Gill & Rabbeth in sending and receiving the aforesaid telegrams and letters set out in paragraphs 6 and 7 of the amended complaint were acting as the agents of plaintiffs and were authorized by plaintiffs to despatch and receive said communications, by telegram and letter, from defendant for plaintiffs." The letters and telegrams referred to included all those of April 13th, 15th, and 16th hereinbefore set forth. We regard this finding as most vital to plaintiffs. If Gill & Rabbeth were lawfully acting as plaintiffs' agents in sending and receiving such letters and telegrams, it is obvious that the receipt by Gill & Rabbeth of any such letter or telegram from defendant was a receipt thereof by plaintiffs, their principals, which rendered it unnecessary, in order to make the same effective as a proposition or acceptance, that the same should be communicated to plaintiffs by Gill & Rabbeth. On the other hand, if Gill & Rabbeth were not the agents of plaintiffs in such matter, but were the agents of defendant, it is obvious that, as long as any such letter or telegram from defendant was not communicated to plaintiffs for the purpose of carrying on the negotiations, it was no more effective as a proposal or acceptance than if it had remained in defendant's pocket in Texas. Being in the possession of his agent, it would still have been in his possession, undelivered. There was sufficient evidence to support this finding, and it must here be assumed that Gill & Rabbeth were the agents of plaintiffs in such matter. There was also evidence to support a conclusion that defendant knew that Gill & Rabbeth were acting as the agents for a proposed purchaser in making the propositions for purchase, and not as his agent therein.

[1] The trial court found that Gill & Rabbeth on April 16, 1909, before the receipt of defendant's telegram of that date, acting as agents for defendant, sold the property to one Bethell for $15,000 net cash, Bethell to pay the sale commission; that at that time Bethell paid Gill & Rabbeth $3,000 cash on such purchase and took possession of the property and has ever since been in possession. This finding, except in so far as it states that Bethell paid Gill & Rabbeth $3,000 on account of an attempted purchase by him, is entirely without support in the evidence. There was absolutely nothing in the evidence to warrant the conclusion that Gill & Rabbeth had been authorized by defendant to make any contract on his behalf for the sale of any of his property, or that they were anything more than mere brokers with power merely to find a purchaser. See Lambert v. Gerner, 142 Cal. 399, 76 Pac. 53; Grant v. Ede, 85 Cal. 418, 24 Pac. 890, 20 Am. St. Rep. 237. And there is nothing in the record to support a conclusion that defendant in any way ratified the attempted action of Gill & Rabbeth in regard to a sale to Bethell prior to the sending or receipt by him of plaintiffs' telegram of April 19th, or did anything that would operate as an estoppel in Bethell's favor. So we must determine the question raised in regard to the matter of the orange crop without regard to the attempted action of Gill & Rabbeth in the matter of a sale to Bethell.

[2] While for some purposes growing crops are considered personal property, it is practically elementary law that, as between the vendor and vendee of real property having a growing crop thereon, such crop constitutes a part of the realty (unless there has been a constructive severance), and in the case of a voluntary conveyance of the land passes to the grantee unless specially reserved by the grantor.

[3] And while there are some authorities holding that an oral exception or reservation of the crop is effective in such a case, the weight of authority as well as the better reasoning are to the effect that, where a writing is essential to the transfer of real property, such a reservation cannot be established by parol to impair the effect of the writing purporting to convey the land without reservation. See 8 Am. & Eng. Ency. of Law (2d Ed.) pp. 303, 306. And this court appears to have committed itself to this doctrine in Fisk v. Soule, 87 Cal. 313, 25 Pac. 430, where it was substantially said that a written contract for the sale of land which did not contain any reservation of the crops bound the grantor to include the crops in his conveyance, notwithstanding an oral understanding that the crops were not to be included, "unless corrected on the ground that by mistake it was not in accordance with the agreement actually made." As we have already seen, the evidence was sufficient to support the conclusion of the trial court that the crop remaining on the trees on this property had not been sold at the time of these negotiations, and that there had been no constructive severance thereof from the land.

[4, 5] The first offer of plaintiffs to purchase the property was that of April 13th. So far as the matter of the crop was concerned, it was clear and certain in its terms. It was an offer of $14,000 net, half cash, for everything that would then pass by a grant of the land. This, as we have seen, necessarily included the crop on the trees. This offer having been rejected by defendant's telegram of April 15th, plaintiffs on April 15th made a second offer "of fourteen cash"; the necessary implication of the language used being that it was an offer of $14,000 net cash for the same property referred to in the telegram of April 13th, viz., the realty as it stood, without reservation or exception of any kind. To this, on April 16th, defendant answered by telegram, "I accept fourteen thousand net cash to me for lower ten *without* crop." The italics are ours. His letter of the same day was simply a confirmation of this message, with expressions indicating that he was satisfied that the purchase would

be proceeded with upon the terms stated by him.

It may be conceded that this telegram introduced a provision for a reservation in the proposed conveyance that was not contained in the written offer of plaintiffs, and that defendant's acceptance was therefore a qualified acceptance, which under our law constituted a new proposal. Section 1585, Civ. Code. When this new proposal was received by Gill & Rabbeth, it was, in legal effect, received by plaintiffs. There is nothing to indicate that it was revoked by defendant at any time before the receipt by him of plaintiffs' telegrams of April 17th and 19th. Section 1587, Civ. Code. Defendant's telegram of April 19th to plaintiffs was in no sense a revocation of his previous proposal. If either of these telegrams constituted an acceptance by plaintiffs of defendant's new proposal, the contract was complete so far as the matter of the reservation by the defendant was concerned. "A proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterwards." Section 1586, Civ. Code. We do not see how it can be held that plaintiffs' telegrams of April 17th and 19th can be considered otherwise than as an acceptance of defendant's proposition. Especially is this true of their telegram of April 19th, when read in connection with that of April 17th. It was an absolute compliance with the terms of the proposition made by defendant's telegram so far as the consideration named was concerned (the $400 additional being the amount of the agents' commission), and, although silent on the question of reservation of crop so far as express words were concerned, it necessarily implied acquiescence in the making of such a reservation. No other construction could reasonably be given to the telegram, in the light of the other telegrams and letters that had passed between the parties, than that the same was an absolute and unconditional assent to the terms proposed by defendant. The demand therein for a deed was clearly, in effect, one for a deed of the property without the crop. It is not to be doubted, in view of all the writings, that plaintiffs could have been compelled to accept in full satisfaction of the contract a deed containing such a reservation. No condition having been provided by the proposer concerning the communication of the acceptance, any reasonable and usual mode could be adopted, and the consent must be deemed to have been fully communicated between the parties as soon as plaintiffs put their acceptance in the course of transmission to defendant. Civ. Code, §§ 1582 and 1583.

It may be said, in passing, that nothing could be clearer, in view of the evidence, than that it was the understanding of all parties that the crop was not to go with the land; but, as we have said, the agreement to this effect must be shown by the writings.

There is no force in any of the other points made against the validity of the alleged contract. Some of these claims rest upon the assumption that there had been a sale to Bethell before the contract with plaintiffs was perfected—an assumption that we have seen is not warranted. The series of letters and telegrams passing between Gill & Rabbeth, acting for plaintiffs, and defendant, and between plaintiffs and defendant, contained all the essential elements expressed in such a way as to make a complete, certain, and definite contract between the parties. This is certainly true both as to the description of the property and the names of the purchasers, the matters as to which defendant makes his main contention. It cannot be disputed that the description of the property contained in the telegram of April 17th was certain and complete, and the court finds that it was understood by all the parties that the "lower ten" mentioned in the earlier telegrams "was the property described in paragraph 2 of the amended complaint," which included no other land than that described in the telegram of April 17th, as well as that of the 19th. It was shown that defendant owned no other 10-acre piece of land, and that he owned only one other parcel in San Bernardino county, one containing 14.7 acres. It cannot be disputed that plaintiffs themselves could effectually continue in their own names the negotiations theretofore carried on in the name of their agents.

Some claim is made, based on the allegations of paragraph 2 of the amended complaint, that the defendant is the owner of certain land (describing it), "together with 10 shares of the capital stock of the East Redlands Water Company, a corporation," and on the prayer of such complaint by which plaintiffs asked that the defendant be required to execute a conveyance to them of the property hereinbefore described. We do not see how this in any way affects the question of the *validity* of the contract. It is apparent, of course, from what we have said, that if the water stock referred to in this allegation was not appurtenant to the land, and consequently was personal property, the contract made did not include it. If, on the other hand, it was appurtenant to the land, as is claimed in plaintiffs' brief, and therefore legally part of the land, it was covered by the contract.

We conclude, therefore, that there was a good and sufficient contract in writing between these parties for the sale of the land described in paragraph 2 of the amended complaint, and that the findings of the trial court to the contrary are not sustained by the evidence.

[6] We are now brought to the remaining claims of defendant, which relate to the right of plaintiffs to have specific performance of the contract. It is unnecessary to consider his contention that the complaint fails to

state facts showing that the contract should be specifically enforced, for we are satisfied that we cannot interfere with the action of the lower court denying such relief in view of its conclusion upon the question of the fairness, justness, reasonableness, and adequacy of the consideration. It is alleged in the amended complaint that at all the times mentioned $14,000 "net cash was and is now a fair, just, reasonable, and adequate price for the said property described in paragraph 2." This was denied by the answer, and it was alleged therein that said property was and is reasonably worth $18,000. As we read the findings, the trial court concluded that the value of the property as it stood at the time of the negotiations, including the crop then on the trees, was $16,000, and that the value without such crop was $15,000. The court further found "that the sum of $14,000, net cash, was and is not a fair or just or reasonable or adequate price for the property," without the crop. There was ample evidence to sustain the conclusion of the trial court as to the real value.

Our Civil Code (section 3391) provides that specific performance cannot be enforced against a party to a contract: "(1) If he has not received an adequate consideration for the contract; (2) if it is not, as to him, just and reasonable." The claim of plaintiffs is that, in view of the small difference between the true value and the consideration agreed on, it cannot be held that there was such an inadequacy in the price agreed on as to support the conclusion of the trial court, quoting Mr. Pomeroy to the effect that the rule is well settled that, where the parties were both in a situation to form an independent judgment concerning the transaction and acted knowingly and intentionally, "mere inadequacy in the price or in the subject-matter, unaccompanied by other inequitable incidents," is never of itself a sufficient ground for refusing the remedy of specific performance. It is clear, of course, that our statute has made inadequacy of consideration a separate ground for refusing specific performance. Morrill v. Everson, 77 Cal. 114, 19 Pac. 190; Cummings v. Roeth, 10 Cal. App. 144, 101 Pac. 434. See, also, White v. Sage, 149 Cal. 613, 87 Pac. 193. Clearly the difference between the true value and the agreed value may be such as, under our statute, to warrant the conclusion that specific performance should be refused on the ground alone of inadequacy of consideration.

[7] The question in such cases necessarily is, not whether the price agreed on was the highest price obtainable, but whether such price is a fair and adequate price "under all the circumstances." Morrill v. Everson, supra.

[8] It is peculiarly a question of fact for the trial court to determine in the light of all the circumstances, and the conclusion of that court upon the question should not be set aside unless it is clear that it has no sufficient support in the evidence. A conclusion that the agreed price was not adequate means that it was not such as to be, under all the circumstances, a "fair, or just or reasonable" price to be paid by the vendee to the vendor, terms expressly embodied by the trial court in the finding in this case. While a mere difference in value of $1,000 on property worth only $15,000 is perhaps not so large as to warrant a conclusion of inadequacy sufficient to justify a refusal of specific performance, something more was shown in this case. The vendor resided and was in the state of Texas, many hundreds of miles from the property, and was dependent upon those near the property for information as to its condition and value. On the other hand, the plaintiffs were on the ground and were well informed regarding the value of orange groves in that vicinity, and one of them had been engaged for eight years in buying and selling such orange groves. In their telegram of April 13th to defendant, Gill & Rabbeth advised a sale on the terms then offered, stating that there was much scale in the grove. We cannot say, in the light of these facts and the inferences that may be reasonably drawn therefrom, that the finding of the trial court that the consideration was not, under the circumstances, fair or just or reasonable or adequate as to defendant, is without sufficient support in the evidence. If the finding is sufficiently supported by evidence, it follows that the judgment denying specific performance was correct.

[9] Complaint is made that, in any event, plaintiffs should have been awarded damages. It was generally alleged that, by reason of the failure and neglect to convey on the part of defendant, plaintiffs had been damaged in the sum of $2,000. This was denied, and the court found that plaintiffs had suffered no damage whatever. The measure of damage for breach of an agreement to convey real estate, where no bad faith on the part of the vendor is alleged and shown, is prescribed by section 3306 of the Civil Code to be "the price paid, and expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon." There was no evidence whatever to show any such expenditure by plaintiffs, no showing that would have sustained a conclusion of damage, in view of the provisions of section 3306 of the Civil Code.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; SLOSS, J.

161 Cal. 433

PEOPLE v. COFFEY. (Cr. 1,599.)

(Supreme Court of California. Dec. 1, 1911.)

1. CRIMINAL LAW (§ 757*)—INSTRUCTIONS—TESTIMONY OF ACCOMPLICES.

If the evidence requires it, the court should charge the law as to accomplices, leaving, as a rule, the question of whether a witness is an accomplice for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1775; Dec. Dig. § 757.*]

2. CRIMINAL LAW (§ 742*)—ACCOMPLICE'S EVIDENCE—QUESTION OF LAW OR FACT.

Where the fact of whether a witness did certain things, which would make him an accomplice is in dispute, the matter is for the jury; but, where the facts are not disputed, it becomes a question of law for the court to say whether such acts make the witness an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1720; Dec. Dig. § 742.*]

3. CRIMINAL LAW (§§ 934, 935*)—NEW TRIAL—VERDICT CONTRARY TO LAW AND EVIDENCE.

A contention that a conviction was had upon the uncorroborated evidence of an accomplice presents a legal question, under Pen. Code, § 1181, authorizing the granting of a new trial on the ground that the verdict is contrary to the law and evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2293–2298; Dec. Dig. §§ 934, 935.*]

4. CRIMINAL LAW (§ 507*)—ACCOMPLICES—DEFINITION—"ACCOMPLICE."

At common law, an "accomplice" includes all participes criminis, whether they be principals in the first or second degree, or mere accessories before or after the fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082–1096; Dec. Dig. § 507.*

For other definitions, see Words and Phrases, vol. 1, pp. 75–79; vol. 8, p. 7561.]

5. CRIMINAL LAW (§ 507*)—"ACCOMPLICE"—STATUTES.

Since under the direct provisions of Pen. Code, § 31, all persons concerned in the commission of a crime, whether they directly commit the act or aid and abet therein, or being absent advise and encourage its commission, are principals, such persons are also accomplices within the rule as to accomplice's testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082–1096; Dec. Dig. § 507.*]

6. CRIMINAL LAW (§ 507*)—"ACCOMPLICE."

The fact that one cannot be convicted as a principal of the same offense of which accused is charged does not prevent him from being an accomplice within the rule as to accomplice's testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082–1096; Dec. Dig. § 507.*]

7. CRIMINAL LAW (§ 507*)—"ACCOMPLICE."

Pen. Code, § 31, provides that all persons concerned in the commission of a crime, whether they directly commit the act or aid and abet therein, or advise and encourage its commission, are principals. Section 654 provides that an act which is made punishable in different ways by different provisions of the Code may be punished under either of such provisions, but cannot be punished under more than one. *Held*, that the fact that an act of participation as an accessory or accomplice has been made a separate crime would not necessarily prevent such accomplice from being indicted so as to prevent him from being an accomplice within the rule as to corroborating an accomplice's testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082–1096; Dec. Dig. § 507.*]

8. BRIBERY (§ 1*)—DEFINITION AT COMMON LAW.

At common law, "bribery" was the voluntary giving or receiving of anything of value in unlawful payment of an official act done or to be done.

[Ed. Note.—For other cases, see Bribery, Cent. Dig. §§ 1–3; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 1, pp. 867, 868; vol. 8, p. 7593.]

9. CRIMINAL LAW (§ 507*)—ACCOMPLICES—DEFINITION.

The test of whether one is an accomplice, within the rule as to accomplice's testimony, is whether his participation in the offense has been criminally corrupt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082–1096; Dec. Dig. § 507.*]

10. CRIMINAL LAW (§ 507*)—ACCOMPLICES—CORROBORATION.

Pen. Code, § 165, punishes every person who gives or offers a bribe to any member of any board of supervisors of any county or city with intent to corruptly influence him in his action on any matter pending in the body, and every member of such bodies who receives or agrees to receive any bribe upon any understanding that his vote or judgment shall be influenced thereby. *Held*, that one who acted as intermediary for another in offering a bribe to a member of a board of supervisors prosecuted under section 165, for agreeing to receive and receiving a bribe, was an accomplice, requiring his evidence to be corroborated.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082–1096; Dec. Dig. § 507.*]

11. CRIMINAL LAW (§ 511*)—ACCOMPLICE'S TESTIMONY—CORROBORATION.

While the corroboration of an accomplice's testimony may be slight, it must of itself, independent of the accomplice's testimony, tend to show accused's guilt, so that the accomplice's own direct evidence is not available as corroborating evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1127–1137; Dec. Dig. § 511.*]

12. CRIMINAL LAW (§ 511*)—ACCOMPLICE'S TESTIMONY—"CORROBORATE."

In the prosecution of a member of a city and county board of supervisors for receiving a bribe for his vote, another supervisor testified that, acting for another, he approached the members of the board as to buying their votes, and that he offered accused a certain sum for his vote on a certain proposition, and that accused said it would be all right. *Held*, that such witness' evidence was not "corroborated," within the rule as to corroborating an accomplice's testimony, by evidence which merely showed how accused voted on such proposition, or that immunity was offered to accused for "any and all crimes" he committed as supervisor without specifying any particular crime, or of the receiving of sufficient money by the alleged briber to enable him to make the bribe without a showing that accused received anything, nor was the fact that after accused was indicted such witness tried to induce the district attorney to abandon the prosecution available to corroborate his evidence.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1127–1137; Dec. Dig. § 511.*

For other definitions, see Words and Phrases, vol. 2, p. 1627.]

13. Bribery (§ 1*)—Offenses.

The acceptance by an officer of a gift after an official act is consummated without any prior corrupt understanding does not constitute bribery.

[Ed. Note.—For other cases, see Bribery, Cent. Dig. §§ 1–3; Dec. Dig. § 1.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

M. W. Coffey was convicted of bribery, and, from the judgment of conviction and orders denying motions to set aside the judgment and for a new trial, he appeals. Reversed and remanded.

Carroll Cook, Franklin P. Bull, and Robert Farral, for appellant. U. S. Webb, Atty. Gen., W. H. Langdon, Dist. Atty., and Francis J. Heney, Asst. Dist. Atty. (Wm. Hoff Cook, of counsel), for the People.

HENSHAW, J. Defendant was indicted under section 165 of the Penal Code, and was charged as a supervisor with having "agreed to receive and receiving" a bribe of $4,000 from James L. Gallagher, Abraham Ruef, and Tirey L. Ford. It was alleged that the agreement to receive the bribe and the reception of the bribe were "with the willful, felonious, unlawful, and corrupt intent" upon the part of Coffey that his official vote, opinion, judgment, and action should be influenced thereby in the matter of granting to the United Railroads of San Francisco a franchise for an overhead trolley system. From the judgment of conviction and from his various motions to set aside the judgment, in arrest of judgment, and for a new trial, each of which was denied by the court, defendant appeals. His principal contentions are that the court erred in the instructions which it gave upon the law of accomplices, and that his conviction was had in violation of the law, upon the uncorroborated testimony of a self-confessed accomplice in his crime.

[1] When the question of an accomplice arises in the trial of a case, the general and accepted rule is for the court to instruct the jury touching the law of accomplices, and leave the question whether or not the witness be an accomplice for the decision of the jury as a matter of fact. People v. Kraker, 72 Cal. 459, 14 Pac. 196, 1 Am. St. Rep. 65.

[2] Whenever the facts themselves are in dispute, that is to say, wherever the question is whether the witness did or did not do certain things, which, admittedly, if he did do them, make him an accomplice, the jury's finding, upon familiar principles, is not disturbed. But where the facts are not in dispute, where the acts and conduct of the witness are admitted, it becomes a question of law for the court to say whether or not those acts and facts make the witness an accomplice. For the law declares in mandatory terms that "a conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence which in itself, and without the aid of the accomplice, tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." Pen. Code, § 1111.

[3] Therefore whenever upon appeal it is argued that the conviction was had upon the uncorroborated testimony of an accomplice, it is equivalent to a declaration that the verdict is contrary to the law and the evidence, and this is always a legal question. Pen. Code, § 1181, subd. 6. Therefore, in every proper case, a Court of Appeals is called upon to consider whether or not the witness is an accomplice, and, if so, whether his evidence has received the corroboration demanded by the law before a defendant may be convicted upon it.

To the consideration of what constitutes a man an accomplice in a bribery case we are thus at once brought, and to an understanding of these matters a brief statement of the evidence becomes necessary. The principal witness for the prosecution was Gallagher, himself a supervisor. Gallagher, by his own statements, was testifying under a promise of immunity, agreed to by the prosecution, in consideration of his giving truthful evidence touching his own crimes, and the crimes of the board of which he was a member, including the crime under examination. He swore that he acted as the intermediary of Abraham Ruef and for Ruef, and approached and consulted with his fellow members on the board in relation to the corrupt bargains which were, and were to be, entered into, and the amounts of money which the members of the board were to receive for voting as Ruef desired. In this particular instance Gallagher spoke to Coffey, at the suggestion of Ruef (quoting from his testimony): "Mr. Ruef told me what he could or would give the board of supervisors in the matter, and asked me to present the proposition to them, and I did so, and I reported back to Mr. Ruef from them that it was all right; that the matter could go through. I said to Mr. Coffey, in the matter of the overhead trolley, that there would be $4,000 in that matter, and Mr. Coffey said that that would be all right—words to that effect. That is the substance of it." The trolley franchise was granted, and subsequent thereto, Gallagher testifies, he gave to Coffey $4,000 in two separate payments. This evidence, coming from the prosecution itself, is uncontroverted, and presents the legal question whether, by virtue of it, Galagher was an accomplice of Coffey in the corrupt agreement thus charged and proved.

The rules of law and principles of evidence controlling the testimony of accomplices are drawn from the common law. The difficulty which the common-law judges experienced was not in determining the weight to be given to the testimony of an accomplice. Under their rules of evidence, a *convicted* felon could not testify. Influenced in no small degree by the maxim of the Roman law that a man of self-confessed infamy should not be heard as a witness against another (nemo, allegans turpitudinem suam, est audiendus), their principal difficulty was in determining whether the oath and evidence of a self-confessed though unconvicted felon—an accomplice—should be received at all. When this question was resolved against the doctrine of the Roman law, it was, of course, recognized that evidence of an accomplice, coming from a tainted source, the witness being, first, an infamous man, from his own confession of guilt, and, second, a man usually testifying in the hope of favor or the expectation of immunity, was not entitled to the same consideration as the evidence of a clean man, free from infamy. Hence it soon became the practice of the common-law judges, in the wide latitude allowed to them in the instruction of their juries, to advise the latter that the testimony of an accomplice, for the reasons indicated, was to be viewed with care, caution, and suspicion (see Code Civ. Proc. § 2061), that the accomplice stood before them as a witness entitled to little credit, and that the surest way of establishing his credit in their eyes was for them to note whether his testimony was corroborated in any material matter by independent evidence, and that if it were so corroborated they might put faith in all that the accomplice had said. Instructions to this effect did not, of course, embody any rule of positive law. They were but the expression of considerations naturally arising from a contemplation of the weight and value to be given to such evidence. Subsequently they were cast into the form of positive law by varying enactments in the Codes and statutes of the states. In this state, the rule of positive law since the year 1851 is as has been declared in section 1111 of the Penal Code. Time has not changed the value of such evidence, and succeeding Legislatures have retained the rule; the amendment to the section in 1911 not materially affecting it.

[4] But while the Legislature was thus at pains to declare that a conviction could not be had on the uncorroborated testimony of an accomplice, it omitted to define this word. At common law no difficulty was experienced, for the word was interpreted broadly to include principals in every degree and accessories before and after the fact. Those who "receive, relieve, comfort, or assist" the felon, were regarded as having participated in his crime, and as meriting the same punishment that he had earned. And so it will be found that at common law, and in the jurisdiction of the federal courts, an accepted definition of an accomplice includes "all participes criminis, whether they are considered, in strict legal propriety, as principals in the first or second degree, or merely as accessories before or after the fact." In re Rowe, 77 Fed. 161, 23 C. C. A. 103.

Although the Legislature did not in terms define an accomplice, it did lay down certain rules from which an acceptable definition of an accomplice may readily be derived. Thus it obliterated the common-law distinctions between principals in their different degrees and accessories before the fact, and declared that "all persons concerned in the commission of a crime, whether it be a felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or not being present, have advised and encouraged its commission, * * * are principals in any crime so committed." Pen. Code, § 31. The object of this was both to simplify criminal procedure and to do away with the technicalities of the common law, which made the aider or abettor a principal in the second degree, and which forbade the accessory to be brought to trial until the principal had been convicted or outlawed, a rule that lived in modern times and did much mischief. 2 Stephen, History Criminal Law, 232.

[5] Rejecting from the category of accomplices the accessory after the fact (People v. Collum, 122 Cal. 186, 54 Pac. 589), we may derive a satisfactory definition of an accomplice from the language of section 31 of the Penal Code above quoted. Accomplices, then, are "all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission." Certainly, since the law has said that all such persons are so tainted with guilt that they may be indicted as principals, it cannot be denied that they are also accomplices. This definition, moreover, runs counter to no authority, since, by all, every person of legal responsibility, who knowingly and voluntarily co-operates with or aids or assists or advises or encourages another in the commission of a crime is an accomplice, without regard to the degree of his guilt. 1 Russell's Crimes, 49; Wharton, Crim. Ev. 440; Rice, Crim. Ev. § 319; Bishop, Crim. Proc. § 1159.

Having reached the point of defining an accomplice, it becomes proper to consider what acts or facts fix this relationship or characteristic upon a witness. Manifestly, the single, sole determinative consideration is the part which the witness has borne in the crime perpetrated. If the witness has committed the crime, if he has aided and abetted in its commission, if he has advised and encouraged its commission, the existence of any one of these facts admitted or established stamps his status as that of an accomplice. This is the precise language of the law, and this, and this alone, is the governing principle of the law. Yet, in view of the cases hereinafter to be considered, it will be found that occasionally, a court losing sight of this paramount and all-controlling consideration, namely, the conduct of the witness in relation to the crime, has wandered widely from the true test, and, in accordance with faulty definitions of its own making, has determined upon entirely false premises whether a witness is or is not an accomplice.

[6] The commonest of these errors may thus be expressed: The law declares that all persons concerned in the commission of a crime, whether they directly commit it, or aid and abet in its commission, or advise and encourage its commission, are principals. They are, of course, accomplices. Therefore an accomplice is one who may be indicted for the same crime as that charged against the person on trial, and therefore, if he cannot be charged with the same crime, he is not an accomplice. Here is epitomized the reasoning of such cases as State v. Durnam, 73 Minn. 150, 75 N. W. 1127, and the fallacy of the reasoning must be obvious. One is an accomplice in a crime because of the part that he has taken in it, not because he may be indicted as a principal. The latter is a mere accidental circumstance, depending upon the language of the statute, and in no way affecting the true touchstone, namely, the part which the accomplice has taken in the offense. The judicial declaration that, under a statute such as our section 31 of the Penal Code, all accomplices may be indicted as principals, is perfectly sound. But the attempted reasoning from this that if a person cannot be indicted as a principal, he is, therefore, not an accomplice, is absolutely fallacious. To illustrate: In the present condition of our law, no one would question but that the man who instigated and incited a murder and the man who actually committed the murder were both accomplices in the crime of murder. No one would question, moreover, but that both could be indicted as principals in the crime of murder. But suppose that to-morrow the Legislature, as it would be quite competent for it to do, should declare that where a man had incited murder he should be indicted only for subornation of murder, and upon conviction be punished by death, but that the man who committed the murder under such incitement should be charged with murder, and upon conviction should be punished by life imprisonment, there would be presented a case where the law denounced as different crimes the different acts of the parties. Would it for a moment be said that they ceased therefore and thereby to be accomplices in the crime of murder? Or, again, the law to-day declares that the giver of a bribe may be punished for the giving; that the officer who receives a bribe may be punished for the receiving. A. offers B. a bribe, and by this means advises and encourages the commission of a crime. B., in turn, consults his friend C., who "advises and encourages" B. to accept the bribe. B. returns to A. and agrees to A.'s corrupt proposition, and A. pays the bribe money. C. is admittedly an accomplice. He has advised and encouraged B. in the commission of a crime, but A. has done precisely the same thing, and has gone even further than B., in that he has not only advised and encouraged, but has become a party to the criminal agreement. By what logic or reasoning may it be said that C. is an accomplice and A. is not? Not because of the accidental circumstance, if such circumstance exist, that A. can be charged with another crime growing out of the same acts, not because of the accidental circumstance, if it exist, that A. cannot be charged with the same crime, as B., for these *are* purely accidental circumstances and are not of the essence of the consideration. At common law the accomplice could not be indicted for the same crime, yet he was none the less an accomplice. The declaration that one *is* an accomplice if he can be indicted for the same crime charged against the defendant on trial is perfectly sound; but the converse of the declaration, namely, that, if he cannot be indicted for the same crime, he is *not* an accomplice, is the merest sophistry, which, ignoring the true test and meaning of the word, seeks to turn shadow into substance. That test and meaning, as we have said, are expressed in section 31 of the Penal Code. If a man has committed a crime, if he has aided and abetted in its commission, if he has advised or encouraged its commission, he is an accomplice with all other participes criminis.

It is, of course, no argument to say that, where the law has denounced as separate crimes the separate acts of the parties as bribe giving and bribe taking, to hold the parties to be accomplices would make them principals in one crime and accomplices in another "at the same time and through the same overt act." This is a frequent occurrence in and condition of the law. The law may and oft does go further and make different offenses with different punishments of the *same* act. The prosecution may be had for any of the crimes embraced within the acts committed. But the law exacts only a single punishment, and upon conviction or acquittal for the given acts the defendant may successfully plead autrefois convict or autrefois acquit against another prosecution for the same acts under a different section of the Code. Indeed, this condition of the law is expressly recognized in section 654 of the Penal Code, which declares that "an act or omission which is made punishable in different ways by different provisions of this Code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other." And as specific illustrations, subornation of perjury is declared a crime punishable by imprisonment in the state prison for not less than one nor more than fourteen years. Pen. Code, §§ 126, 127. A futile effort to induce a witness to commit perjury may be punished as an attempt under section 664 of the Penal Code, when upon conviction the defendant could be sentenced to state prison for a term not exceeding seven years. Yet by section 137 of the Penal Code the same attempt is declared to be a felony, and by section 18 of the Code that felony could be punished only by a term of imprisonment not exceeding five years. Again, extortion under color of office contains all the elements of bribe taking, and the guilty official may be indicted and prosecuted indifferently for either offense, notwithstanding that their punishments may be different. Com. v. Wilson, 30 Pa. Super. Ct. 26.

While our law generally does not seek to admeasure the degrees of guilt between principals, accessories, and accomplices, it is quite competent for it to do so, and in the past it has been quite common for it to do so. If A. instigates B., C., D., and E. to join in the commission of a murder, B. furnishing the weapon, C. transporting D. and E. to the scene of the crime, D. holding the victim while E. inflicts the fatal blow, the law might admeasure their degrees of criminality, define their offenses separately, and punish them accordingly. If it did not do so, all, under our Code, would be accomplices and principals alike in the crime of murder. Would they be any the less accomplices, would they any the less have instigated, aided, abetted, and committed the crime because the law should happen to mete out different punishments for their separate acts of participation, as it actually did at common law?

[7] Nor yet does it follow, because the particular act of participation of an accessory or accomplice in a crime has been denounced by our law as a separate crime, that he cannot therefore be indicted as a principal. If the law made manifest its intent that he should not be so indicted as a principal, it would be but an exception to the general provision of section 31. If it did not make manifest this intent, then the situation presented is that contemplated by section 654 of the Penal Code, where the act is made punishable in different ways by different provisions of the Code. But in either case the accidental circumstances clearly do not affect the definition of an accomplice. One is an accomplice, we repeat, because of what he has done, and not because of the form of punishment which the law may mete out for his acts. Wherever the law has denounced as a separate crime the particular act of participation by an accessory or accomplice, the sole logical and legal effect is not to destroy the relationship of accomplice, but merely to effect a modification of section 31 of the Penal Code, as though by an express proviso it should read, "All persons concerned in the commission of a crime," etc., "are principals in any crime so committed, provided that they shall not be indicted as principals in any case where the law has denounced their participation as a separate crime and declared that they shall be prosecuted exclusively for such separate crime." But this, as we have said, does not and cannot, by any species of legal hermeneutics or legerdemain, relieve an accomplice of his character of accomplice. It is merely prescribing a separate punishment for the particular act of one who is still an accomplice.

By a few courts which have regarded the *effort* to induce a witness to commit perjury as the essence of the crime of subornation, disregarding as negligible the success of the effort resulting in a corrupt agreement and in the commission of the perjury itself, it is held that in a charge of subornation the perjurer is not an accomplice with the suborner. The case most often cited and here relied upon by respondent is that of Stone v. State, 118 Ga. 717, 45 S. E. 630, 98 Am. St. Rep. 145. That was a charge of subornation of perjury; the perjury having been committed. The testimony of the perjurer was received. It was contended that the perjurer was an accomplice. The Supreme Court of Georgia reasoned that while "in perjury and subornation of perjury the act of the two offenders is concurrent, parallel, and closely related in point of time and conduct," still there was "sufficient inherent difference between the two to warrant the lawmaking power in separating the act into its component parts and making that of the suborner a new and independent offense, punishable with greater or less severity than that inflicted on the perjurer." From this the court reasoned that "the suborner is not, under our law, treated as the accessory of the perjurer." This is "further evident from the fact that they are punished differently, while under the Code accessories before the fact are punishable in the same way as principals." The next step in the reasoning is sound. It is that "if not accessories the suborner and the perjurer are not accomplices." And having determined to its satisfaction that the suborner and the perjurer were not accessories, the conclusion that they were not accomplices followed irresistibly. The court would have made a more plausible presentation if it had reasoned solely from the proposition that the sole substantive element of subornation is the effort and attempt to procure perjury, and that the success or nonsuccess of the effort is a negligible quantity, and that it was thus like the crime of soliciting a bribe or the crime of offering a bribe. But to place its reasoning upon the ground that the suborner is not an accessory of the perjurer, so that if the trial were for perjury the suborner would not be considered as an accomplice, does violence to the common law and to the decision of every state which has made the common law the basis of its jurisprudence. The accomplice at common law—the accomplice in this state—is one who advises and encourages the commission of a crime. How can it be said that the very instigator of the crime—the suborner—has not advised or encouraged it? But faulty as we believe even this reasoning would have been, because we conceive the corrupt agreement to be of the essence of the crime of subornation, though not of attempt to suborn, it would still have been at variance with the common-law rule and the rule of such well-considered cases as People v. Evans, 40 N. Y. 5, and Commonwealth v. Smith, 11 Allen (Mass.) 243. The latter case merits quotation at length: "The crime of subornation of perjury is clearly in its nature that of an accessory before the fact to the perjury. Both perjury and subornation are felonies under our statute, being punishable by imprisonment in the state prison. Gen. Stats. c. 163, §§ 1, 2, 3; Id., c. 168, § 1. Whoever procures a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact, for it is not necessary that there should be any direct communication between the accessory and the principal. Rex v. Cooper, 5 C. & P. 535; Foster's Crown Law, 125; 2 Hawk. c. 29, §§ 1, 10; Earl of Somerset's Case, cited in 19 Howell's State Trials, 804. And the accessory is a felon, though his felony is different in kind from that of the principal. Foster's Crown Law, 343. So it is said to be a principle in law, which can never be controverted, that he who procures a felony to be done is a felon. 1 Russ. on Crimes, 32. We cannot see that the application of these principles is changed, when the crime of the accessory before the fact is made by statute a substantive felony. The object of making it a substantive felony may be either to provide a distinct or milder punishment upon conviction, or to authorize the indictment and conviction of the accessory where the principal has not been convicted. But whether the crime is made the subject of separate prosecution and punishment or is to be included in an indictment with the principal offense will not, in the opinion of the court, change the definition of it, or alter the facts or circumstances in which the commission of it consists. The same facts to be averred and proved in the same way will substantiate the crime in one case as in the other. * * * The crime of subornation of perjury would consist in procuring perjury to be committed, directly or indirectly, as much after subornation was made a felony as before."

To the same effect is the case of State v. Fahey, 3 Pennewill (Del.) 594, 54 Atl. 690, and in State v. Renswick, 85 Minn. 19, 88 N. W. 22, the Supreme Court of Minnesota, which, as we shall see, is the only court that announces the extreme view that the briber and bribed are not accomplices, declares that in a trial for subornation of perjury the mere *attempt* to suborn testified to by the witness does not make him an accomplice; but, if the subornation itself is sought to be established by the testimony of the perjurer, the latter is an accomplice, and his evidence must be corroborated.

Wherever the commission of a crime involves the co-operation of two or more people, the guilt of each will be determined by the nature of that co-operation. Whenever the co-operation of the parties is a corrupt co-operation, then always those agents are accomplices, even as at common law they were principals. To the crime of seduction two parties are necessary, but the co-operation of the seduced is not criminal. She is a victim, and she is not therefore an accomplice of the seducer. In such lesser offenses as laws denouncing the *sale* of lottery tickets or the *sale* of liquor, while two are necessary to the transaction and to the commission of the crime, the law reasons that the purchaser's act is entirely innocent, and he will not be regarded as an accomplice. In cases of abortion, where the law denounces the commission of an abortion, some cases hold that the consenting pregnant woman is not an accomplice. These decisions doubtless arise in part out of a tenderness for the sex and a consideration of the extreme temptations by which a woman so situated may be beset. Under our law a woman may or may not be an accomplice, depending upon her part in the transaction. Thus she may consent to the taking of the drugs, or the performance of the operation in ignorance of the intended purpose. She may, indeed, be coerced into submission, in neither of which cases would she be an accomplice. But if a woman voluntarily solicits the performance of such an operation upon herself, and to that extent induces it, it is impossible to see how she can fail to have been an instigator and encourager of the crime, and so an accomplice. Such is the ruling of the Ohio Supreme Court in State v. McCoy, 52 Ohio St. 157, 39 N. E. 316, and such is the decision of this state in People v. Josselyn, 39 Cal. 393, and the recognition of the relationship of an accomplice is evidenced by the provisions of the Penal Code, which in section 1108 declares that upon a trial "for procuring or attempting to procure an abortion, or aiding or assisting therein, the defendant cannot be convicted upon the testimony of the woman upon or with whom the offense was committed, unless she is corroborated by other evidence."

In adultery and fornication, where the willing consent of the woman is proven or assumed, the courts have found no difficulty in declaring her to be an accomplice with the man. For there, differing from abortion, no considerations of the temptation of the woman's hard lot operate to soften the court's views. They are accomplices the one with the other because their conduct is corrupt and each has mutually aided the other in the commission of a crime to which the corrupt participation of the two is necessary. State v. Scott, 28 Or. 331, 42 Pac. 1; Merritt v. State, 12 Tex. App. 203; Townser v. State, 58 Tex. Cr. R. 453, 126 S. W. 572, 137 Am. St. Rep. 976.

[8] "Bribery" at common law, as defined by Bishop (1 Bishop, New Crim. Law, 85), was "the voluntary giving or receiving of anything of value in corrupt payment for an official act done or to be done." It is the uniform rule of decision, not only of the common law but of every state of the United States, with one exception hereinafter to be considered, that the giver and the receiver of the bribe are principals in the crime, and so necessarily accomplices of each other. The giving and the receiving are reciprocal. Rex v. Vaughan, 4 Burr, 2494; Regina v. Boyes, 1 Best & Smith, 311. In the Vaughan Case, supra, says Lord Mansfield: "Wherever it is a crime to take it is a crime to give." Various states have in various ways denounced as crimes certain phases, elements, and transactions going to the crime of bribery, but stopping short of its completion. Thus, in some states the soliciting of a bribe without its payment is a crime. Pen. Code, § 93. In others it is not. In some states the offer to pay a bribe without regard to its acceptance is a crime. Pen. Code, § 93. In others it is not. Manifestly in the crimes last mentioned, since the denounced act in no wise depends upon a plurality of agents, in no wise rests upon the corrupt assent, agreement, or procurement of another, the person approached is not an accomplice of the approacher. But whenever a crime embraces the corrupt, guilty, criminal co-operation of two or more persons, those persons always have been and must be accomplices.

[9] This, then, is the true test and rule: If in any crime the participation of an individual has been criminally corrupt, he is an accomplice. If it has not been criminally corrupt, he is not an accomplice. In those cases where the concurrent act or co-operation of two people is necessary, as in seduction, sometimes in abortion, and in the minor offenses of selling liquor, lottery tickets or harmful drugs, the relationship of accomplice does not exist because the co-operation of the other party is not denounced by the law as criminally corrupt, and, as matter of fact, need not be criminally corrupt. Upon the other hand, where the act requires the co-operation of two persons, and their co-operation is criminally corrupt, the relationship of accomplice is at once established, as in adultery and fornication, in duelling, in agreeing to fight a duel, in illegal rebating (U. S. v. N. Y. C. R. R. Co. [C. C.] 146 Fed. 298), in bribery, and in all forms of criminal agreement, where the agreement itself constitutes the crime. Conspiracies are typical instances of agreements in and of themselves constituting crimes. All the conspirators are principals and, of course, accomplices.

In the charge against this defendant of "agreeing to receive a bribe" and "receiving a bribe," each element, the agreeing and the receiving, necessarily contemplates the criminally corrupt co-operation of another (eliminating from consideration, of course, the feigned accomplice). To this proposition the authorities are so numerous and so uniform that one is rather embarrassed by the wealth than by the dearth of them. But on the question of accomplices in bribery alone, as sustaining this principle, either tacitly or with discussion, may be cited Newman v. People, 23 Colo. 300, 47 Pac. 278; People v. Bissert, 71 App. Div. 118, 75 N. Y. Supp. 630, affirmed 172 N. Y. 643, 65 N. E. 1120; People v. Winant, 24 Misc. Rep. 361, 53 N. Y. Supp. 695; People v. Acritelli, 57 Misc. Rep. 574, 110 N. Y. Supp. 440; State v. Callahan, 47 La. Ann. 444, 17 South. 50; State v. Smalls, 11 S. C. 262; State v. Horner, 1 Marv. (Del.) 504, 41 Atl. 139; Murphy v. State, 124 Wis. 635, 102 N. W. 1087; People v. McGarry, 136 Mich. 316, 99 N. W. 147; People v. Fielding, 36 App. Div. 401, 55 N. Y. Supp. 530; Ruffin v. State, 36 Tex. Cr. R. 565, 38 S. W. 169; O'Brien v. State, 6 Tex. App. 665; Birch v. State (Tex. Cr. App.) 106 S. W. 344; State v. Carr, 28 Or. 389, 42 Pac. 215; Butt v. State, 81 Ark. 173, 98 S. W. 723, 118 Am. St. Rep. 42; and State v. Duff, 138 Am. St. Rep. 269, note, where it is said: "It may be stated as a general rule that a person offering, giving, or paying a bribe is an accomplice of the person who receives it, particularly wherever the statutes make it a crime for a person to offer, give, or pay, and a crime for a person to receive, a bribe."

There is but one court, as has been intimated, which has advanced a view on this subject contrary to all other authorities and decisions. That is the Supreme Court of Minnesota, in the case of State v. Durnam, 73 Minn. 150, 75 N. W. 1127. In that case the defendant was indicted and convicted of the crime of "asking" for a bribe, the crime contemplated in our state by such sections as Penal Code, 93 and 94. He had solicited the bribe from Richards and Halvorson, witnesses in the case. The defendant's demands were not acceded to; the bribe money was not paid. Upon appeal it was contended that Richards and Halvorson were accomplices. The Attorney General in his brief made the argument that follows: "As to defendant's contention that Richards was an accomplice, it seems to us that, if a person from whom a bribe is asked is an accomplice when he refuses to give it, then a person who is held up on the street at night by a highwayman is an accomplice. In both cases the person robbed and the person solicited furnish subjects upon which the crime could be committed; but that does not make them accomplices. In order to be an accomplice, a person must be a criminal. He must do a criminal act with a criminal intent, and the person who is merely asked for a bribe may refuse it and be perfectly innocent of any offense." The position of the Attorney General was perfectly sound. It could have been adopted by the court with absolute security. But the court went still further and, under the fallacious formula above adverted to, worked out the proposition that if the witness could not have been indicted for the offense he was not an accomplice; and that, consequently, if the law has denounced the acts of participation of the two as separate offenses, "the one is not the accomplice of the other." How utterly mistaken this line of argument is, we think has been abundantly shown. We have already pointed out how this same court, in the case of perjury and subornation, crimes made separate and distinct by the Minnesota law, has held, notwithstanding, that the testimony of the perjurer must be corroborated in a charge against the suborner. We are not called upon to reconcile the inconsistency of these decisions, and it is sufficient to point out that State v. Durnam is unique in the history of the law.

[10] The charge against this defendant, as we have seen, is under section 165 of the Penal Code. It is not for asking or soliciting a bribe. It is for "*agreeing*" to receive and "*receiving*" a bribe. The agreement necessarily carries with it the essential concept of a criminal and corrupt bargain. There can be no agreement without a meeting of minds, and a meeting of minds for this base bargain is declared to be a crime. There is nothing in the law to suggest even that in such a crime the two parties stand in any different position from that occupied by two who agree to fight a duel. In such an agreement the act of the person who contracts to pay the consideration is admittedly base, corrupt, and criminal. Moreover, his conduct is essential to the very existence of the crime of agreeing. How then shall it be said that he is not, within the narrowest or the fullest meaning of the law, an accomplice of the man agreeing to take the bribe? He is an actual participant in the crime, as well as an aider, abettor, adviser, and encourager in its commission, for it is to be remembered that in the case at bar the crime itself is the agreement. An officer may solicit bribes, may ask for bribes, may advertise his willingness to accept bribes. Each one of these acts is a separate, distinct, and recognized crime; but no one of them is the crime of agreeing to take a bribe, which ex vi termini requires the guilty co-operation of another. U. S. v. Deitrich (C. C.) 126 Fed. 664. Moreover, if, as we have seen, by all of the authorities, saving one, when the bribery is completed the payer of the bribe and the recipient of the bribe are reciprocally accomplices in the bribing, it cannot successfully be argued that in the perfected agreement for the accomplishment of this crime the same two persons are not accomplices.

With the law thus before us we are in a position to consider the rulings of the trial court.

The court gave the following instruction: "Where two or more persons are concerned in the commission of a crime, whether they or either of them directly commit the act constituting the offense, or aid and abet in the commission, or, not being present, have advised and encouraged in its commission, each one of them is an accomplice with the other in any crime so committed, and the final test of the question, as applied to a witness in any case, is: Could such witness lawfully be indicted with the defendant for the offense on trial? If so, he is an accomplice within the meaning of the law. If not, he is not, and the man who gives or offers a bribe is not for that reason an accomplice of the one who receives or agrees to receive a bribe." The opening sentence of this instruction defines an accomplice in just terms. But when it proceeds to say that the final test as applied to a witness in any case is: "Could such witness lawfully be indicted with the defendant for the offense on trial?" the court adopted the fallacious reasoning of the Durnam Case, supra, and fell into error—an error which was repeated in the closing sentence with, "the man who gives or offers a bribe is not, for that reason, an accomplice of the one who receives or agrees to receive a bribe." For, as Lord Mansfield said, "Wherever it is a crime to take it is a crime to give." These crimes are reciprocal and mutually interdependent. The same is true of an agreement to receive a bribe.

It thus being established that Gallagher was clearly an accomplice, the equally important question remains whether or not his testimony was corroborated. If it be corroborated, up to the requirements of the law, it might be argued that, notwithstanding the erroneous instruction above quoted, the jury determined that he was an accomplice, but rendered its verdict because of the corroborating evidence. Upon this it is declared by respondent that, treating Gallagher as an accomplice, his evidence was sufficiently corroborated.

[11] The corroboration of an accomplice's

testimony, as has been said, may be slight. People v. Melvane, 39 Cal. 616; People v. Clough, 73 Cal. 351. But it must in and of itself, and independent of the testimony of the accomplice, tend to inculpate the defendant on trial with the commission of the crime.

[12] But no part of the testimony which the respondent declares effects such corroboration is of any legal effect for this purpose. Thus it is said that the defendant's act "established primarily by Gallagher's direct testimony" tends to corroborate Gallagher. But this, in legal effect, is but the untenable declaration that one part of the evidence of an accomplice may corroborate another part. "The testimony of independent witnesses as to the defendant's votes in the board of supervisors on the bills and ordinances in relation to the overhead trolley system" does no more than to show how he voted, and affords not the slightest independent evidence that he so voted under a corrupt agreement to accept a bribe for so doing. The immunity contract offered in evidence did no more than to declare that immunity would be granted for any and all crimes which Coffey as a supervisor might have committed, but contained no reference whatsoever to this or any particular crime. The tracing of a fund from the United Railways into the hands of Ruef was likewise insufficient. This was but a showing of the possession of sufficient money by the alleged briber. It did not tend to show that the defendant actually received any of it. See People v. Bissert, 71 App. Div. 118, 75 N. Y. Supp. 630; Id., 172 N. Y. 643, 65 N. E. 1120.

The other matters of evidence alleged as establishing sufficient corroboration are equally without substance. It is unnecessary to discuss them all. But in exemplification, after Coffey was indicted for the present crime, Gallagher interceded on his behalf with the district attorney, and sought to have the latter abandon the prosecution. This is urged as corroboration. So far as appears, it was an unsolicited act, and could not have the slightest effect as showing, from an independent source, that Coffey either corruptly agreed to take a bribe, or corruptly received a bribe. The latter fact, the reception of the bribe, stands equally upon the uncorroborated testimony of Gallagher.

[13] Moreover, the money was received after the franchises were granted, and it is well established that, however atrocious in good morals the reception of a present after the act may be, the acceptance of a gift without corrupt prior understanding is not bribery. 2 Wharton's Crim. Law (10th Ed.) § 1858; State v. Ellis, 33 N. J. Law, 102, 97 Am. Dec. 707; Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569.

It follows herefrom that the testimony of Gallagher is corroborated in no respect required by the law, and for the reasons given the judgment and orders appealed from are reversed, and the cause is remanded.

We concur: BEATTY, C. J.; SHAW, J.; MELVIN, J.; LORIGAN, J.; SLOSS, J.

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161 Cal. 531

MARTZ v. AMERICAN BRAN GOLD CO.

(Sac. 1,902.)

(Supreme Court of California. Dec. 13, 1911.)

1. Judgment (§ 155*)—Vacating—Grounds—Mistake and Inadvertence.

The notice of a motion to set aside a default judgment for plaintiff stated specifically that it was "upon the ground that said judgment was entered by mistake and inadvertence," and stated immediately thereafter that "no service has ever been made upon the defendant corporation herein." A sufficient affidavit of merits accompanied the notice. *Held*, that the motion was one for relief from the judgment, under Code Civ. Proc. § 473, upon the ground of inadvertence and mistake, and not one to vacate for want of jurisdiction of the person.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 306, 307; Dec. Dig. § 155.*]

2. Judgment (§ 159*)—Default Judgment—Vacating—Inadvertence and Mistake.

An affidavit, served with notice of motion to vacate a default judgment for plaintiff against defendant corporation, showing that none of the officers of the corporation knew of the institution of the suit until after the default judgment was entered, and that the person served was not an agent of the corporation, authorized the vacation of the judgment upon the ground of inadvertence and mistake, pursuant to Code Civ. Proc. § 473.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 312, 313; Dec. Dig. § 159.*]

3. Judgment (§ 147*)—Default Judgment—Vacating—Inadvertence and Mistake.

Defendant may waive an objection to a default judgment that he was not personally served, and yet have it vacated on the ground of mistake and inadvertence.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 257; Dec. Dig. § 147.*]

Department 1. Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by C. E. Martz, administrator of Elmer W. Martz, deceased, against the American Bran Gold Company. From an order setting aside a default judgment for plaintiff, he appeals. Affirmed.

A. K. Robinson, James D. Meredith, and J. B. Landis, for appellant. Ben P. Tabor and C. H. Wilson, for respondent.

ANGELLOTTI, J. This is an appeal by plaintiff from an order setting aside and vacating the default of the defendant and the judgment in plaintiff's favor entered thereon.

The action was one for damages in the sum of $25,000 for the death of plaintiff's intestate, alleged to have been caused by the wrongful neglect of the defendant. The only attempted service of summons in said action was on August 23, 1909, and consisted of the delivery of a copy of the complaint and summons to one W. S. Fletcher, in Placer county; said delivery being made to him as "the managing agent of said corporation." On May 3, 1910, the default of the defendant was entered, and on May 9, 1910, judgment was entered in favor of plaintiff for the relief demanded in the complaint—$25,000 and costs of suit. Execution was thereupon issued and levied upon property of defendant. The principal place of business of defendant corporation was at Long Beach, Los Angeles county, where both the president and secretary resided. Such corporation had been engaged in the business of mining in Placer county, and it was the theory of plaintiff that it was so engaged at the time of the attempted service of summons, and that said W. S. Fletcher was then its managing agent in that county.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

On May 28, 1910, defendant served upon plaintiff's attorneys and filed a notice of motion to set aside the default and judgment, "upon the ground that said judgment was entered by mistake and by inadvertence; that no service has ever been made upon the defendant corporation herein." The notice stated that the motion would be based upon the affidavits of J. F. Thompson and J. W. Delker, copies of which were served therewith, and upon the records and files in the case. The affidavit of Mr. Thompson contained the matters essential to an affidavit of merits. In such affidavit he further declared that W. S. Fletcher, upon whom the summons was served, was not at any time since April 5, 1909, connected with defendant corporation, either as agent, officer, employé, or stockholder; and, further, that Fletcher did not report to the officers of defendant that he had been served with summons. He further declared that no process had ever been served on any officer or agent of the company, and "that affiant did not know, and that none of the officers of said defendant corporation knew, of the institution of this suit until long after judgment was rendered therein and an execution issued and levied founded upon said judgment." The affidavit of J. W. Delker, the secretary of defendant, contained similar allegations as to Fletcher, and lack of knowledge, prior to May 18, 1910, of the institution or pendency of the action. There was never any denial, either in any affidavit presented by plaintiff or otherwise, of any of the statements contained in these affidavits, except those in regard to the status of Fletcher as managing agent of the company. On May 30, 1910, another notice of motion to vacate the default and judgment, to be based on the same affidavits, records, etc., was served; the exclusive ground stated therein being want of jurisdiction of defendant, for the reason that there had been no service of process therein.

The motions so noticed were heard together; the affidavits hereinbefore referred to and numerous other affidavits, together with the files and records of the cause, being received in evidence on such hearing. The question of fact as to which the principal controversy existed on such hearing was whether Fletcher was, at the time of the attempted service of summons, the "managing agent of defendant," within the meaning of those words as used in subdivision 1, § 411, of the Code of Civil Procedure, providing that service of summons on a corporation formed under the laws of this state must be had by delivering a copy thereof "to the president or other head of the corporation, secretary, cashier, or managing agent thereof." Upon this issue there was a substantial conflict in the evidence, and the trial court expressly found in its order vacating the judgment and default that Fletcher, at the time of such service, "was not, nor had he been for more than three months, the agent, managing agent, employé, servant, officer, or stockholder of the defendant corporation." It was, however, contended by plaintiff, upon the authority of Security, etc., Co. v. Boston, etc., Co., 126 Cal. 418, 58 Pac. 941, 59 Pac. 296, that defendant had waived the want of service of summons by uniting with its motion for the vacating of the default and judgment on the ground of want of service, an application for relief on the ground of mistake and inadvertence, under section 473 of the Code of Civil Procedure. It was further claimed that it had waived such want of service by applying to and obtaining from the court two orders shortening the time that must elapse between the service of the notices of motion to vacate and the hearing thereon. The trial court, while apparently treating the motion as one based solely on the ground of want of service of process, expressly found in its order "that said corporation defendant had no knowledge of the pending of said action, nor of the entry of said default, nor of any of the proceedings in said action, until after the issuance of execution herein"—a conclusion absolutely required by the undisputed evidence if Fletcher was not the "managing agent" of the defendant; and it must be assumed, in view of the conflict of evidence on the latter point, and the express finding of the trial court thereon, that he was not such managing agent. The court, concluding "that the defendant corporation was never served with summons herein, and is entitled to have the default set aside and the said judgment vacated," decreed "that the default entered herein be and is hereby set aside, and that the judgment entered herein on the 9th day of May, 1910, be and the same is hereby vacated, annulled and set aside," with leave to defendant to plead to the complaint within 30 days.

[1] We do not deem it necessary to consider the question whether defendant, by the

language of its first notice of motion, and its application for and taking of two orders shortening the time that must elapse between the service of its notices of motion and the hearing thereon, waived the objection of want of jurisdiction of its person. Regardless of that matter, we are satisfied that the first motion should be considered as one by defendant for relief, under section 473 of the Code of Civil Procedure, from a judgment taken against it through its mistake and inadvertence, even if it could be considered as also being a motion to set aside the judgment for want of jurisdiction of the person. It is to be observed that the notice of this motion does not in terms specify want of such jurisdiction as a ground of the motion. It does in terms specify that the motion will be "upon the ground that said judgment was entered by mistake and by inadvertence," following this immediately with the statement "that no service has ever been made upon the defendant corporation herein." A sufficient affidavit of merits accompanied the notice, a thing not essential to an attack for want of jurisdiction.

[2, 3] The affidavits served, by copy, with the notice, stated facts sufficient to warrant the granting of the relief asked because of the excusable mistake and inadvertence of the defendant, for surely, even if the objection of want of jurisdiction by reason of want of legal service of the summons was waived by a voluntary appearance after judgment, the fact that none of the officers of the corporation had any knowledge of the institution of the action until after the judgment had been entered is a sufficient basis for a conclusion that the judgment was taken against the defendant through its excusable mistake and inadvertence. But it is needless to discuss this particular question further, for plaintiff's contention that defendant waived the objection of want of service is based principally upon its further contention that defendant's motion was, in part, one for relief, under section 473 of the Code of Civil Procedure, on the ground of mistake and inadvertence. It is not to be doubted, of course, that a defendant may waive such an objection and still have relief under the section last referred to.

So considering the motion, it is obvious that the order vacating the judgment and default was correct. Assuming that there was a waiver of the want of jurisdiction of the person of defendant by reason of its voluntary appearance after judgment, there was, according to findings of the trial court, sufficiently sustained by the evidence, no actual service of summons upon any officer or agent of defendant, and, according to another finding of the trial court, sustained by undisputed evidence, if Fletcher was not the managing agent of defendant (as is established by the former findings), no actual knowledge on the part of said defendant of the pendency of the action. Such a state of facts manifestly required that the motion for relief under section 473 should be granted, in order that defendant might have an opportunity to be heard upon the merits. So that, whatever may have been the exact reason for the action of the trial court, its order that the judgment and default be vacated was one that it was bound to make, in view of the facts found.

The order appealed from is affirmed.

We concur: SHAW, J.; SLOSS, J.

161 Cal. 548

SOHER v. CABANISS, Superior Judge.

(S. F. 5,850.)

(Supreme Court of California. Dec. 13, 1911.)

1. RECORDS (§ 18*) — DESTROYED RECORD — PROCEEDINGS — PETITION — SUFFICIENCY — "CHARACTER."

Under the McEnerney act (St. 1906 [Ex. Sess.] p. 76), providing for an action to establish title in case of loss of records, and providing, in section 5, that an affidavit of plaintiff, fully and explicitly setting forth the character of his estate, right, title, and interest or claim in and possession of the property, shall be filed with the complaint, an affidavit, alleging simple possession without describing its character, was sufficient to give the court jurisdiction to decide the action; the word "character" having no reference to possession.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 18.*

For other definitions, see Words and Phrases, vol. 2, pp. 1061–1063.]

2. RECORDS (§ 18*) — DESTROYED RECORD — PROCEEDINGS—PETITION—SUFFICIENCY.

In an action to establish title under the McEnerney act (St. 1906 [Ex. Sess.] p. 78), an affidavit, alleging complainant's interest and possession, and showing who were her grantors and under what decree she became entitled to possession, is sufficient under section 5, providing for the filing of an affidavit fully setting forth the character of the claimant's estate and possession of the property, during what period the same has existed, and from whom obtained.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 18.*]

In Bank. Petition by Adele Paturel Soher for writ of mandate against George H. Cabaniss, as Judge of the Superior Court, in and for the City and County of San Francisco. From a judgment sustaining a demurrer, petitioner appeals. Demurrer overruled, and writ issued.

J. L. Kennedy, for petitioner. Robert H. Borland and Harding & Monroe, for respondent.

MELVIN, J. Petitioner seeks a writ of mandate to compel respondent, who is a judge of the superior court, to proceed with the trial of an action to quiet title brought under the so-called "McEnerney Act." Respondent demurred to the petition, and as the question involved is purely one of law we may dispose of the whole matter by the ruling on this demurrer.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] Petitioner commenced, in the superior court of the city and county of San Francisco, an action in rem to establish her title to certain parcels of land. All the necessary steps were taken, summons was published pursuant to order of court, and the cause was set for trial. Respondent refused to proceed with the hearing of the cause, on the ground that the affidavit accompanying the complaint was insufficient to give the superior court jurisdiction of the action. In our examination of the questions arising out of the court's action in this regard, it will be necessary to scrutinize some of the provisions of the McEnerney act. Stats. 1906 (Extra Session) p. 78. Section 1 of that act provides that in case of the loss or destruction of public records by flood, fire, or earthquake, an action, such as petitioner sought to inaugurate, may be maintained by "any person who claims an estate of inheritance or for life in, and who is by himself or his tenant, or other person, holding under him, in the actual and peaceable possession of any real property." Section 2 prescribes the manner of commencing the action, which must be by filing a "verified complaint," containing, among other things, "a statement of the facts enumerated in section one" of the act, "a particular description of such real property and a specification of the estate, title or interest of the plaintiff therein." Section 5 provides for filing with the complaint an affidavit of the plaintiff, fully and explicitly "setting forth and showing" certain things; among them being "the character of his estate, right, title, interest or claim in, and possession of the property, during what period the same has existed and from whom obtained." Section 15 of said act is as follows: "An executor, administrator or guardian, or other person holding the possession of property in the right of another, may maintain, as plaintiff, and may appear and defend in the action herein provided for."

In her verified complaint, plaintiff mentioned and described, by metes and bounds, five parcels of land in the city and county of San Francisco. Respecting three of these parcels, she alleged that she was "by herself in the actual and peaceable possession of" them, and "claimed an estate of inheritance in" them. She alleged similar estate of inheritance in the other lots, and averred that she was "by her tenants holding under her in the actual and peaceable possession of" them. Her affidavit contained the following statement: "That the character of her estate, right, title, interest, and claim in and possession of all those portions of the real property described in the complaint herein, and therein designated 'Parcel One,' 'Parcel Two,' and 'Parcel Three,' is a fee simple absolute." Respecting the first parcel the affidavit sets forth the fact that it was obtained by grant, bargain, and sale deed to herself and husband of equal undivided shares, on April 9, 1900, followed by her husband's gift deed to her, July 29, 1900. Then occurs the statement that "said estates, rights, titles, interests, and claims in and possession of said property * * * has existed since the dates of said two deeds." As to parcel 2, it is averred "that said estate," etc., "and possession of said property * * * has existed since the 21st day of April, A. D. 1903." This is followed by a recital that said interests and possession were obtained by a grant, bargain, and sale deed of that date from a certain named grantor, followed, July 7, 1903, by deed of gift from her husband. There is a later allegation that her possession had existed since the dates of the two deeds aforesaid. Of parcel 3, the affidavit alleges the distribution to plaintiff of a one-fourth interest from her mother's estate on a specified date, and the obtaining of the remaining interests in fee simple by certain deeds, giving the dates thereof, and contains the statement that "said estates, rights, titles, interests, and claims in and possession of said real property, designated 'Parcel Three,' have existed since the delivery of said deed from Gustave Paturel, the dates of said two deeds from Alexis Paturel and Emile Paturel, and of said decree of distribution." Of parcels 4 and 5, the affidavit contains the statement that plaintiff obtained an undivided one-fourth interest in each from the estate of her mother by a certain decree of distribution, giving the date, and regarding each parcel she alleges that "said estate, right, title, interest, and claim in and possession of said real property * * * has existed since the said date of said decree of distribution."

Respondent contends that the affidavit in a case of this kind must contain all the facts required by section 5 of the McEnerney act, and that plaintiff's affidavit does not comply with the statute, in that it does not set forth the character of Mrs. Soher's possession of the property. We do not think section 5 of the act requires the affidavit to show the "character" of the possession of the plaintiff. The requirement is that there shall be an affidavit filed, "setting forth and showing" certain things, among which is "the character of his estate, right, title, interest, or claim in, and possession of the property." The reasonable construction of this appears to us to be that the word "character" has no reference to the word "possession," and that the only requirement as to possession is that the affidavit shall show possession. This, we think, is sufficiently done by the affidavit before us to answer all objections on the ground of want of jurisdiction.

[2] It is asserted that plaintiff did not al-

lege from whom she obtained possession. Her affidavit showed her interest in parcels 1, 2, and 3, to be fee simple absolute. Of parcels 4 and 5, she showed by her affidavit an undivided one-fourth interest in each of them, derived from her mother's estate, and alleged possession from the date of the decree of distribution of March 20, 1905. Here was certainly no ambiguity. In setting forth her interest in the two first-named parcels, she described in each instance her deeds, with their dates and the places, books, and pages of their recordation, and alleged that her possession had existed since their dates; and with reference to parcel 3 she followed the same plan, except the decree of distribution was included with the deeds in the averment of the date of her possession. At most, her failure to name the one of her grantors who actually placed her in possession and the exact date of such possession is an ambiguity which cannot be reached in this proceeding. At any rate, regarding these three parcels, she stated a title in fee which gave her the right to possession following the deed of latest date, and she averred possession from a time not later than the completion of her title in fee simple absolute. This was a sufficient compliance with the statute, which is "designed for the benefit of the defendants in enabling them, by verifying plaintiff's claim, to prevent fraud and safeguard their rights." Potrero Nuevo Land Co. v. All Persons, etc., 158 Cal. 735, 112 Pac. 303.

It follows that the demurrer of respondent to the petition herein should be overruled and a writ of mandate issue as prayed for, and it is so ordered.

We concur: ANGELLOTTI, J.; SHAW, J.; HENSHAW, J.; SLOSS, J.; LORIGAN, J.

(161 Cal. 522)

ARNOLD v. CALIFORNIA STANDARD PORTLAND CEMENT CO.

(L. A. 2,773.)

(Supreme Court of California. Dec. 13, 1911.)

1. EVIDENCE (§ 472*)—OPINION EVIDENCE.

Where, in an action for injuries to an employé by an explosion of dynamite, the employer relied on contributory negligence, questions asked the employé as to whether, when he applied the battery for the discharge of several blasts of dynamite, he exercised the ordinary precaution were objectionable as calling for the opinion of the employé on the merits of the defense, which the jury must determine.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2189; Dec. Dig. § 472.*]

2. EVIDENCE (§ 481*)—OPINION EVIDENCE.

Where, in an action for injuries to an employé by the explosion of dynamite, the evidence showed that the employé, after attempting to explode several blasts of powder, cleaned out two holes in safety, and was injured by an explosion of dynamite while attempting to clean out the third hole, a witness could not properly give his opinion as to whether the employé acted in a reasonable way, in view of his understanding of the business.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2248–2254; Dec. Dig. § 481.*]

3. APPEAL AND ERROR (§ 1050*)—ERRONEOUS ADMISSION OF EVIDENCE—PREJUDICIAL ERROR.

Where, in an action for injuries to an employé, there was but slight evidence that the employé used due care, the error in admitting evidence of the opinion of the employé that he exercised the ordinary precautions, and in permitting a witness to state his conclusion that the employé acted in a reasonable way, was prejudicial to the employer, necessitating a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153–4160; Dec. Dig. § 1050.*]

Department 1. Appeal from Superior Court, San Bernardino County; George H. Hutton, Judge.

Action by Frank M. Arnold against the California Standard Portland Cement Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Horace S. Wilson and Le Roy M. Edwards, for appellant. F. B. Daley, Frank T. Bates, and Bates & Hodge, for respondent.

SHAW, J. Plaintiff sued to recover damages for personal injuries, alleged to have been caused by the negligence of the defendant.

The complaint alleges that defendant negligently furnished for plaintiff's use an unsafe, defective, and insufficient electric battery, in the use of which plaintiff was injured. He was engaged in exploding blasts of dynamite and powder for the defendant. At the time of the injury, it appears, they were blasting in beds of clay. Small holes would be drilled several feet into the clay, at the bottom of which heavy charges of black powder would be exploded to break up the clay, so that it could be shoveled up and carried away. As a part of the process, it was necessary first to enlarge these holes at the bottom, so that they would hold enough of the black powder to lift the dirt. This process of enlargement was called "springing the holes." It was done by putting a small charge of dynamite at the bottom of the hole, connecting it by an "exploder" and wires with an electric battery a safe distance away, tamping about eight inches of dirt in around the wires immediately above the exploder, and then exploding the dynamite by means of an electric charge through the wires from the battery to the exploder. The result would be that the dirt tamped in would resist the upward force of the explosion, which would exhaust itself in making the hole larger at the bottom, ready for the black powder. Nine holes had been drilled, and plaintiff was engaged in "springing" them. After the small dynamite charge was exploded, it was his duty to remove the earth that had been tamped in, thus clearing the hole, so that the black powder could be let down to the enlarged space at the bottom. While he was removing this earth from one of these holes, the charge exploded, inflicting the injuries complained of.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The plaintiff first connected the entire nine holes in series, and attempted to explode all of them at once by a single electric shock from the battery. He found that the first hole had blown out—that is, the blast had escaped from the top—because of defective tamping. It could not be ascertained from the surface appearances of the holes which had not thus blown out whether the blast had been set off or not; for, if the tamping had been properly done, the force of the explosion would be spent below the tamping, in springing out the sides of the hole, producing no effect at the surface. Fearing that some of the other blasts had not exploded, he then connected each separately with the battery, and tried them singly with the electricity. None of them upon this trial gave any indication of an explosion. Assuming from this that the first shock from the battery had set off all the charges, he proceeded to clean the holes to receive the black powder. In the third hole the dynamite had not been set off by the battery, and in cleaning it out he exploded the charge, inflicting the injuries alleged. There is evidence that this battery had been in use for several months, and that it sometimes failed to discharge a blast, even when connected with a single hole. Plaintiff had been at work there for a considerable time before the injury, and had often seen this battery. Its defects were well known to the other men in the same service, but there is no conclusive evidence that they were known to the plaintiff. The circumstances also tend to show that the plaintiff knew that a battery would sometimes fail to set off a blast, but the evidence is conflicting on that point. He testified that he proceeded to clean the hole precisely as if there were no dynamite in it, taking no care to avoid an explosion in case there was. The questions whether he used due care in failing to take such precautions as were possible to that end, and in assuming that the blasts were exploded, and whether the failure to explode was due to the weakness of the battery or to his own neglect in failing to make proper connections between the dynamite and the battery, are very close ones, in view of all the evidence in the case. We are not satisfied that it is insufficient to sustain the verdict. But, considering its weakness, it is obvious that the admission of any incompetent evidence on the subject must be deemed to have been prejudicial to the defendant. Evidence of that character was admitted, over the defendant's objection, and for that reason we think the order denying a new trial was erroneous.

[1] The plaintiff testified that he had been engaged in the business of exploding blasts of powder and dynamite by means of batteries for 3½ years before his injury. He was asked by his own counsel the following question: "At the time you sprung those holes—that is, applied the battery the second time to the four or five holes which you tested—did you use, from your experience in the use of the battery and springing of those holes, the usual, ordinary, and customary precaution?" "At the time, considering your long experience in dealing with a battery, did you use all customary and necessary and usual precaution to see that those wires were connected?" Objections that these questions were incompetent, irrelevant, and immaterial and called for the conclusions of the witness were overruled, and he answered both questions in the affirmative. These rulings were erroneous. One of the defenses was contributory negligence. The question whether or not the plaintiff had used proper care and caution in doing his preparatory work was one for the determination of the jury from all the evidence. It was not a question upon which the opinions of expert witnesses are allowable. The questions called for the decision of the plaintiff as to the merits of the defense.

[2, 3] Another witness for the plaintiff was permitted to state that if, after trying the battery the second time on the holes separately, one of them should be cleaned out, and it was found that the charge in that hole had gone off properly, then, in such case, "the conclusion of a reasonable man who understood his business, and acting in a reasonable way," would be that the next hole, and each of the others, had also been exploded by the battery. This also was witness should have been confined to the testimony should have been excluded. The witness should have been confined to the facts, the usual method of operations in such work, and the things necessary to be done to avoid danger. Even if we admit that the plaintiff was held only to the standard suggested—the care required of a reasonable man who understood the work—nevertheless it was for the jury, and not the witness, to apply the standard and decide from the evidence what a reasonable man should have done or concluded from the facts before him. In view of the slight margin of evidence in favor of the proposition that the plaintiff used due care in connecting the wires and cleaning out the holes, we cannot say that this evidence was without prejudice to the defendant.

The judgment and order are reversed.

We concur: SLOSS, J.; ANGELLOTTI, J.

161 Cal. 536

In re LAVINBURG'S ESTATE.

LAVINBURG v. SCHWALBE et al.

(S. F. 5,665.)

(Supreme Court of California. Dec. 13, 1911.)

1. Wills (§ 166*)—Undue Influence—Sufficiency of Evidence.

Evidence *held* not to show that a will was made through the undue influence of testator's daughter.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421–437; Dec. Dig. § 166.*]

2. Wills (§ 166*)—Undue Influence—Sufficiency of Evidence.

While undue influence may be shown by circumstantial evidence, it must amount to more than a mere suspicion, and be proof of circumstances which are inconsistent with the fact that the will was the spontaneous act of testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421–437; Dec. Dig. § 166.*]

3. Wills (§ 288*)—Validity—Presumption.

The presumption in a will contest is in favor of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 651; Dec. Dig. § 288.*]

4. Wills (§ 166*)—Undue Influence—Evidence.

That a will was unnatural, in that it did not give a son and daughter that share of the property which they were entitled to expect, does not of itself show undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421–437; Dec. Dig. § 166.*]

5. Wills (§ 163*)—Undue Influence—Evidence—Fiduciary Relation.

The existence of a confidential relation between testator and the principal beneficiary will not of itself raise the presumption of undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 390; Dec. Dig. § 163.*]

6. Evidence (§ 222*)—Declarations—Will Contest.

In a will contest by a son against testator's daughters, who were the residuary and principal legatees, another daughter who received only a small sum testified that the month after their father's death she had a conversation with one of the residuary legatees in the absence of the other residuary legatee, in which she charged that such legatee made their father make the will, to which the latter replied, "Of course, wouldn't you have done the same thing if you could?" and evidence was also admitted of such residuary legatee's boast that she could "handle" her father like a child. *Held*, that the evidence was not admissible; such declarations not having been made in the presence of the other residuary legatee.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 768–800, 803–806; Dec. Dig. § 222;* Wills, Cent. Dig. § 410.]

7. Wills (§ 81*)—Will Contest—Invalidating in Part.

A will cannot be invalidated as to one legatee and upheld as to the others.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 201, 202; Dec. Dig. § 81.*]

8. Wills (§ 165*) — Will Contest—Admission of Evidence—Affection for Children.

Declarations tending to show testator's affection for his son, to whom he only gave a small sum, are admissible in evidence in a will contest to show testator's friendliness to one of his heirs, but it is error not to limit them to that purpose.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 415–420; Dec. Dig. § 165.*]

9. Wills (§ 164*)—Contest—Admission of Evidence—Undue Influence.

In a will contest on the ground of undue influence, in which contestant claimed that testator's marital troubles had so affected his mind that he was easily influenced by the daughter, who was claimed to have influenced him in making the will, evidence as to his unhappy married life, showing that he was greatly distressed by his wife's divorce, was admissible.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403–414; Dec. Dig. § 164.*]

10. Wills (§ 164*)—Will Contest—Admission of Evidence.

In a contest by testator's son to set aside a will for undue influence, evidence was not admissible for contestant, in rebuttal of contestee's claim that testator believed his son to be wealthy on account of his display of wealth, that contestant was, in fact, poor, though he could deny that he boasted of or displayed any wealth.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403–414; Dec. Dig. § 164.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Proceedings by Leon Eleazar Lavinburg, contestant, against Sarah Schwalbe, individually and as executrix, and another to contest the will of Samuel L. Lavinburg. From orders denying motions to set aside a verdict for contestant, defendants appeal. Reversed.

Heller, Powers & Ehrman, Marcel E. Cerf, J. E. Harper, and John R. Tyrrell, for appellants. J. J. Dunne, H. H. Davis, and Jerome H. Kann, for respondent.

PER CURIAM. Jessie Bloom and Sarah Schwalbe, two of the legatees under the will of Samuel L. Lavinburg, deceased, appeal from the orders denying their motions to vacate the verdict of the jury rendered in favor of Leon E. Lavinburg in a contest of said will. Contestant is a brother of appellants and also a legatee under his father's will.

By the terms of the will of Samuel L. Lavinburg legacies were provided as follows: To the son Leon L., the contestant, $500; to Cecilia Werthman, a daughter, $500; to Jane Ruben, a daughter, $5,000; and the residue in equal parts to Sarah Schwalbe and Jessie Bloom, daughters. Sarah Schwalbe and California Safe Deposit & Trust Company were nominated as executrix and executor, respectively, but, the latter failing to qualify, Mrs. Schwalbe was appointed and letters testamentary issued.

The contestant did not depend upon any direct showing that the testamentary act of Samuel L. Lavinburg was influenced by Sarah Schwalbe, but, according to the theory of the contest, all of the facts and circumstances surrounding the acts of the testator in making his will led to the inevitable conclusion that it must have been, not the spontaneous act of Lavinburg, but the product of his daughter Sarah's malign influence over him. The essential facts as shown at the trial were as follows: Lavinburg was formerly a resident of England, living first at London and afterward at Brighton. While residing in the latter city in 1884 he became involved in financial troubles, and wrote a letter to his son who had gone to Canada to live, asking the latter (the contestant here) to return to Brighton, and to assist in the settling of the father's affairs. In response to this letter Leon returned to Brighton, contributed between $400 and $500 to the father's account, helped the latter in the settlement of his affairs, and in 1885 accompanied the family to San Francisco, where his father and mother remained, but where he stayed only a short time, returning to the Middle West and settling finally in Chicago, where he resided until 1906, when he returned to San Francisco. Here he has resided ever since. It was shown at the trial that a very warm affection existed between the father and his only son. On the latter's return from Canada to Brighton, the father kissed him and exclaimed, "Oh, Leon, Leon, you have saved me by coming home." The letters of the father to the son, while not frequent, were of most affectionate tenor. When Leon returned to San Francisco in October, 1906, he was met at the station by his sister Mrs. Schwalbe, who conducted him to the home of Mrs. Bloom, another sister, where his father then resided. Again he was received by his father with many demonstrations of love, and during the next few days he and his father were together almost constantly. Without going into the testimony in detail it is sufficient to say that it indicated great affection upon the part of testator for his son. After the family arrived in San Francisco the daughters married. One of them, Mrs. Jessie Bloom, resided for some years in Seattle, but later returned to San Francisco. Lavinburg's wife died in 1892, and soon afterwards he went to live with his daughter Mrs. Cecilia Werthman, but, owing to some quarrel, he sought other quarters. In 1904 there was another disagreement between Mr. Lavinburg and the Werthmans, which apparently was never settled prior to his death at Christmas, 1907. Meanwhile his will was executed on January 5, 1905.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

There was abundant evidence of testator's love for his daughter Mrs. Sarah Schwalbe, who was found by the jury's verdict to be guilty of influencing him unduly in the making of his will. Dr. Levy, who had been his pastor and friend for 20 years, testified: "He was a man of very strong will power and determination. He told me he would dispose of his property in his own way, and that Mrs. Schwalbe had been more kind to him than the rest of the members of his family." Mr. D. R. Wilson, a member of the San Francisco Stock and Bond Exchange, who knew Lavinburg very intimately, gave the following testimony regarding testator's affection for his daughter, Sarah Schwalbe: "He said that he had the utmost confidence in Mrs. Schwalbe; that she had always treated him with filial respect; that he had a great deal of regard and trust in her." Similar testimony was given by Dr. Mann, Mr. Thomas Craig, Mr. Robert F. Parsons, and Miss Celia Caro.

In 1898 Lavinburg married. This union proved to be a very unhappy one, and in 1904 his wife instituted divorce proceedings on the ground of extreme cruelty. The usual order for costs and counsel fees pendente lite was made and an order was issued to him and to the bank which held custody of his property restraining them from disposing of any of it. Lavinburg, who was unquestionably most averse to parting with any of his money, was greatly disturbed by the prospect of having to support his wife after a divorce. A settlement was finally reached, and Mrs. Lavinburg went back to live with her husband on December 20, 1904. By the terms of the agreement with his wife, Lavinburg placed $6,000 worth of bonds in trust with the California Safe Deposit & Trust Company to provide an income of $25 a month for her. She remained with him but a short time after the reconciliation, however. She testified that on the morning of January 2, 1905, her husband called her names and quarreled with her without occasion. Afterwards she went out to do some shopping, and on her return Mr. Lavinburg and Mrs. Schwalbe were talking together in the dining room. She overheard the latter say: "I can't stand that any longer. You have to go and see a lawyer and make an end of that." Thereupon Mrs. Lavinburg left the house and never again lived with her husband, although in 1906 Mrs. Schwalbe urged her to return saying: "You know I can make father do better for you if you want to go back."

On January 3, 1905, the day after his wife's departure, Lavinburg and his daughter Sarah Schwalbe, who had remained at his house during the previous night, went to the San Francisco Savings Union, where Mr. Lavinburg conferred with Mr. Robert M. Welch, the cashier of that bank. He told Mr. Welch that he had married a young woman, that divorce proceedings were pending, and that he had made a settlement with his wife, but feared further attacks by her upon his fortune, as she knew he was worth about $50,000. He desired to part with his title to certain stocks and bonds deposited with the bank to secure an indebtedness. Finally, upon the suggestion of Mr. Welch, Lavinburg made a bill of sale to Mrs. Schwalbe of more than $50,000 worth of securities, and she became substituted as the bank's debtor in her father's place for approximately $30,000. She also placed three certain orders with the bank directing that the securities were to be released to her father as payment of their market value might be made by him; that on payment of the balance due on her note the securities were to be delivered to him; and that he was to collect all dividends on the pledged stocks and bonds. The trust relation thus created was greatly relied on as tending to establish contestant's case, and we shall have more to say of it later. After the transaction at the bank on January 3, 1905, according to the testimony of Mrs. Schwalbe, she said to her father that he had placed a great responsibility upon her, and that he would better make some paper to show what he would wish her to do in case of his death. He replied, "Well, after a while I will make a will," and they parted. She also testified that two weeks later he told her that she and the California Safe Deposit & Trust Company were the "executors" of his will, but that he never revealed its contents to her until after the great fire of April, 1906. After leaving Mrs. Lavinburg on January 3, 1905, and probably on the same day, Mr. Lavinburg went alone to the California Safe Deposit & Trust Company's place of business, and was referred to Mr. Cerf as a lawyer who would properly draft a will for him. He went alone to Mr. Cerf's office. Mr. Cerf was engaged upon some important work, and suggested that while Lavinburg was waiting for him to complete the task at hand the time might be profitably employed in drawing a memorandum of the matters which he wished to incorporate in his will. This was done, and the memorandum in Lavinburg's handwriting, which was introduced in evidence, contained practically the provisions which were afterwards incorporated in the will. After considerable discussion at Mr. Cerf's office Mr. Lavinburg departed. Two days later he returned alone and executed the will, Mr. Cerf and Mr. Norris acting as witnesses, and the document, at Mr. Lavinburg's special request, remained in Mr. Cerf's custody until the testator's death. Mrs. Schwalbe never saw it until after that event. There was not only the testimony of the witnesses to the will that on January 5, 1905, Lavinburg was of sound and disposing mind, but a number of intimate friends testified that he was a man of iron resolution with reference to his own affairs, who was not easily influenced by any one.

Contestant introduced evidence to the effect that Mrs. Schwalbe had a general influence over her father, and was wont to boast of it. His contention seems to be that the will was unnatural; that Mrs. Schwalbe had a great influence over her father; that at a time when he was greatly perturbed over his marital difficulties she suggested that he make a will; that at the time she made such suggestion she was his trustee, holding his possessions, as counsel for contestant phrase it, "in the hollow of her hand"; that this trust relation, coupled with other facts and circumstances, created a presumption of undue influence; that she accompanied her father to the bank on January 3, 1905, after the opportunity of influencing him accorded by her remaining at his home during the preceding night; and that her influence remained with him and overpowered his volition during the subsequent period of preparation and execution of his last will.

[1] We think that the circumstances shown do not justify the conclusion reached by the jury. The verdict must have been influenced by the idea in the minds of the jurors that the will was unnatural and by certain matters erroneously admitted in evidence which we shall discuss later. Testator was a man who, though of an age somewhere between 74 and 80 years, was abundantly able to conduct his affairs, and who did manage them with ability and thrift. There was some conflict of evidence regarding his bodily vigor at the time the will was executed, but there is no contention that he was not mentally competent. This man of business went alone to the office of an attorney; without suggestion or assistance drew the memorandum of his wishes respecting the disposition of his property by will; returned according to appointment; and executed that instrument. For almost three years thereafter he mingled with his friends, attended to his affairs, met and associated with his son who returned after an absence of 20 years, and yet he made no complaint of his daughter's dominion over him, nor any effort to free himself from that malign charm. It requires better evidence than this record presents to set aside an act done apparently with deliberation and executed with the solemn formality required by law.

[2, 3] To the facts shown by the record before us this language from the opinion in Re McDevitt, 95 Cal. 33, 30 Pac. 106, seems thoroughly applicable: "Evidence must be produced that pressure was brought to bear directly upon the testamentary act; but this evidence itself need not be direct. Circumstantial evidence is sufficient. It must, however, do more than raise a suspicion. It must amount to proof, and such evidence has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator. I think there is nothing beyond suspicion shown here. There is no proof. Circumstances have been proven which accord with the theory of undue influence, none of which are inconsistent with the hypothesis that the will was the free act of an intelligent mind. This does not amount to proof. And many circumstances are shown which are wholly inconsistent with the hypothesis of undue in-

fluence. And the presumption of law, in the absence of all proof, in a contest, is in favor of the will." See also In re Langford, 108 Cal. 622, 41 Pac. 701; Estate of Kendrick, 130 Cal. 368, 62 Pac. 605; Estate of Nelson, 132 Cal. 194, 64 Pac. 294; Estate of Carithers, 156 Cal. 428, 105 Pac. 127.

[4] Assuming that the will was an unnatural one which cut off the son and one daughter from that share of the property which they were entitled to expect, that alone cannot avail to sustain the verdict finding undue influence; and in this connection it is well to remember that the testator was not upon good terms with Mrs. Werthman when the will was drawn.

It is insisted by respondent's counsel that, under the circumstances of this case, undue influence is presumed from the confidential relations existing between Mrs. Schwalbe and her father.

[5] The court properly instructed the jury that the existence of a confidential relation between the testator and this beneficiary was not enough, taken alone, to raise a presumption of undue influence. While there was such a relation existing between Mrs. Schwalbe and her father, it was more nominal than real, because, as we have seen, Mr. Lavinburg up to the time of his death held complete control over his property. But, giving to the circumstances of the trust relation all possible weight, it amounts to nothing in view of the fact that the testator had the independent advice of an attorney and acted in the absence of his trustee in the preparation and signing of his will. This is not a case where advantage was taken of a sick man to whom others had no access by one standing with reference to him in a relation of confidence and trust. It is rather the case of a shrewd, stubborn business man who acted after obtaining professional legal advice. This case is similar in several essential particulars to Estate of Higgins, 156 Cal. 259, 104 Pac. 8. That was a case in which the testator was an aged, feeble man, and the proponent a favorite son, who stood in a confidential relation to him. This son had urged the father to make a will. After referring to the presumption arising from the existence of confidential relations, Mr. Justice Sloss, speaking for the court, said: "This presumption was fully met and overthrown by the uncontradicted evidence showing the actual circumstances surrounding the preparation and execution of the will. Estate of Morey, 147 Cal. 495 [82 Pac. 57]. It was shown that the testator, before executing his will, had consulted with an attorney, who visited him for that purpose. At this interview no member of his family, except his wife, was present. The nature and extent of a surviving wife's interest in community property was explained to the testator, who said that one-half of the estate (all of which he declared to be community property) would be sufficient provision for Mrs. Higgins. Concerning the disposition of the other half, he said he did not desire to give his daughter an equal share. He first spoke of giving her $1,500, but before the close of the interview mentioned the sum of $2,500. He stated that he did not want Mr. Chick, his daughter's husband, to handle any considerable amount of his property. In the afternoon of the same day, the attorney, accompanied by his son, returned with a draft for the proposed will. In the absence of the proponent, the testator was asked for his decision regarding the gift to his daughter. He expressed a thought of raising it to $3,500. The attorney then suggested a division into shares, instead of a cash legacy. This, after some consideration, was approved by the testator, and he fixed upon the proportions of one-sixth to Mrs. Chick, two-sixths to Albert, and three-sixths to Herbert. Blanks which had been left in the draft were filled accordingly, and the will was executed. Its other provisions, such as appointment of executor, etc., followed the direction of the testator. In the face of this showing, which we have set forth in mere outline, there is no basis for the claim that the will was secured to be made by the undue influence of proponent." In the later case of In re Ricks, 117 Pac. 536, the rule is thus stated by Mr. Justice Lorigan: "But no warrant is given to a jury to find that undue influence was exerted at the time the will was made from proof merely of such relation alone. Undoubtedly the relation between respondent and his mother was affectionate and confidential, and that he would have a general influence over his mother proceeding from such relation. But the existence of such relation and this general influence raises no presumption that undue advantage was taken of it by respondent. There is no legal suspicion of undue influence arising from the existence of such a relationship, which imposes upon the son the necessity, when a will in his favor is attacked, of assuming the burden of proof that he had not unduly influenced his mother in making her will. The confidential relation and the opportunity afforded therefrom to exercise undue influence may, of course, always be taken into consideration with other evidence, when the question of undue influence is in issue. But the relation itself and opportunity are not sufficient alone to warrant a finding that undue influence was actually exerted. Proof merely that confidential relations existed between a testator and the main beneficiary under his will is not sufficient to destroy its validity, but there must be some proof, in addition to the relation of facts or circumstances showing the use of that relation at the time the will was made overcoming the free will and desire of the testator, in order to invalidate the testament."

[6] Appellants call our attention to the admission of certain testimony regarding the declarations of one residuary legatee not

made in the presence of the other. There were several instances of this sort of testimony, but it will be sufficient to refer to a few only. Mrs. Werthman related a conversation which she said occurred in Oakland in the month of April following her father's death. She testified that on that occasion she said to Mrs. Schwalbe, "You made father make that will, you know you did," to which, as she testified, Mrs. Schwalbe replied, "Of course, wouldn't you have done the same thing if you could?" Respondent contends that this evidence went in without objection, but an examination of the record shows that, as soon as any conversation with Mrs. Schwalbe was called for in a question to Mrs. Werthman, counsel raised the specific objection that a declaration of one legatee made without the presence of the others was hearsay, and not binding upon them. All the rest of Mrs. Werthman's testimony went in subject, by stipulation, to the same objection and exception. This was clearly error under the rulings of this court in Estate of Dolbeer, 149 Cal. 245, 86 Pac. 695; Estate of Dolbeer, 153 Cal. 662, 96 Pac. 266. The same error was committed by the court in admitting evidence of Mrs. Schwalbe's boasts that she could "handle," her father and "turn him around in five minutes like a child," and in allowing certain papers in the probate proceedings to be offered as written admissions of Sarah Schwalbe. In allowing one of these documents to be received in evidence the court said: "It will not be binding against her [meaning Mrs. Bloom], but binding against Mrs. Schwalbe."

[7] Evidently the court did not have in mind the rule announced in Estate of Dolbeer, supra, Estate of Freud, 73 Cal. 556, 15 Pac. 135, and Estate of Pforr, 144 Cal. 121, 77 Pac. 825, that a will cannot be invalidated as against one legatee and upheld with respect to others. This misconception led to the erroneous admission of numerous declarations of Mrs. Schwalbe which we need not review with greater particularity.

[8] The court also admitted declarations made before and after the execution of the will tending to show the affection of Lavinburg for his son, Leon. Such declarations, when there is no issue of unsoundness of mind, are properly admitted if limited by the court in suitable instructions to their function of showing friendliness of a testator to one of his heirs, but appellants contend that error was committed by the court in failing to limit their application. We think this contention must be sustained. See Estate of Ricks, 117 Pac. 532, and cases there cited.

[9] Appellants also complain of the introduction of evidence by the contestant revealing the unhappy married life of the testator and his second wife, but it was the theory of the contestant that these marital troubles so worked upon the sensibilities of Lavinburg as to make him an easy prey to the machinations of his daughter Sarah. The evidence did show that he was greatly distressed by the divorce case and the incidents connected with it. If the engagement of respondent to show that Mrs. Schwalbe took advantage of her father's distress had been successfully accomplished, the evidence of the domestic woes of the old man would have been material. The court properly admitted it in support of the theory of the contestant.

Appellants also call our attention to the court's refusal to permit the former wife of the testator to answer certain questions with reference to his mental condition at about the time of the execution of the will. The record shows, however, that she testified upon direct examination regarding her former husband's mental condition as favorably to appellants as they could possibly desire. The court properly sustained an objection to an interrogatory on cross-examination by which her opinion was sought upon the question whether or not Lavinburg was easily influenced. The question was not pertinent to anything about which she had spoken on her direct examination.

[10] Respondent was permitted to introduce evidence regarding his financial condition. If this has been done as a part of his case in chief, respondent concedes that it would have been serious error (Estate of Kaufman, 117 Cal. 296, 49 Pac. 192, 59 Am. St. Rep. 179), but proof of his poverty he insists was properly allowed in rebuttal of the showing made by appellants that the testator believed his son Leon to be a wealthy man by reason of certain boastings and exhibitions of ready money. He denied on the witness stand that he had ever made any such pretenses of wealth to his father. This evidence, of course, was properly allowed, but, as the material inquiry related to the father's belief on the subject of his son's wealth and not to the fact of the latter's wealth or poverty, the principle of the Kaufman case was applicable, and the evidence that Leon Lavinburg was really a poor man was improperly allowed.

Certain instructions are criticised by appellants, but we think that these criticisms are for the most part unfounded. Viewed in its entirety the charge to the jury fully and fairly stated the law.

The orders from which appellants prosecute their appeal are reversed.

161 Cal. 573

PEOPLE v. SCHAFER. (Cr. 1,708.)

(Supreme Court of California. Dec. 14, 1911.)

1. Burglary (§ 20*)—Information—Sufficiency.

Under Pen. Code, § 459, providing that every person who shall enter any house, etc., with intent to commit grand or petit larceny therein, is guilty of burglary, an information charging that accused entered a portion of the plant of a tanning company known as the "Beam House" with intent to steal leather is a sufficient statement of the offense of burglary.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 51–54; Dec. Dig. § 20.*]

2. Criminal Law (§ 1166½*)—Appeal and Error—Harmless Error—Presumptions.

Where a challenge for cause was refused, the juror being peremptorily challenged, the refusal was harmless if it is not shown that the use of this peremptory challenge compelled accused to accept a juror unsatisfactory to him, though accused exhausted all of his peremptory challenges before the jury was selected.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3116–3117; Dec. Dig. § 1166½.*]

3. Criminal Law (§ 655*)—Trial—Remarks by Court.

Where a juror was challenged because he had stated that he knew a probable witness for the prosecution, and that he would believe him in preference to witnesses he did not know, the court's remark to counsel in refusing the challenge "that if you know a man, and he is perfectly satisfactory to you, you would naturally believe him before an unknown," was not objectionable, as it could not have prejudiced the minds of the jurors present.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1520–1523; Dec. Dig. § 655.*]

4. Criminal Law (§ 351*)—Evidence.

A letter written by accused, who was incarcerated, asking another person to assist him in effecting an escape and stating that he was in a bad fix, is admissible in evidence as tending to show consciousness of guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 778–785; Dec. Dig. § 351.*]

5. Criminal Law (§ 1043*) — Appeal—Exceptions — Necessity of Specific Exceptions.

Where accused objected generally to the admission of the incriminatory letter, he cannot complain on appeal that isolated portions were inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2654, 2655; Dec. Dig. § 1043.*]

6. Burglary (§ 41*) — Prosecutions — Evidence—Sufficiency.

In a prosecution for burglary, evidence *held*, under Pen. Code, §§ 460, 463, making a burglary committed between sunset and sunrise an offense in the first degree, sufficient to show burglary in the first degree.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. § 98; Dec. Dig. § 41.*]

7. Criminal Law (§ 1147*)—Appeal—Sentence—Discretion of Court.

Pen. Code, § 461, making burglary in the first degree punishable by imprisonment for not less than 1 nor more than 15 years, an accused cannot complain that a sentence of 10 years is an abuse of the trial court's discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3072, 3073; Dec. Dig. § 1147.*]

In Bank. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

William Schafer was convicted of burglary, and appeals. Affirmed.

Louis Ferrari, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

ANGELLOTTI, J. The defendant was convicted of burglary in the first degree, and appealed from the judgment and from an order denying his motion for a new trial. The appeal was transferred to this court for determination after decision by the District Court of Appeal for the Third District, affirming such judgment and order.

[1] 1. It is urged that the information does not state a public offense. After accusing defendant and one Daniel McFadden of the crime of "burglary, committed as follows," it proceeds: "The said Daniel McFadden and William Schafer, on or about the 14th day of October, A. D. nineteen hundred and ten, at the said county of Solano, state of California, * * * at and in the city of Vallejo then and there willfully, unlawfully, feloniously, and burglariously did enter that certain portion and part of the plant, premises and building of the Santa Rosa-Vallejo Tanning Company, a corporation, said portion and part of said plant, building and premises being designated, called and known as the 'Beam House,' with the felonious and burglarious intent * * * then and there * * * at and in said 'Beam House' to commit the crime of larceny, contrary to the form, force, and effect of the statute," etc. The claim is that the information does not allege that the defendants entered any place as to which burglary may be committed under our statute. The statute (section 459, Pen. Code) provides that "every person who enters any house, room, apartment, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, or railroad car, with intent to commit grand or petit larceny, or any felony, is guilty of burglary." No demurrer was interposed to this information, and there is no pretense that the defendant was not fully advised thereby as to the precise charge against him. His claim, after trial and conviction, simply is that it so absolutely fails to show the offense of burglary that it cannot serve as sufficient support for the conviction and judgment. While the information, as said by the District Court of Appeal, is "open to some criticism," and contains more words than necessary, we think it substantially alleges an unlawful entry of a house of the tanning company, with intent therein to commit

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

grand larceny. No other construction could reasonably be given to the language used. The qualifying word "beam" used in the information does not detract from the effect of the word "house," which denotes one of the structures named in section 459 of the Penal Code. Substantially the information alleged that the defendants unlawfully entered the "Beam House" of the tanning company, with intent therein to commit larceny. It thus sufficiently stated a public offense to support a judgment.

[2] 2. It is claimed that the trial court erred in disallowing a challenge for cause interposed to juror William Fraser on the ground of actual bias. It is unnecessary to determine whether there was any error in this ruling. Mr. Fraser was subsequently peremptorily challenged by the defendant, and did not serve as one of the jurors. While the record shows that the defendant did subsequently exhaust his 10 peremptory challenges, it does not appear that he had occasion or desire to use an additional peremptory challenge, or that each and all of the 12 jurors finally accepted and sworn were not entirely satisfactory to him. All that the record shows in this connection is the examination of Mr. Fraser and the proceedings and ruling upon the challenge for cause interposed to him, and the fact that the defendant used 10 peremptory challenges, including that used on Mr. Fraser. This is not enough to warrant reversal for error in the ruling on the challenge for cause to Mr. Fraser. It is entirely consistent with the record that the 12 jurors who actually tried the case were absolutely satisfactory to defendant, and that he desired all of them to serve, and would not have excused any one of them if he had been given the opportunity. After judgment, the contrary should not be presumed. It was said in People v. Durrant, 116 Cal. 196, 48 Pac. 78: "Thompson on Trials, § 120, thus declares the principle: 'It is a rule of paramount importance that errors committed in overruling challenges for cause are not grounds of reversal, unless it be shown an objectionable juror was forced upon the challenging party after he had exhausted his peremptory challenges. If his peremptory challenges remain unexhausted, so that he might have excluded the objectionable juror by that means, he has no ground of complaint.' The rule above stated finds overwhelming support from the authorities." It is true that in People v. Durrant, supra, the defendant had not exhausted his peremptory challenges when the jury was completed, but the fact that he does exhaust them does not preclude the application of the rule above quoted. The important thing is that it does not appear that an objectionable juror was forced upon the defendant. This rule was applied by the Supreme Court of Nevada in State v. Raymond, 11 Nev. 98, where the court said: "In Fleeson v. Savage Silver Mining Company [3 Nev. 157], the Supreme Court of this state said that 'the rules governing the impaneling of juries, the introduction of evidence, and the general conduct of trials are but the means by which such right is to be obtained,' and that, if it appeared 'that a departure from them did not defeat or affect the ultimate object of the trial, it would be a mockery of justice to set aside a judgment, otherwise proper and regular, because of such departure.' And it was there decided that, if a juror is challenged for cause, that challenge is overruled, and he is then challenged peremptorily, there does not necessarily arise any inference that the challenging party is thereby injured; that an injury could only arise in case the challenging party was compelled to exhaust all his peremptory challenges, and afterward have an objectionable juror placed on the panel for the want of another challenge. This general principle to which we adhere has been frequently decided in both civil and criminal cases." In People v. Riggins, 112 Pac. 862, relied upon by defendant, the opinion states, not only that the defendant exhausted all his peremptory challenges, but that by reason of the rulings of the court he was forced to accept McKeen, a juror objectionable to him and challenged for cause by him, and also that he asked the privilege of challenging McKeen peremptorily, and that his request was denied.

[3] 3. Complaint is made of a remark made by the trial court in a discussion with defendant's counsel as to the merits of the challenge interposed to Mr. Fraser, before the ruling thereon. Fraser had testified that he knew Mr. Johnson, a probable witness for the state, and, on being asked whether in view of his acquaintance with him he would believe him in preference to another witness whom he did not know, answered that he would. Counsel then challenged the juror for cause, whereupon the court said: "Not on that. That is the principle observed by every one. If you know a man and he is perfectly satisfactory to you, and if you don't know the other man testifying, you would naturally believe him first." The claim appears to be that this remark of the court was in effect an instruction to the jury that they must believe the men they knew and mistrust the men they did not know. Of course, what the court said was not by way of instruction to the jury at all, and could not have been considered by any juror as such, but was simply a remark to counsel. The court's instructions to the jury were given later, and were so fair that absolutely no complaint is made concerning them on this appeal. The claim that the remark was of such a character as to operate to defendant's prejudice in the minds of such jurors as may have been present in the courtroom at the

time appears to us to be utterly without basis. Evidently counsel for defendant perceived nothing prejudicial in the remark at the time it was made, for no objection or exception was then made to the same, and nothing was said in regard thereto until the case reached the appellate court.

[4, 5] 4. A letter written by defendant while he was in the county jail awaiting trial was admitted in evidence over his objection. As to this ruling the District Court of Appeal said: "A letter written by appellant in the county jail was admitted over his objection. It was delivered to the jailer by one Edwin Hines, 'a trusty,' two or three days before the latter's term of imprisonment had expired. Hines was not a witness in the case—presumably for the reason that he could not be found. The letter, however, was produced by the jailer with the foregoing explanation, and it was clearly shown to be in the handwriting of appellant. The superscription was, 'Friend Ed,' and a portion of the letter was as follows: 'Hello Ed. Now Ed, can I depend on you Tuesday night? Now Ed don't disappoint me when the lights go out. Be here with the steel saw. I guess one steel saw will do the work. I can work in here in the daytime, two bars inside and one outside. The bar outside I can get out in two hours. It is a snap.' Among additional things the letter contained this declaration: 'We are in a hell of a hole, you know that.' We can see no error in the ruling of the court admitting the letter in evidence. It contained written declarations by appellant of his purpose and intention to escape from jail if possible, and also that which might be reasonably construed as an admission of his guilt. If similar oral statements had been made by appellant, testimony concerning them could certainly be received. That he reduced them to writing makes them no less admissible. They are received as tending to reveal a consciousness of guilt, and the fact that appellant was not furnished the saw, and therefore he made no attempt to carry his purpose into execution, does not affect the question. Appellant complains that certain portions of the letter should not have been admitted, but he made no such objection in the court below; his opposition being to the letter as a whole, and it is too late to make the point now."

No objection to this portion of the opinion of the appellate court has been made in this court. It appears to us to correctly dispose of the claim made by defendant's counsel that the court erred in admitting the letter, and we adopt the same as a portion of this opinion.

[6] 5. It is urged that the evidence was insufficient to sustain a verdict of guilty of burglary of the first degree, which is burglary committed during the period "between sunset and sunrise." Pen. Code, §§ 460, 463. There is no foundation in the record for any such claim. The evidence is without dispute to the effect that the burglary was committed between 5 o'clock p. m. of the afternoon of October 13, 1910, and some time prior to 7 o'clock a. m. of October 14, 1910; that it had not been committed when Johnson left the tannery at 5 p. m. on October 13th, leaving the place unoccupied by any one; and that it had been committed when he returned some time before 7 a. m. the next morning. The parties committing the burglary took from the house entered by them hides weighing at least 1,400 pounds and loaded them on a wagon brought to the tannery for the purpose. Added to the almost necessary inference that this was not accomplished either in the short period between 5 p. m. and sunset on October 13th, or in the short period between sunrise and a few minutes before 7 a. m. on October 14th, is the testimony of a witness to the effect that he saw Schafer and his codefendant about 2:30 a. m. on the morning of October 14th about 3½ miles north of Vallejo, driving a single horse attached to a wagon, headed north (going from Vallejo), and that the horse was wringing wet.

[7] 6. It is urged that the court abused its discretion in sentencing the defendant to 10 years imprisonment in the state prison. The punishment awarded may appear somewhat severe, if, as is claimed, defendant had never before been convicted of any public offense, in view of the fact that the building entered was uninhabited and the property stolen was valued at something less than $130. But in this state the determination of the trial court as to the penalty to be adjudged on conviction of a public offense is conclusive upon all appellate courts, provided the court adjudges a penalty which is authorized by the statutes of the state. Section 461, Penal Code, makes burglary of the first degree punishable by imprisonment in the state prison "for not less than one nor more than fifteen years." As the trial court confined itself within these limits, its action is beyond review by the courts on appeal.

The judgment and order denying a new trial are affirmed.

We concur: MELVIN, J.; LORIGAN, J.; SHAW, J.; HENSHAW, J.; SLOSS, J.

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161 Cal. 581

BECKMAN v. WATERS et al. (L. A. 2,724.)

(Supreme Court of California. Dec. 15, 1911. Rehearing Denied Jan. 12, 1912.)

1. MORTGAGES (§ 37*)—ABSOLUTE DEED AS MORTGAGE.

An instrument purporting to convey the title to real or personal property may be shown to have been intended to secure a debt due from the grantor to the grantee, and to operate as a mortgage only.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 97–107; Dec. Dig. § 37.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. Appeal and Error (§ 1002*)—Findings—Review—Conflicting Evidence.

A finding on conflicting evidence will not be reversed, where there is substantial evidence sustaining it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. § 1002.*]

3. Mortgages (§ 38*) — Absolute Deed as Mortgage—Evidence—Findings.

Evidence *held* to sustain a finding that a conveyance of real and personal property, absolute on its face, was intended as a mortgage to secure the price of the interest of the mortgagor's partner in the property mortgaged.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 108, 111; Dec. Dig. § 38.*]

4. Depositions (§ 76*) — Notary's Certificate—Signature.

Under Code Civ. Proc. § 2032, providing that a deposition must be certified by the judge or officer taking it, a certificate bearing the notarial seal of the officer taking the deposition, but not signed by him, is insufficient.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 190–196; Dec. Dig. § 76.*]

5. Continuance (§ 46*)—Application—Diligence.

It was not an abuse of discretion to deny a continuance because of the absence of plaintiff, where the affidavit in support of the motion only showed that plaintiff was unable to be present at the time set for trial, and there was nothing to indicate that he would be able to appear at any later time; there being no sufficient excuse for failure to take a deposition before trial.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 132–140; Dec. Dig. § 46.*]

Department 1. Appeal from Superior Court, Santa Barbara County; Chas. Monroe, Judge.

Action by Elias Beckman against William G. Waters and the San Miguel Island Company. From an order denying plaintiff's motion for a new trial, he appeals. Affirmed.

J. F. Conroy and E. W. Squier, for appellant. W. S. Day and Henley C. Booth, for respondents.

SLOSS, J. This is an appeal by plaintiff from an order denying his motion for a new trial. The controversy between the parties turns principally upon the effect of an instrument, in form a deed absolute, executed by the defendant Waters to plaintiff, Beckman, and purporting to convey certain real estate, to wit, the island of San Miguel, containing about 14,000 acres of land, and situated in the Pacific Ocean off the coast of Santa Barbara county. On the part of the plaintiff, the claim was and is that this instrument was in fact what it purported to be, while the defendants contended below, as they contend here, that the deed was intended to be and was a mortgage. The transaction included the execution and delivery by Waters to Beckman of a bill of sale of live stock and other personal property on the island, and the same question of mortgage or absolute transfer is presented with reference to this bill of sale.

The action was commenced on March 11, 1904. An amended complaint, filed on July 2, 1904, alleges that on or about the 1st day of February, 1892, Waters executed and delivered to plaintiff a deed conveying the said island of San Miguel, and on the same day executed and delivered to plaintiff a bill of sale transferring the personal property above referred to. It then alleges that on the same day (February 1, 1892) the plaintiff executed and delivered to Waters an instrument in writing, whereby, after reciting the conveyance by Waters to Beckman of all the right, title, and interest of Waters in the island of San Miguel and in the personal property thereon, it was agreed that Waters, his heirs, executors, administrators, or assigns "may at any time hereafter within three years from the date hereof, pay to me, my heirs, executors, administrators or assigns, the sum of $7,000, gold coin of the United States, with interest thereon at the rate of ten per cent. per annum, interest payable semi-annually, and upon the payment of the said sum and interest thereon in manner and time aforesaid I do * * * agree to reconvey by a good and sufficient quitclaim deed and bill of sale to said William G. Waters * * * all my right, title and interest in and to the above described real and personal property and the increase thereof, excepting such personal property or products from said island that are sold in the meantime, and in the event of such payment in the manner and at the time hereinabove set forth with the interest at the time it becomes due, then the said W. G. Waters shall be entitled to credit for the amount of such sales upon said indebtedness." It is alleged that on March 25, 1892, defendant Waters paid $1,000 on account of the purchase price of the property mentioned in said instrument; that at divers times prior to January 1, 1896, sums aggregating $1,500 were received in part payment of said purchase price as proceeds and profits accruing from the property on the island; and that on or about the 1st day of January, 1896, the plaintiff, at the request of Waters, granted said defendant further time for payment of the balance of the purchase price. Plaintiff, it is alleged, held possession of the real and personal property so transferred to him from the 1st day of February, 1892, to the 11th day of May, 1896, said island being in charge and control of a manager employed by plaintiff; said manager died on the 11th day of May, 1896, whereupon Waters assumed charge and control of said island, and he and those claiming under him have ever since held possession of said island and property as trustees for plaintiff. On March 8, 1897, Waters sold, conveyed, and assigned unto his codefendant, San Miguel Island Company, a corporation, his right to and interest in said island and the property thereon, and said corporation has ever since claimed an interest in said real and personal property. It is further alleged that Waters is the manager of the business of said corporation; that as such he has received rents, issues, and profits of said island for which he has not accounted; and that the defendants claim said island and the property thereon adversely to plaintiff. No payments, except as above stated, have been made under said agreement of purchase. Under these allegations the plaintiff prayed for the appointment of a receiver; that the defendants be required to account; that they be restrained from disposing of the real or personal property; and that upon the ascertainment of the amount due by Waters to plaintiff, under the agreement of February 1, 1892, the court order said amount to be paid to plaintiff, and in default of such payment that the interest of the defendants in the property be divested.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The defendants answered separately, denying most of the material allegations of the complaint and setting up affirmative defenses. The nature of the issues raised will appear with sufficient clearness from the following summary of the findings.

The court found that the possession of the property was never delivered to the plaintiff, and that plaintiff never held possession as owner or otherwise; that defendant Waters never held possession of said property as trustee for the plaintiff or otherwise than as owner; that, in fact, said deed and bill of sale and said written agreement, all dated February 1, 1892, were and were intended by the parties thereto to be a mortgage by Waters to Beckman to secure the payment to Beckman of the sum of $7,000 on or before three years from February 1, 1892, with interest thereon at the rate of 10 per cent. per annum, payable semiannually. It was found that no extension of time had been granted by plaintiff to defendant, and that plaintiff's claim was barred by the statute of limitations.

As above suggested, the plaintiff's main contention on his motion for a new trial was that the evidence did not sustain the finding that the transaction in question constituted a mortgage. Of course, if the plaintiff's position was that of a mortgagee, there can be no question that his right to relief is barred by limitation. The debt secured by the mortgage was due three years from February 1, 1892. The finding that no extension was granted is not attacked, and, consequently, an action to foreclose the mortgage was barred at the expiration of four years from the maturity of the debt, or February 1, 1899. The last-mentioned date was more than five years before the commencement of the action.

[1, 2] It is thoroughly settled by the decisions of this court that an instrument purporting to convey the title to real or personal property may be shown to have been intended to operate as a mortgage. It has often been said that clear and convincing evidence is required to justify a court in finding that a deed which purports to convey the title to land in fee simple was intended to be a mortgage. But, as is said in Couts v. Winston, 153 Cal. 686, 96 Pac. 357, in which many earlier cases are cited: "Whether or not the evidence offered to change the ostensible character of the instrument is clear and convincing is a question for the trial court. * * * In such cases, as in others, the determination of that court in favor of either party upon conflicting or contradictory evidence is not open to review in this court." And similarly, in Wadleigh v. Phelps, 149 Cal. 627, 637, 87 Pac. 93, 98, it is said that this court "will not disturb the finding of the trial court to the effect that the deed is a mortgage, where there is substantial evidence warranting a clear and satisfactory conviction to that effect."

[3] In the case at bar, it appears that, before any of the transactions here involved, the defendant Waters and one Schilling had been jointly interested in the ownership of San Miguel Island and the personal property thereon. In December, 1890, Waters had purchased Schilling's interest, giving him therefor a promissory note for $7,000, secured by an instrument described in the record as a "pledge" of the island and of the property thereon. This note and pledge were assigned by Schilling, in January, 1892, to the plaintiff Beckman, who was acting on behalf of himself and one Gaty. A finding, which is not attacked, declares that this assignment was a part of the transaction of February 1, 1892, by which the deed, bill of sale, and reconveyance agreement were executed. Coincident with the assignment of the pledge, Schilling made a quitclaim deed to Beckman of an undivided one-half interest in the island. This deed declared that it was made to Beckman for the purpose of enabling him "to fulfill all the obligations required in the said pledge of the said Schilling." Beckman and Gaty signed an agreement, declaring that they were equally interested in the purchase of the note and pledge from Schilling, and on the 1st day of February—the date on which the papers between Beckman and Waters were executed—Beckman executed to Gaty a deed of an undivided one-half interest in the island and the personal property thereon; such instrument reciting that Gaty had advanced a part of the consideration for the transfer from Schilling to Beckman. On the same day and as part of the same transaction, Beckman conveyed to Waters all of his interest in the island and personal property by instruments reciting that they were intended to discharge the pledge of Schilling. Then followed the making of the deed and bill of sale and the agreement set forth in the complaint.

We think these facts fully justified the trial court in concluding that the conveyance from Waters to Beckman was, in fact, a mortgage to secure the payment of $7,000, and this, notwithstanding the fact that there was no writing, whereby Waters in terms bound himself to pay such sum to Beckman. It will be observed that $7,000 was the consideration which Waters had originally agreed to pay Schilling for a one-half interest in the property, and that the payment of this sum was secured by lien upon the property. Beckman and Gaty succeeded to the interest of Schilling. New papers were executed, eliminating Schilling from the transaction, and introducing Beckman as the party with whom Waters was dealing. The same property which had been "pledged" to Schilling to secure the payment of the $7,000 was conveyed to Beckman, and this property was, by the agreement accompanying the deed and bill of sale, to be reconveyed to Waters upon payment of the same sum of $7,000, which had, two years before, been the purchase price of an undivided one-half interest. Waters remained in possession, and, as is shown by the pleadings, made partial payments to Beckman.

Taking all of these transactions together, it is a reasonable inference that the transaction between Beckman and Waters was intended to simply substitute the former for Schilling. The fact that under the terms of the agreement set forth in the complaint Waters was to receive a retransfer on payment of the precise sum which had been due to Schilling, lends strong support to the view that Beckman was purchasing the claim of Schilling, together with the security for it held by Schilling. It is certainly unlikely that Water's, after agreeing to pay $7,000 for a one-half interest in the property, would be willing to part with the entire property for no greater consideration than a release of his liability for this amount. And it would likewise be strange that Beckman, if he were the owner of property, one-half of which had, two years before, been sold for $7,000, should be willing to agree to sell the entire property at any time within three years for the same sum, with interest. Again, the partial payments which, in his complaint, Beckman admits having received are more consistent with the existence of a debt and mortgage than of an agreement for sale, which contained no provision for partial payments. A further circumstance supporting the conclusion of the court below is the execution by Beckman to Gaty, on February 1, 1892, the very date of the transactions in question, of a deed conveying a one-half interest in the property. If his interest was that of a mortgagee, his conveyance might well have been intended to transfer an interest in the mortgage, but if, on the other hand, he was the owner, and had already made an agreement to sell the property to Waters, he could not properly convey any part of the property to any one else.

It is undoubtedly true that there can be no mortgage without an indebtedness (Ahern v. McCarthy, 107 Cal. 382, 40 Pac. 482; Henley v. Hotaling, 41 Cal. 22), and that no note for the $7,000 was given by Waters. But in this respect the case is analogous to Couts v. Winston, supra. There, too, there was no direct promise in writing to pay the sum advanced, but the transaction as a whole was such as to justify the inference that the money was advanced as a loan, and that the party executing the deed had at least impliedly agreed to repay the sum advanced. The same inference is permissible here, and is the more reasonable, because of the fact that the instrument providing for a reconveyance speaks of payment of the sum of $7,000 "at the time it becomes *due*," and provides for credits to Waters upon his "*indebtedness*."

There are several alleged errors of law assigned by the appellant. The plaintiff offered in evidence a power of attorney from himself to Gaty. This paper does not appear to have been executed on the same day as the instruments in controversy, and was not proven to be a part of the same transaction. Furthermore, there is nothing to show that it was ever brought to the knowledge of the defendant Waters, and it could not therefore bind him.

[4] The plaintiff was not present at the trial. His deposition, taken in a former action, was offered. The defendants objected to its admission upon two grounds, one of which was that the certificate of the notary before whom the deposition was taken was not signed. The objection was sustained. There was no error in this ruling. Under section 2032 of the Code of Civil Procedure, a deposition must be "certified by the judge or officer taking" it. A certificate, prepared in proper form, was attached to the deposition, but, as suggested above, the notary had neglected to sign it, although the notarial seal had been affixed. Where, as here, the form of certificate indicates that it was intended that the authentication should be by means of a signature, we do not think a sealed, but unsigned, certificate amounts to a compliance with the requirement that the deposition shall be certified by the officer.

[5] It is also claimed that the court erred in denying the motion for a continuance on the ground of the absence of the plaintiff. The court did not abuse its discretion in this ruling. The affidavits offered to support the motion showed, at most, that the plaintiff was unable to be present at the time set for the trial. But there was nothing to indicate that he would be able to appear at any later time; nor was there any sufficient showing of an excuse for the failure to take his deposition in proper form before the trial. No other points are raised.

The order is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

161 Cal. 588

In re CAROTHERS' ESTATE. (Sac. 1,671.)

(Supreme Court of California. Dec. 15, 1911.)

1. Wills (§ 439*)—Construction—Circumstances of Making.

By express provision of Civ. Code, 1318, in case of uncertainty arising on the face of a will, testator's intention is to be ascertained from its words, taking into view the circumstances under which it was made.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955, 957; Dec. Dig. § 439.*]

2. Wills (§ 602*) — Estates Created—Defeasible Fee—Conditional Limitations.

A will gave to testator's wife and a son an estate in a farm for the life of the wife. It then provides that on the wife's death the farm "vests absolutely in and is the property of" the son, "and in case" he "dies without issue his property herein specified becomes the property of" a second son, and at his death goes to a daughter. Civ. Code, § 1322, provides that a clear and distinct devise cannot be affected by any other words not equally clear. *Held*, that the words of the devise over to the second son and daughter were sufficiently clear to meet the requirements of the statute and to impose conditional limitations on the fee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1351–1359; Dec. Dig. § 602.*]

3. Wills (§ 466*)—Construction—Particular Words—"That."

Where by his will testator creates an estate in fee in his eldest son, and then provides "that in case" the devisee "dies without issue his property herein specified becomes the property of" testator's second son, the word "that" must be construed as "but" or "provided that."

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 466.*

For other definitions, see Words and Phrases, vol. 8, p. 6935.]

4. Wills (§ 622*) — Estates Created—Remainders—Fee on a Fee.

Where, after the creation of a defeasible fee in the first son, a will provides that on the death of such son without issue the farm devised becomes the property of testator's second son and on his death goes to testator's daughter, the devise to the daughter is not void as an attempt to create a remainder after a devise in fee to the second son.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1440–1444; Dec. Dig. § 622.*]

5. Wills (§ 542*) — Survivorship—Death Coupled with Contingency—"Simply."

Civ. Code, § 1336, providing that "words in a will referring to death or survivorship simply relate to the time of the testator's death unless possession is actually postponed, when they must be referred to the time of possession," has no application to the construction of a will containing words of limitation upon a death coupled with a contingency such as dying without issues; this not being death "simply."

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1165–1168; Dec. Dig. § 542.*]

6. Wills (§ 545*) — Survivorship — "Dies Without Issue."

If, from the terms of the will and the circumstances attending its making, it does not appear that the words "dies without issue" are intended to mean death before testator or the first taker, they will be construed to mean death either before or after that event.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1171–1176; Dec. Dig. § 545.*

For other definitions, see Words and Phrases, vol. 3, pp. 2059–2061.]

7. Wills (§ 545*) — Survivorship — "Dies Without Issue."

A will created in testator's wife and eldest son an estate for the wife's life in a farm constituting the bulk of his estate. It then provides that on the wife's death the farm "vests absolutely in and is the property of" the son, and in case said son "dies without issue his property herein specified becomes the property of" a second son, and at his death goes to a daughter. When the will was made, the eldest son was a bachelor 42 years old, while the daughter had three young children. *Held*, that testator intended to preserve the estate for his daughter, and hence the words "dies without issue" will be construed as meaning death at any time, and not death in the lifetime of the wife in order to effectuate that intent.

[Ed. Note.—For other cases, see Wills, Cent. §§ 1171–1176; Dec. Dig. § 545.*]

Angellotti, Melvin, and Sloss, JJ., dissenting.

In Bank. Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

In the matter of the estate of Andrew Carothers, deceased. From an order John E. Witherspoon, administrator, and others, appeal; Earl D. White being the respondent. Reversed.

White & Miller, Richards & Carrier, and Devlin & Devlin, for appellants. William M. Sims, R. C. Van Fleet, and W. B. Treadwell (Snook & Church, of counsel), for respondent. Charles A. Bliss, amicus curiæ.

SHAW, J. This is an appeal from an order of partial distribution of the estate of Andrew Carothers, deceased, to the respondent, Earl D. White.

The decision of the case depends on the meaning and effect of the last will of the deceased. After a clause giving certain specific personal property to his son, William P. Carothers, to his wife, Eleanor Carothers, and to one Joseph A. Lowry, respectively, the will proceeds with the portions here involved, which are as follows:

"I also give and bequeath to my wife and William P. Carothers my entire farm with all improvements thereon located in the county of Sacramento county, state of California, during the lifetime of my said wife, and at her death said land with all the improvements and proceeds thereof vests absolutely in and is the property of said William P. Carothers, that in case said William P. Carothers dies without issue his property herein specified becomes the property of John Thomas Carothers, and at his death goes to Elizabeth Witherspoon.

"I further direct at the death of my said wife my daughter Elizabeth Witherspoon shall receive one thousand dollars proceeds from said property and May H. Lowry five hundred dollars."

The testator died on December 13, 1876, leaving surviving as his heirs at law his wife, Eleanor, and three children, namely, William P. Carothers, John Thomas Carothers, and Elizabeth Witherspoon. Eleanor, the wife, died on February 24, 1897. On February 14, 1898, William P. Carothers executed a deed purporting to convey an undivided one-half interest in the farm to said John Thomas Carothers. On March 11, 1899, John conveyed to his wife, Kate A. Carothers, all of his right, title, and interest therein. On September 15, 1904, Kate conveyed to J. J. Burke a part of said farm, a small tract of four acres. This is the land in controversy. The respondent, Earl D. White, is the successor of Burke, and the undivided one-half of the four acres was distributed to him, subject to a charge for the legacies to Elizabeth Witherspoon and May H. Lowry, in case they had not been paid previously. The claim of the respondent is that by the terms of the will, upon the death of the testator's wife, Eleanor, William P. Carothers became vested of the farm in fee, that his deed to John carried the undivided one-half thereof to John in fee, and that by the subsequent transfers the respondent became vested of the fee in the undivided half of the four acres.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The appellants are the children of Elizabeth Witherspoon. She died in the year 1881. John Thomas Carothers died in the year 1899. William P. Carothers died on June 2, 1902, without issue. The claim of the appellants is that by the will William P. Carothers was given, first, an estate in common with Eleanor Carothers for and during the lifetime of Eleanor, and, secondly, a contingent remainder in fee; the condition being that in case he should die without issue the property should go to John Thomas Carothers for his life and that at the death of John it should go to Elizabeth Witherspoon. Their theory is that the estate of William terminated upon his death without issue, carrying with it all the subordinate estates conveyed by him, including that of John's wife and that of the respondent, and that as John died before the death of William, upon the death of the latter the entire estate in the farm became vested in the appellants as the heirs of Elizabeth Witherspoon, to whom the will in that event had devised it.

[1] In case of uncertainty arising upon the face of a will, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made. Civ. Code, § 1318. Assuming that the will is uncertain, the circumstances to be considered in this case are as follows: At the time he executed the will the testator was 74 years of age. He was then very sick, confined to his bed, and his death was expected soon. It was executed on December 7, 1876, and he died six days afterward. Eleanor Carothers was his childless second wife. She was then aged 56 years. William P. Carothers was a bachelor, then aged 42 years, John was 39 years old, and had one child then living. She afterwards died before the death of John. Elizabeth Witherspoon was then 46 years old, was married, and had three young children. The farm was his place of residence. It contained 158 acres and comprised the bulk of his estate. The will appointed William P. Carothers and Eleanor Carothers as executor and executrix, without bonds.

[2] The respondent's theory is that the clause in the will which reads as follows: "That in case said William P. Carothers dies without issue his property herein specified becomes the property of John Thomas Carothers, and at his death goes to Elizabeth Witherspoon"—refers solely to the death of William without issue in the lifetime of the widow, Eleanor, so that when he survived Eleanor he became vested of an unconditional and unqualified fee. Upon this theory a complete and accurate statement of the intention of the testator would have required the interpolation of an additional phrase, so as to express it thus, the interpolated words being italicized: " that in case said William P. Carothers dies without issue *during the lifetime of my said wife*, his property herein specified becomes the property of John Thomas Carothers, and at his death goes to Elizabeth Witherspoon."

The respondent, in support of this construction, advances two propositions which he states substantially as follows: (1) A clear devise of a fee will not be cut down by other expressions or clauses contained in the will which do not with reasonable certainty indicate the intent of the testator to cut it down, and if such intent is not thus shown the subsequent clause will be construed so as to make it consistent with the positive devise, or, if necessary, entirely disregarded. (2) Where a devise is made to one in fee, with a devise over in case of his death without issue, the words "death without issue" are to be taken as relating solely to his death in the lifetime of the testator, or, if the fee is in remainder after the termination of an estate for life or years, then to his death prior to the ending of the particular estate, so that if he survives thereafter he will take an absolute fee.

1. The first proposition is embodied in section 1322 of our Civil Code: "A clear and distinct devise or bequest cannot be affected * * * by any other words not equally clear and distinct." The words, "and at her death said land with all the improvements and proceeds thereof vests absolutely in and is the property of said William P. Carothers," considered separately, clearly give William a fee-simple estate. They are immediately followed, however, as part of the same sentence, separated only by a comma, by the words, "that in case said William P. Carothers dies without issue his property herein specified becomes the property of John Thomas Carothers, and at his death goes to Elizabeth Witherspoon." Passing the second proposition and assuming that this refers to

the death of William at any time, this passage, so far as it imposes a limitation upon the fee, is as clear and distinct as the previous devise of the fee to William.

[3] The word "that" beginning the clause is obviously used in the sense of "but" or "provided that." The testator's intention is unmistakably declared to be that in the contingency mentioned—that is, William's death without issue—the farm should go to John and Elizabeth successively. The rule contended for, as in case of all other rules of interpretation, is designed to aid in arriving at the intention of the testator as expressed in his will, and it must yield to that intention when it appears with reasonable clearness from the words used. The subsequent words are sufficiently clear to meet the condition of the rule, and they must be taken as providing a conditional limitation upon the fee previously devised, as they were manifestly intended to do.

[4] It is suggested that these words are not sufficiently certain to comply with the rule because, when taken literally, they appear to give the entire fee in remainder to John, and it is insisted that if John had the fee it would go to his heirs at his death and not to Elizabeth. We do not think there is any foundation for this objection. While the form of the provision is not elaborate and the language is not particularly well chosen, its effect is plain if the entire clause is considered together. It can mean nothing else than that, upon the death of William without issue, John should take, for and during his own life, whatever estates were given to William by the previous clauses, and that upon John's death the entire remainder would vest in Elizabeth, or her heirs if she were not then living. If William's death had occurred during Eleanor's lifetime, of course the estates of John and Elizabeth, respectively, would have been in the undivided one-half only, while Eleanor lived.

[5, 6] 2. The second proposition is expressed in the Civil Code as follows: "Words in a will referring to death or survivorship, simply, relate to the time of the testator's death, unless possession is actually postponed, when they must be referred to the time of possession." Section 1336. In this case William's possession of the fee was postponed until the death of Eleanor, and therefore, if this rule should be applied, the words relating to his death would be taken to mean his death in the lifetime of Eleanor. This section of the Code expresses what appears to be the general rule upon the subject at common law. The respondent relies upon the following statement of the rule by Mr. Underhill: "The intention of the testator in providing for a devise over after giving a fee in absolute terms is most likely to prevent a lapse; and, if the devisee shall survive the testator, he will take an absolute fee simple in the property devised to him, which will not be defeasible on his subsequent death without issue, and the limitation over will be disregarded." 1 Underhill on Wills, § 347. The author, in the next section, materially modifies this statement of the rule by the following language: "The rule is extremely technical in its character. It does not apply where there are indications, however slight, that the testator indicated a death without issue occurring subsequent to his death. The rule which construes death without issue to mean death without issue prior to that of that testator is not favored by the courts. The ages and conditions of the primary devisees may be material in determining whether the testator meant death without issue before or subsequent to his death. * * * In such a case, particularly where at the date of the execution of the will any of the primary devisees are unmarried, it may fairly be presumed that the testator had in contemplation a future marriage and birth of issue, and that, intending to keep the property in his family, he meant a death without issue to take place after his death. If, therefore, the primary devisees survive him, they take an estate in fee which is defeasible upon their subsequent death without issue." Section 437. In both these passages the author is discussing the effect of a devise over upon death without issue in cases where there is no intervening life estate to postpone the possession of the contingent remainder, and hence he speaks only of the effect of a death without issue before and after the testator's death. But manifestly, where there was such postponement, the same considerations would apply as to the effect of such death before and after the ending of the life estate. It is contended by both parties here that there is an irreconcilable conflict in the decisions of other jurisdictions upon the question whether words in a will referring to death *without issue* relate to the time of the testator's death or of actual possession if there is a postponement by reason of an intervening particular estate, or whether they relate to a death after the devise vests in possession, as well as before, and each claims that the weight of authority is in his favor. We have no decision on the subject in this state.

It is important to notice that the rule as stated in the Civil Code applies only where there are words "referring to death or survivorship, *simply*." The will of Carothers does not refer to the death of William "simply." It refers to his death "without issue," a contingency which might never happen. We have no provision of our Code declaring what the rule should be where the words refer to death upon a contingency. With respect to cases of this kind, speaking of those in which possession is postponed by a particular estate, Mr. Underhill says: "The general rule is that, in the absence of clear evidence of a contrary intention, a devise over in case of death without issue in the case of a remainder, as with an immediate estate or interest, means a death *at any time, and not a death without issue during the life tenancy.* The devisees therefore take a remainder, whether vested or contingent, upon the death of the testator, but which becomes vested in possession and enjoyment only upon the death of the life tenant, and which is then defeasible on their subsequent death without issue." Volume 1, § 346, p. 465. The italics are the author's. Mr. Jarman treats the subject at length by classes or heads. In one part he considers cases where the reference is to death "simply"; in another a class which he designates by the title, "Death, with Contingency," in which he includes the words "death without issue." This latter class he again divides into those where the estate is to vest immediately upon the death of the testator, and those where the original gift is postponed to take effect after an intervening estate for life or years. Speaking of those vesting immediately, he says: "The general rule is that, where the context is silent, the words referring to the death of the prior legatee in connection with some collateral event apply to the contingency happening as well after as before the death of the testator." 2 Jarman on Wills (6th Ed.) 719, *p. 1596. And in reference to the case of a postponed gift to one, with a devise over in case of his death on a contingency, he says: "It is settled, however, that in this case, as well as where the original gift is immediate, the substituted gift will prima facie take effect whenever the death under the circumstances described occurs." Id. 725, *p. 1603. In view of this well-known classification of the different varieties of testamentary gifts where death is referred to, it is at least clear that in adopting section 1336 there was no intention to provide a statutory rule for the cases where the reference was to death with a contingency. We are therefore left to construe the words of this will with the aid of such light as the authorities afford.

A large number of cases are cited by the respective counsel upon the question of the proper application of the words "dies without issue." We do not deem it advisable to review them. The above quotations from Jarman and Underhill show that the text-writers who have given close consideration to the subject favor the theory that they should be held to refer to death after as well as before the death of the testator or life tenant, unless the context or circumstances show the more limited meaning. A reading of the cases cited rather leads to the conclusion that, after all that may be said, the only rule truly applicable to such expressions is that the intention of the testator is the primary object of search, and that it is to be ascertained by considering the whole will in connection with the nature and character of the testator's estate and the part of it affected, and such of the surrounding circumstances known to him as may tend to illustrate his meaning. If all these indicate that the reference is to a death without issue before some particular time or event, effect must be given to the will accordingly. If, on the contrary, they show an intention that death at any time was to bring about the result stated, then that effect must be given to the words. If there is nothing to indicate either, then the ordinary meaning of the words is that the reference is to death at any time it may occur, and that the happening or not happening of the contingency is to determine the result. Nearly all of the cases cited fall within one or the other of the first two of the alternatives just stated, and they were, for the most part, really decided in that way; but in some of them the decision is reached by the arbitrary application of what was considered the correct rule of construction. This would probably account for much of the conflict.

[7] Applying the principles of interpretation above stated, we find little difficulty in ascertaining the testamentary intent. When the testator gave William the remainder after the death of Eleanor, and then proceeded to declare what should become of the property if William should die without issue, he must have had in mind the fact that William was a bachelor 42 years old and the possibility of his future marriage and the birth of children. It is more reasonable to suppose that he intended to preserve the estate to Elizabeth Witherspoon or her children, in case William left no issue, than that he merely desired to avoid a lapse if William died before Eleanor. If the former was his purpose, there can be no doubt that the qualifying clause was intended to limit the fee devised to William and referred to his death at any time.

We have also, in the will itself, more than a mere death upon contingency to point out the testator's meaning. The clause immediately preceding the reference to William's death on its face gave William a remainder in fee in the farm. The farm was therein "specified" as William's property, to become "his" in possession upon the death of Eleanor. Knowing William's age and unmarried state, he then came to consider that William might die without issue after coming into possession of the fee. To provide for this apprehended contingency, he proceeded to declare that if William should die without issue "his property herein specified" should go to John for his life and then to Elizabeth. The provision would doubtless have been construed to apply to and include the unexpired life estate as well as the fee in remainder, in case William had died before Eleanor; but it also shows that the testator was thinking of the property which would be "his"—that is, William's—and referred to the death of William after the death of Eleanor and after he had come into possession of the remainder "specified" as his in the preceding clause of the sentence, as well as to his death before that event.

It is suggested that the last paragraph of the will, which gives legacies to Elizabeth Witherspoon and May H. Lowry payable at the death of Eleanor out of the proceeds of the farm, shows that the testator supposed that William, if he were living, would then have an indefeasible fee, and that he must have intended that result. The argument is that the payment of these legacies out of a mere defeasible fee would have been a burden on William greater than the testator can be supposed to have intended. We cannot see that this argument is of any force. When the testator made the will, all the future possibilities were before him. If William had died without issue before Eleanor, leaving John surviving, John would have had a vested life estate in the remainder, beginning, as to one-half, with the death of Eleanor. At her death the legacies would be payable, and the burden upon John, if he survived her, would assuredly be as great as it would have been upon William, had he survived Eleanor.

Our conclusion is that the estate of William was a fee defeasible upon his death without issue, and that as that event has occurred, and John is also dead, the farm is now vested in the heirs of Elizabeth Witherspoon.

Upon a former submission of this cause, the foregoing opinion was filed, and the order, accordingly, reversed. Upon petition of the respondent, the judgment of reversal was vacated and a rehearing ordered for the purpose of giving further consideration to the questions involved. The cause was thereupon reargued and again submitted. Upon the further consideration we are satisfied with the opinion and conclusions heretofore announced, and we again adopt the aforesaid opinion as that of the court.

The order appealed from is reversed.

We concur: BEATTY, C. J.; HENSHAW, J.; LORIGAN, J.

ANGELLOTTI, J. (dissenting). This appeal was first decided in the District Court of Appeal for the Third Appellate District, where judgment was rendered affirming the order appealed from. Accompanying the judgment was the following opinion prepared by Mr. Justice Burnett:

"This is an appeal from a decree of partial distribution to one Earl D. White of the estate of Andrew Carothers, deceased.

"Andrew Carothers died on or about the 13th day of December, 1876, and on January 8, 1877, his will was admitted to probate and his son, William P. Carothers, was appointed executor of the estate. By his last will and testament said Andrew Carothers disposed of the real estate herein involved as follows: 'I also give and bequeath to my wife and William P. Carothers my entire farm with all improvements thereon located in the county of Sacramento, state of California, during the lifetime of my said wife, and at her death said land with all improvements and proceeds thereof vests absolutely in and is at said death the property of said William P. Carothers, that in case said William P. Carothers dies without issue his property herein specified becomes the property of John Thomas Carothers, and at his death goes to Elizabeth Witherspoon.' The said wife, Eleanor A. Carothers, died on the 24th day of February, 1897. On the 14th day of February, 1898, said William P. Carothers conveyed by a good and sufficient deed to John T. Carothers an undivided one-half interest in said property. The latter, on the 11th of March, 1899, conveyed the same to his wife, and she to J. J. Burke, on September 15, 1904. The said Burke died, and on the 6th day of September, 1907, in the superior court of the county of Alameda, a decree of distribution was made and entered by which all of the interest of said Burke was distributed to said Earl D. White. On the 31st day of October, 1904, the said Burke had filed in the superior court of Sacramento county his petition for the distribution to him of the undivided one-half interest in this real property belonging to the estate of said Andrew Carothers, deceased. His death occurred before the hearing of said petition, and his successor, the said Earl D. White, was regularly substituted, and to the latter the distribution was made. The said John Thomas Carothers died testate in the year 1899, without leaving issue; his said surviving widow, Kate A. Carothers, being the sole devisee of his estate. William P. Carothers was never married and never had any issue. He died intestate on June 2, 1902. The said petition for distribution was contested by John E. Witherspoon, as administrator with the will annexed of the estate of said Andrew Carothers, deceased, and by John E. Witherspoon, Andrew H. Witherspoon, and Emma Witherspoon, the heirs at law and successors in interest of Elizabeth Witherspoon, a deceased daughter of the said Andrew Carothers, deceased. The position of respondent is that the fee, subject only to the life estate of the said Eleanor, vested in William at the death of the testator, and that the provision in reference to the said John Thomas and Elizabeth are substitutionary only, or, at least, that at the death of said Eleanor the said William became entitled to the fee simple absolute. To the contrary, it is insisted by appellants that the estate of said William P. Carothers was terminated by reason of his death without issue, and that therefore the alternative provisions of the will to take effect in case of the happening of the contingency became operative. Hence the claim of appellants to the fee as heirs of said Elizabeth, whose death antedated that of the said William P. Carothers.

"Many questions of law suggested by the

language of the will are discussed with great learning by the counsel for both parties. Their investigations have taken a wide range, and it would seem that no relevant authority worthy of consideration has escaped attention. We deem it unnecessary, however, to follow the discussion in all its ramifications, as the determination of the controversy really hinges upon the construction of the phrase 'dies without issue,' or rather upon the question whether that contingency is limited to any particular time.

"Respondent's position is stated as follows: 'Our contention is that after devising the property absolutely to William P. Carothers, and carving out of it a life estate for his wife, he bethought himself that in case William P. Carothers died in his own lifetime or in the lifetime of his wife there would occur a lapse, and so he provided the substitutionary scheme. This is the only way in which the intention of the testator to convey an absolute interest in the property to the first taker can be possibly carried out.' In support thereof it is submitted: '(1) A devise of testator's real estate to a person absolutely carries the fee simple absolute. A devise of the proceeds, rents and profits without limit passes the absolute fee. (2) A clear devise or bequest will not be cut down by other expressions or clauses contained in the will which do not with reasonable certainty indicate the intent of the testator to cut it down. The court will, when in doubt, justly prefer that construction of any subsequent clause which will make it consistent with the plainly expressed intention to devise or bequeath an absolute estate. (3) Under section 1336 of the Civil Code words in a will referring to death or survivorship relate to the time of the testator's death, unless possession is actually postponed, when they must be referred to the time of possession. This is the rule which must govern the construction of Andrew Carothers' will.'

"As opposed to this view, it seems clear to appellants that: 'The testator intended that William P. Carothers should have the remainder in the property after the expiration of the life estate, but that he would not have the same absolutely so that he could dispose of it to others. The testator wanted to keep the property in the family. If William had issue, the property was to stay in his family. If he had not, it was to go to the other children of testator.' The reasons for this conclusion are summarized as follows: '(1) The natural meaning of the words "die without issue" is a death at any time. (2) The context of the will shows an intention to keep the property in his family, and this can best be done by so construing the words. (3) The surrounding circumstances show that the testator must have intended the words to refer to death at any time. (4) Respondent's construction is based not on the testator's intention, but on harsh and technical rules of construction. That even in those states, which have adopted it, it is according to respondent's own authority, Underhill, regarded as highly technical, often defeating the intention of the testator, not favored by the courts and departed from on indications however slight.'

"The fact is, however, that there is no difference of opinion—and there can be none—between counsel, that the court's duty is to ascertain, if possible, from an inspection of the will, the intention of the testator, and to give effect to such intention if not in contravention of the law, and that rules of construction are prescribed to aid, and not to embarrass or retard, the court in its effort to determine such intention. The rules of construction suggested by counsel, indeed, are provided by the Code, and the only question can be as to their application to the will in controversy. Section 1318, Civil Code, is: 'In case of uncertainty arising upon the face of a will as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made exclusive of his oral declarations.' Of course, the surrounding circumstances are to be resorted to only in case of uncertainty in the language used and for the purpose of ascertaining what the testator intended by the words of the will. Estate of Tompkins, 132 Cal. 173, 64 Pac. 268. The question as to the period of time to which the words 'die without issue' should be referred seems to be within the purview of the phrase 'as to the application of any of its provisions,' and if it does not appear from the language of the will, in view of other rules of construction, what the testator intended by said contingency, the surrounding circumstances, if of any significance to remove the uncertainty, may be considered and accorded the weight to which they seem to be entitled. In re Mackay, 107 Cal. 308, 40 Pac. 558.

"Again, in section 1322 we have the rule upon which respondent relies with such confidence expressed as follows: 'A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or any other words not equally clear and distinct or by inference or argument from other parts of the will or by an inaccurate recital of or reference to its contents in another part of the will.' But appellants contend that equal effect must be given to section 1321, providing that 'All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but, where several parts are absolutely irreconcilable, the latter must prevail.' And also to section 1329, that 'a devise of real property passes all the estate of the testator, unless otherwise limited.'

"In Estate of Marti, 132 Cal. 672, 61 Pac. 966, the importance of said section 1322 is considered, and it is therein said: 'The testator had, by a previous clause in his will, given and bequeathed to his wife "all the other property, real and personal, and wherever situated of which I may die possessed." This gift is explicit and without any words of limitation or qualification. Considered by themselves, they create in her an absolute estate in the property given by him. The authorities all agree that, when an absolute estate has been conveyed in one clause of a will, it will not be cut down or limited by subsequent words except such as indicate as clear an intention therefor as was shown by the words creating the estate. Words which merely raise a doubt or suggest an inference will not affect the estate thus conveyed, and any doubt which may be suggested by reason of such subsequent words must be resolved in favor of the estate first conveyed. This rule of construction controls the rule that an interest given in one clause of a will may be qualified or limited by a subsequent clause'—citing cases.

"There is no room for controversy as to the foregoing, unless possibly as to the accuracy of the statement that one rule 'controls' the other. The fact seems to be that in the case discussed by Mr. Justice Harrison the rule as to qualification or limitation has no application. Nor is there any inconsistency between the various sections of the Code to which we have referred. If A. in one part of his will by language free from uncertainty devises real estate to B. absolutely, and in a subsequent portion uses language of an uncertain import, but which might be construed as a limitation or qualification of the fee, no one would contend that B. is entitled to less than the entire estate in said property. But if A. should devise real estate to B. and qualify the devise by an equally clear declaration that B. should have only a life estate, there would be no hesitation in giving effect to the subsequent limitation. It follows necessarily from the principle that certainty is preferred to uncertainty and that the intention of the testator should be rendered operative as far as possible.

"In the light of the foregoing familiar principles, what estate was devised to the said William P. Carothers? There is no uncertainty as to the significance of this language: 'I also give and bequeath to my wife and William P. Carothers my entire farm with all improvements thereon during the lifetime of my said wife, and at her death said land with all improvements and proceeds thereof vests absolutely in and is at said death the property of said William P. Carothers.' The words seem to have been chosen carefully with a view of giving the wife and William a joint life estate and of vesting the fee beyond controversy in the latter. The legal effect of the words used, irrespective of the context, would not be changed as far as vesting the fee is concerned, if 'absolutely' and the phrase 'and is at said death the property of' had been omitted (section 1329, Civ. Code); but they are important as manifesting the intention of the testator to vest without qualification the complete title in William, postponed, however, as to its enjoyment until the death of the wife. An absolute estate is one 'that is free from all manner of condition or incumbrance.' It means 'Complete, final, perfect, unconditional, unrestricted.' Rap. & L. Law Dictionary. 'The ownership of property is absolute when a single person has the absolute dominion over it, and may use it or dispose of it according to his pleasure, subject only to general laws.' Section 679, Civ. Code. 'The term "absolute ownership" hardly needs definition. An ownership liable to be divested by any contingency arising by any instrument creating the ownership is not absolute.' In re Howland's Will, 75 App. Div. 207, 77 N. Y. Supp. 1025.

"We must presume that the testator used language advisedly, in view of its universally accepted significance. And as a bequest to a person necessarily implies the condition that the devisee shall be alive at the time the bequest is to take effect, we find the testator expressing his intention that, if the said William P. Carothers shall be alive at the time of the death of Eleanor, he shall be vested with the absolute dominion over said property, not liable to be divested by any contingency that may arise, provided if he dies without issue the property becomes the property of John Thomas Carothers. Is it not, therefore, the natural construction, to limit the operation of the qualifying contingency at least to the period prior to the death of said Eleanor? At any rate, there is some uncertainty as to whether the testator meant death 'without issue' at any time, and hence to give effect to the rule as to a clear devise we reach the conclusion that the testator had in view a substitutionary provision in case William should die before the testator or the said Eleanor.

"Again, the contrast between the perspicuous words of devise in reference to William P. Carothers and the somewhat obscure phraseology as to John Thomas Carothers and Elizabeth Witherspoon is worthy of notice. In the first instance there can be no doubt as to the testator's intention. He uses language apt and ample to vest in William the entire estate: 'I also give and bequeath.' But in case of William's death without issue 'his property herein specified *becomes* the property of John Thomas Carothers, and at his death *goes* to Elizabeth Witherspoon.' While the words 'becomes' and 'goes,' unembarrassed by the consideration of the clear devise of the fee to William, would probably be held sufficient to express the intention of the testator that the property 'becomes' the property of John Thomas and at his death 'goes' to Elizabeth, yet it is manifest that in one case the intention is entirely free from doubt, but in the other, at least somewhat obscure and uncertain. I think it is reasonably clear that the testator had in view the death of Eleanor as the point of time when all uncertainty should be removed as to the character of the estate vested in the devisee. This conclusion seems to be confirmed by the last devise of $1,000 to Elizabeth Witherspoon and $500 to May H. Lowry to be received 'at the death of my said wife.'

"If we had no other guide than the decisions of the courts to prescribe the limits of the phrase 'death without issue,' it would be difficult to reach a conclusion. The expression has indeed received judicial exposition in many jurisdictions. It is asserted in one of the briefs that more than 100 cases dealing with this question have been cited by each party herein. Many of these decisions are irreconcilably conflicting. In some instances, however, the phraseology is somewhat different, and the conflict is, therefore, more apparent than real. For example, sometimes the devise is to A., and in case of his death to B. Death is not a contingency, but a certainty, and, as it is apparent in such a case that the testator had in view a possible contingency, it is hardly open to controversy that he contemplated the death of A. in his lifetime. But 'death without issue' introduces an additional element and renders the question less free from doubt, although the difference is ignored in some of the decisions.

"But confining our attention to the expression before us, it is apparent that the cases are hopelessly at variance, as may be seen by a reference to the following from the many that have been examined.

"The question is elaborately and learnedly discussed and many authorities reviewed in Fowler et al. v. Duhme et al., 143 Ind. 248, 42 N. E. 623, wherein it is declared: 'Another rule is that the law so favors the vesting of estates and is so adverse to the postponement thereof that they will be held to vest at the earliest possible period in the absence of a clear manifestation of the intention of the testator to the contrary. While this rule has usually been declared with reference to the vesting of remainders, it is nevertheless declaratory of the policy of the law which would prefer certainty rather than contingencies, and which would deny force and effect to an uncertainty raised by doubtfully expressed contingencies instead of resorting to slight circumstances and rendering them effective to defer the vesting of estates or make their vesting contingent. This policy should not be relaxed when inquiry is directed to the force of words asserted to dismantle an estate in fee devised by apt words. * * * Another rule, and that which is of the greatest significance in the construction of the will before us, is, as said in Wright v. Charley, 129 Ind. 257, 28 N. E. 706: "That where real estate is devised in terms denoting an intention that the primary devisee shall take a fee on the death of the testator coupled with a devise over, in case of his death without issue, the words refer to a death without issue during the lifetime of the testator and that the primary devisee surviving the testator takes an absolute estate in fee simple." This rule may be said to be almost, if not entirely, free from conflict in the decisions, and there is no doubt of its adoption in this state and that it is supported by the vast weight of authority'—citing on page 261 of 143 Ind., on page 627 of 42 N. E., a long list of cases.

"On the other hand, the view urged by appellants is strongly upheld by the Supreme Court of the United States in Britton v. Thornton, 112 U. S. 532, 5 Sup. Ct. 294, 28 L. Ed. 816, in the following language: 'When indeed a devise is made to one person in fee and "in case of his death" to another in fee, the absurdity of speaking of the one event which is sure to occur to all living as uncertain and contingent has led the courts to interpret the devise over as referring to death in the testator's lifetime. 2 Jarman on Wills, c. 48; Briggs v. Shaw, 9 Allen (Mass.) 516; Lord Cairns in O'Mahoney v. Burdett, L. R. 7, H. L. 388, 395. But when the death of the first taker is coupled with other circumstances which may or may not ever take place, as, for instance, death under age or without children, the devise over, unless controlled by other provisions of the will, takes effect according to the ordinary and literal meaning of the words upon death under the circumstances indicated, at any time, whether before or after the death of the testator.'

"The question has been brought to the attention of our Supreme Court several times, but I think it can hardly be said to have been positively adjudicated.

"In Jewell v. Pierce, 120 Cal. 82, 52 Pac. 133, it is said: 'The construction which these words in a will should receive has been decided differently in different states, but has never been determined in this state.' The court, however, declined to decide the question, holding that it was not necessary to a decision of the cause.

"The language construed in Estate of Alexander, 149 Cal. 146, 85 Pac. 308, involves a different contingency from the one before us. The court, though, refers to a limitation over in case of death as follows: 'A devise to A. with a limitation over in case of his death vests an absolute estate in A., unless he dies during the testator's lifetime—citing cases. Similarly a gift to various persons "or the survivors of them" refers to those surviving at the death of the testator. The Civil Code of this state provides (section 1336) that "words in a will referring to death or survivorship, simply relate to the time of the testator's death, unless possession is actually postponed when they must be referred to the time of possession." But the above authorities as well as many more that might be cited show that the same rule exists universally irrespective of any statute.'

Whether the court would have made any distinction between a limitation over 'in case of death' and one 'in case of death without issue' does not appear, nor was it necessary to decide the question, although some of the cases cited with approval hold that the phrase 'death without issue' relates to death in the lifetime of the testator. Moreover, for other reasons stated in the opinion, it seems clear that the testator intended the conditional limitation 'if she remains unmarried' to apply at the time of the testator's death.

"In the Estate of Barclay, 152 Cal. 753, 93 Pac. 1012, allusion is made to the subject as follows: 'The only provision in the will under which S. C. Blackinton could possibly be deprived of this property was one to the effect that in case one or more of the children should die their share was to be divided among the remaining children "unless they have heirs." This provision apparently referred only to such a death as might occur before the death of the testator (Civ. Code, § 1336); but in any event it could not apply to S. C. Blackinton's interest, for she left a child surviving her as well as her husband.'

"I think, therefore, that respondent is not justified in saying that by the foregoing decisions in this state the question is foreclosed as to whether the words 'dying without issue' are substitutionary merely or that the issue here is determined by said section 1336, but gathering the intention of the testator from the whole instrument, the only reasonable construction, in my opinion, is opposed to the theory that death at any time without issue was contemplated.

"Appellants also contend that an important feature here is the precedent life estate in favor of the said William P. Carothers. This would be of moment if it were not followed by the devise to him of the absolute fee.

"The said provisions in reference to William and Eleanor express as clearly as language can the intention that they should have the life estate until the death of Eleanor and then the fee should vest in William. Of course, no one would contend that William's life estate would continue after he was vested with the fee. Therefore appellants make a wrong application of the quotation from Fowler v. Ingersoll, 127 N. Y. 472, 28 N. E. 471, to the effect that: 'This rule (holding that the words of contingency are substitutionary merely) has no application when the first devisee or legatee takes a life estate and is applied only when the prior gift is absolute and unrestricted. * * * And many cases could be cited where the courts, having construed the prior estate to be less than the absolute fee have held that the words of contingency referred to a death whenever it may happen.'

"Instead of devising a life estate to said William, the testator, after using language that carries such an implication, hastens to express in the most positive and unequivocal manner his purpose to vest the entire estate in William, subjecting its possession, as we have seen, to the life interest of Eleanor.

"The fact that the testator died within a week after the execution of the will is not of sufficient moment to affect the result. The argument is that since he must have been under a sense of impending death, and William was of the age of 42 and unmarried, it is most improbable that the contingency mentioned could have been contemplated as occurring prior to the testator's death. But the force of the contention is entirely nullified by the construction which refers the said contingency to the time of the death of Eleanor. Besides, there is no positive evidence that the testator believed that he was about to die. It is true that he was quite ill. He was suffering from an ailment that had afflicted him periodically for ten years. But at any rate, conceding that he felt that the end was near, this is only a circumstance to be considered with other circumstances in case of doubt, and in view of the language of the will expressing so emphatically the purpose to vest an unqualified estate in William, should not be given the weight claimed by appellants.

"As we construe the will there is no occasion for the application of the rule preferring the latter in case of conflicting provisions. Holding that there is a clear devise of the fee to William and that the contingency is confined either to the death of the testator or of Eleanor, we find harmony rather than inconsistency in the provisions in controversy."

I believe that this opinion correctly disposes of the questions presented on this appeal, and that the order should be affirmed for the reasons therein stated. I therefore dissent from the judgment.

We concur: SLOSS, J.; MELVIN, J.

161 Cal. 516

INYO CONSOL. WATER CO. v. JESS et al.
(L. A. 2,638.)

(Supreme Court of California. Dec. 11, 1911. Rehearing Denied Jan. 10, 1912.)

1. WATERS AND WATER COURSES (§ 17*)—DIVERSION—NOTICE—RIGHTS — CONSTRUCTION OF WORKS—TIME—EXTENSION.

Civ. Code, § 1416, prior to its amendment in 1907, provided that a claimant of water must begin diversion works within 60 days after the posting of notice and diligently pursue the same to completion. Section 1419 declared that failure to comply with such requirement forfeited the claimant's rights as against a subsequent complying claimant, but section 1422 provided that if the proposed place of diversion, or any part of the diverting canal, was within the United States forest reserve, or other public land, the claimant might commence his works within 60 days after a license from the proper officers to use the reserved lands provided he began steps to secure such license within 60 days after posting the notice of appropriation. *Held*, that where plaintiff's notice of appropriation alleged that the places of its intended diversion and part of the route of its conduit were within the Sierra forest reserve of the United States, plaintiff having diligently prosecuted its application for use of the public land, the right of diversion was not subject to adverse appropriation until 60 days after the application to use the public land had been acted on.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 17.*]

2. WATERS AND WATER COURSES (§ 33*)—"INTEREST IN REAL PROPERTY"—WATER APPROPRIATION.

An appropriator's right pending the determination of his application to use public lands was an "interest in real property" which he was entitled to protect by a suit to determine conflicting claims to real property authorized by Code Civ. Proc. § 738.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 33.*

For other definitions, see Words and Phrases, vol. 4, pp. 3692-3709; vol. 8, p. 7691.]

In Bank. Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action by the Inyo Consolidated Water Company against Stoddard Jess and others. Judgment for defendants, and plaintiff appeals. Reversed.

Hunsaker & Britt, P. W. Forbes, and Andrew H. Rose, for appellant. Leslie R. Hewitt, City Atty., Ben. H. Yandell, and W. B. Mathews, for respondents.

SHAW, J. The court below sustained a general demurrer to the second amended complaint. Plaintiff refused to amend further. Thereupon judgment was given for defendants. Plaintiff appeals.

The first count of the complaint purports to allege a cause of action, under section 738 of the Code of Civil Procedure, to determine the alleged conflicting claims of the plaintiff and defendants, respectively, to the right to use the waters of Cottonwood creek, in Inyo county, and to the right to divert such waters for use. The complaint alleges that the city of Los Angeles has a prior right to divert and use 180 miners' inches of said waters. The alleged conflicting claims do not relate to that water, but solely to the excess of the stream above that quantity. It appears from the briefs that the demurrer to this count was sustained upon the theory that it does not show that the plaintiff owns or possesses any subsisting interest in, or right to, the water or the use thereof. This constitutes the question to be determined.

The plaintiff claims its right under and by virtue of five notices of appropriation posted and recorded by George Chaffey, as provided in section 1416 of the Civil Code. Plaintiff has succeeded to Chaffey's rights. Two of the notices were posted on June 24, 1905; the other three on July 31, 1905. The notices state, and the fact is, that the places of intended diversion, and part of the route of the conduit to be constructed to convey it to the place of use, are and then were within the Sierra forest reserve of the United States. No diversion works or dams had been built or begun in pursuance of the notices, or either of them, at the time the action was commenced, which was on July 16, 1907. In excuse for this delay the plaintiff relies on the extensions of time to begin that work given by section 1422 of the Civil Code, and by the amendment of March 21, 1907, to said section 1416. The amendment took effect on May 20, 1907 (Stat. 1907, p. 780).

[1] Section 1416, as it stood prior to 1907, provides that a claimant must begin the diversion works within 60 days after the notice is posted and diligently pursue the same to completion. There are certain exceptions not necessary here to notice. By section 1419 a failure to comply with this requirement forfeits claimant's right, as against a subsequent claimant who does comply. Section 1422, in effect, is that if the fact is, and the notice so states, that the proposed place of diversion or any part of the diverting canal is within a forest reserve or other United States government reservation of public land, the claimant may commence the diversion works within 60 days after he shall have received a grant of license from the proper public officers to occupy and use such reserved lands for that purpose, provided that, within 60 days after the posting of the notice of appropriation, he shall have begun the necessary surveys required to precede the application for such license, and shall have diligently prosecuted such surveys to completion, and, upon such completion, shall have also applied to the proper officer for such license and prosecuted such application with reasonable diligence. Facts are alleged showing that the provisions of this section have been fully complied with, and that the applications for said licenses or grants of authority to occupy and use said reserved lands are now being considered by the officers of the United States authorized to make such grants, but that they have not yet been determined, and, consequently, that plaintiff is unable to proceed with said diversion works.

The effect is that plaintiff is relieved from the requirement of sections 1416 and 1419 that such works must be commenced within 60 days after the posting of the notices of appropriation in order to preserve the claimant's statutory rights under the notice. As to these claims, the time limited has been extended and has not yet expired. The plaintiff's rights to begin and complete the diversion works are the same as they would be if the original 60 days had not expired. His present right to maintain this action is also the same.

[2] Respondents contend that this right is

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

not a vested right, that it is not property, and that it cannot be protected against adverse claimants by a suit to determine conflicting claims. In this behalf they cite Kelly v. Natoma Water Co., 6 Cal. 105; Maeris v. Bicknell, 7 Cal. 261, 68 Am. Dec. 257; Kimball v. Gearhart, 12 Cal. 50; Nevada, etc., Co. v. Kidd, 37 Cal. 309; and Mitchell v. Amador, etc., Co., 75 Cal. 482, 17 Pac. 246. These cases all involve water rights existing prior to the enactment of the Code in 1872, prescribing a statutory mode of acquiring a right to the use of running water. They lay down the rule that a right to the use of running water does not vest in possession at common law, until there has been an actual diversion and beneficial use of the water. But they all recognize, and some of them declare, that, before any actual diversion or use of the water, a claimant may acquire an incipient, incomplete, and conditional right to the future use of the water, by beginning the construction of the works necessary for such diversion and use, and, in good faith, diligently prosecuting the same to completion.

Thus, in Nevada, etc., Co. v. Kidd, supra, on page 310, referring to such an embryo claim to water and to a hostile use before its completion, the court says: "There is, in fact, as yet, no present water right to be affected. The party has merely acquired the possession and site for his dam and canal, and a *right*, by diligently pursuing his object, *to acquire a future right* to the possession of the water, which, when acquired, shall, for the purposes of priority and of redressing any injuries that may thereafter accrue, date by relation from the first act in selecting the location and making the claim." (Italics ours.) Such claimant had no immediate right to the control or use of the water, because he was not yet ready to take it. And he had no right to damages from any one who used the water while he was making his dam and ditch. It does not follow, from this, that he had no right at all. On the contrary, it was declared that as soon as he began work on his dam and ditch, with the avowed intent thereby to take and use the water, he acquired a prior right respecting the water. In Maeris v. Bicknell, supra, the facts were that plaintiffs' grantors, not intending to use the water, but for the purpose of draining it away from their mining claims, had constructed a ditch, which carried the water away, but they had made no actual use of it. Meantime, defendants diverted the water above plaintiffs' ditch and had used it. The court said: "Unless the grantors of plaintiff had constructed their ditch with the intention of using the water for mining or other useful purposes, or after its construction they had actually so applied it, the defendants could not know that they ever would so apply it, or intended so to apply it. If, at the time plaintiff's ditch was made, *such intention had existed and been avowed*, and afterwards carried out in good faith within a reasonable time, considering all the circumstances, then defendants could not, by any act of theirs, rightfully appropriate any water in the ravine, necessary to fill the ditch of plaintiff." (Italics ours.) There is no case, arising prior to the enactment of the Code, which holds that the party, who thus in good faith began and diligently prosecuted the work on a dam and ditch for the diversion and use of water, could not protect his incipient right to the water, against the hostile diversions and claims of others, by an appropriate suit for that purpose. It is obvious that this could not be so. Such visible act and avowed intent gave him a conditional right to the future use of the water, prior to its actual use; the condition being that he should thereafter diligently continue the work to completion and then divert the water and apply it to a useful purpose, failing which his right would cease. Upon the performance of these conditions, his title to such use would become complete and perfect. In the meantime, however, he had an existing conditional right, manifested by actual visible possession of the works. It would be clearly a property right, and, it being incidental and appurtenant to land, it was real property. Civ. Code, § 658.

The purpose of the Code was to afford a more perfect protection for such rights and to facilitate the subsequent acquisition of the title to the use. Previously, the incomplete right could be acquired only by some open visible work to that end, upon the ground, accompanied by a declaration of the intent. Disputes would naturally arise as to priority between different diversions from the same stream at places far apart. The Code endeavors to avoid this by providing for the posting of a notice at the proposed dam, and declaring that such notice secures a prior right, without any work, for the period of 60 days thereafter. Wells v. Mantes, 99 Cal. 586, 34 Pac. 324. Thus there is given that which it is said did not exist before (Kelly v. Natoma Water Co., supra), a constructive right to the use of the water, a right existing only by publicly declared intent, and which may be made a perfect and complete title, as against all except prior users and riparian owners, by beginning the work within 60 days, diligently prosecuting it to completion, and thereupon actually using the water. This incomplete right, although not as yet a title, is an interest in the realty. Under section 738, Code of Civil Procedure, the person who has an interest in real property may maintain an action to determine the validity of a conflicting claim which is adverse to his own claim. It follows that the first count states a cause of action and that the general demurrer thereto should have been overruled.

The objection to the second count is wholly technical, and, as it may be obviated by amendment, it is not necessary to consider it.

The briefs discuss at length the effect of the amendment of 1907 to section 1416 of the Civil Code, and of an amendment of 1911 (Stats. 1911, p. 1419) to the same section. The latter omits the amendments of 1907, in effect repealing them. The amendment of 1907 purported to give one who had posted such notice, in a case where there were "conflicting claims to the waters so appropriated," a right to begin a suit to determine such claims within 60 days from the time of posting, and it extended the time for beginning the work to 60 days after final judgment in such suit, provided it was diligently prosecuted. A field of inquiry is thus presented upon which we will not enter. Does this apply to notices posted prior to the passage of the amendment? Does it apply where the so-called conflicting claim is a mere assertion, or must there be a physical exercise of the right claimed, and one of such a character that it actually prevents or interferes with the beginning of diversion works under the notice? And must all this be alleged? Does the repeal of these provisions, after this suit was begun, terminate the extension of time thereby granted? These are interesting questions; but as the plaintiff's time appears to be still running by virtue of the extension provided in section 1422, which is not repealed, we deem it unnecessary to determine them.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.

(161 Cal. 526)

KELLOGG v. MALLORY et al. (Sac. 1,909.)

(Supreme Court of California. Dec. 13, 1911. Rehearing Denied Jan. 12, 1912.)

1. Appeal and Error (§ 1010*)—Questions Reviewable—Findings—Conclusiveness.

Where an appeal is taken too late to allow a review of the findings on the ground that they are not supported by evidence, such findings as are responsive to the issues are conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1010.*]

2. Vendor and Purchaser (§ 185*)—Contracts—Time of the Essence—Forfeiture.

Where a contract for the sale of real estate, stipulating for payment in installments, made time of the essence, and the purchaser made default, and the vendor did not acquiesce therein, and no equitable ground for relief was shown, the contract was terminated.

[Ed. Note.—For other cases, see Vendor and and Purchaser, Cent. Dig. §§ 369-372; Dec. Dig. § 185.*]

3. Vendor and Purchaser (§ 3*)—Contracts—Construction.

A complaint alleged that plaintiff was indebted to defendant for $438.13 for money received to make the first payment on a proposed purchase of land from a third person, which land plaintiff was about to purchase; that the third person, at plaintiff's request, contracted to sell the land to defendant for $1,220.85, payable in cash and in annual installments; that on the same day defendant contracted to sell the same to plaintiff for $1,659.03, which was the aggregate of the sum to be paid by defendant to the third person and the sum which plaintiff owed to defendant. The complaint did not allege that the latter sum had been paid by defendant to the third person on account of the purchase of the land or that the full price, so far as the third person was concerned, was more than $1,220.85. *Held*, that defendant's agreement with plaintiff was simply one for the sale by defendant to plaintiff of the land, and defendant did not hold the land in trust for plaintiff.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 3.*]

Department 1. Appeal from Superior Court, Kings County; John G. Covert, Judge.

Action by H. E. Kellogg against H. Mallory and another. From a judgment for defendants, plaintiff appeals. Affirmed.

W. R. McQuiddy and Frank E. Kilpatrick, for appellant. O. L. Abbott, for respondents.

ANGELLOTTI, J. This is an appeal from a judgment in favor of defendants in an action brought by plaintiff to obtain specific performance of a contract between himself and defendant Mallory relative to certain land in Kings county, Cal.

[1] The appeal was taken nearly six months after the entry of judgment, and more than four months after the statement on appeal was settled. It is admitted by plaintiff, in accord with the claim of defendants, that the appeal was taken too late to allow a review by this court of any exception to the decision of the trial court on the ground that it is not supported by the evidence. Such findings of the trial court as are responsive to the issues made by the pleadings are therefore conclusive upon us.

[2] Considering the action as one for the specific enforcement of a contract for the sale of certain land by Mallory to plaintiff, which was apparently the theory of the framers of the complaint, we are satisfied that the judgment is fully supported by the pleadings and the findings on such issues as were made thereby. Substantially, the facts thus established are as follows: On December 3, 1906, Mallory and plaintiff entered into a written agreement, whereby Mallory agreed to sell and convey the property to plaintiff for $1,659.03, $211.63 thereof being paid in cash, and the remaining $1,447.40 being payable in yearly installments on October 1st of each year to and including the year 1914; all of said deferred payments being evidenced by promissory notes of the same date, bearing interest at the rate of 8 per cent. per annum, payable annually. By the terms of said agreement plaintiff was entitled to the possession of the property. It was provided in such agreement as follows: "It is understood and agreed that time is of the essence of this agreement and in each and every one of the terms, conditions and

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

provisions hereof, and that the terms hereof shall bind the heirs, successors and assigns of the parties hereto. It is understood and agreed that if at any time the second party shall be in default in the performance of any of the terms, covenants and provisions of this agreement that all of his rights hereunder shall be forfeited and at an end, * * * and all payments made under this agreement shall be deemed full compensation for the use, rent and occupation of said land during the time the second party shall have remained in possession thereof under this agreement; provided, that whenever the second party shall be in default in any of the terms and conditions of this agreement, if allowed to remain upon said premises by the first party he shall hold and occupy the same as the tenant of the first party subject to the right of the first party to demand and receive immediate possession thereof from the second party as such tenant."

Plaintiff neglected and refused to pay to Mallory the sum of $177.17 due on October 1, 1909, evidenced by promissory note maturing that day, and also neglected and refused to pay $51.27 interest due on that day on that and five remaining installments evidenced by notes maturing respectively on October 1st of the years 1910 to 1914, both inclusive, and defendant did not consent to nor acquiesce in such neglect and refusal. So far as the complaint shows, it was not until November 29, 1909, that plaintiff notified Mallory that he was desirous of paying any additional money on the contract, and on that date he notified him in writing that he would pay all amounts remaining due on December 8, 1909, at a specified place; but Mallory, who in the meantime had transferred his interest in said land to defendant Abbott, never consented to receive the same or in any way waived the default of plaintiff in the matter of the payments due October 1, 1909. Nothing is alleged in the complaint tending to excuse the failure of plaintiff to comply with the contract in the matter of such payments, or tending to show any equitable grounds for relieving him from the effect of such failure, or tending to show any reason why Mallory should be held to have consented to delay in the matter of payments or estopped to claim that the contract was terminated by such failure. These are the material facts established by the pleadings and certain findings within the issues. Plaintiff's claim as to what the evidence introduced on the trial showed in this behalf cannot be considered on this appeal, in view of the fact that the appeal was taken too late to allow us to consider the question of the sufficiency of the evidence to support the findings. We know of no rule of law that would authorize a court to enforce against the vendor a contract for the sale of real estate where, by the express provisions of the contract, all of the rights of the vendee have terminated by reason of his failure to make certain payments at a specified time, and there has been no consent to, waiver of, or acquiescence in, such failure by the vendor, or any pretense of facts excusing such failure of the vendee for tending to show equitable ground for his relief. Under its express provisions, the contract of sale is terminated. Such is the case before us, as shown by the pleadings and findings.

[3] Plaintiff claims in his briefs presented on this appeal that facts alleged in the complaint and admitted by the answer show that the relation between him and Mallory was in reality not that of mere vendor and vendee under a contract for the sale of real estate. It was alleged in the complaint that on December 3, 1906, plaintiff was indebted to Mallory in the sum of about $438.13 for money had and received by him to make the first payment on account of a proposed purchase of these lands from The Laguna Lands, a corporation, the owner thereof, which said lands "plaintiff then desired and was about to purchase"; that said corporation, on December 3, 1906, at plaintiff's request, entered into a contract whereby it agreed to sell such lands to Mallory, for $1,220.85, payable $305.21 in cash and $915.64 in annual installments on October 1st of each of the years 1907 to and including 1914, with interest at the rate of 8 per cent. per annum; that on the same day plaintiff and Mallory entered into the contract of sale hereinbefore described; and that the full consideration specified therein, $1,659.03, was the aggregate amount of the sum agreed to be paid by Mallory to The Laguna Lands for the land, and the sum of $438.13 owed by plaintiff to Mallory. It was not alleged that such $438.13 so received by plaintiff from Mallory had been paid by him to The Laguna Lands on account of the purchase price of such land, or that the full price of the land, so far as the owner was concerned, was more than the amount stated in the contract with Mallory, viz., $1,220.85. Upon these allegations alone, it is now claimed that the transaction between plaintiff and Mallory was simply one by which Mallory was to take the agreement from the owner as security for the payment to him by plaintiff of the purchase price, which he was to advance to the owner for the plaintiff, and that in accord with the doctrine of such cases as Campbell v. Freeman, 99 Cal. 546, 34 Pac. 113, plaintiff was the real purchaser, and Mallory occupied the relation to him of trustee of the legal title and mortgagee for such money as might be advanced by him for its purchase and for the additional indebtedness referred to. It may be conceded that the facts so alleged would afford strong grounds for a conclusion by a court sustaining allegations of a complaint declaring some understanding between Mallory and plaintiff by which Mallory was to advance the purchase money for plaintiff

and take the title to the land as security. But the difficulty with plaintiff's claim in this behalf is that there is nothing in the nature of such an allegation. We have stated all the allegations that bear upon this matter. While not inconsistent with the present claim of plaintiff that Mallory was to pay the purchase price to the owner *for plaintiff*, and take the title in his own name as security, they are likewise not necessarily inconsistent with the theory that there was no such understanding between Mallory and plaintiff, and that the two contracts, that between the owner and Mallory and that between Mallory and plaintiff, were entirely separate and distinct transactions, in the former of which plaintiff had no interest whatever, and there is no allegation or pretense of allegation of the ultimate fact of such an understanding as is, under these circumstances, essential to a maintenance of plaintiff's claim. So far as appears from the complaint, the two contracts were absolutely separate and distinct, and Mallory's arrangement with plaintiff was simply one for the *sale* to him of certain real property. We are aware of no case in which one who has in fact paid the purchase money for real estate conveyed to him has been held to be the trustee of another on the ground that he so paid it on behalf of another who was the real purchaser, in the absence of allegation that he did pay it for such other person, or where one holding the legal title to land has been held to be only the mortgagee thereof in the absence of allegation that the legal title has been conveyed to him as security for an indebtedness. It seems clear that the complaint before us presented no such case as is now urged, but that it was solely a complaint for the specific performance of a contract between Mallory and plaintiff for the *sale* of real estate by Mallory to plaintiff. This was doubtless the theory of the judge of the trial court.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.

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17 Cal. App. 389

BROADBENT v. KEITH. (Civ. 1,036.)

(District Court of Appeal, Second District, California. Nov. 7, 1911.)

ELECTIONS (§ 305*)—CONTESTS—APPEAL—DISMISSAL.

It appearing on appeal in a municipal election contest that respondent has resigned the office, and appellant has been appointed thereto to fill a vacancy, and that the public has no interest in the appeal, it is properly dismissed on agreement of the parties.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 305.*]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Election contest by Andrew E. Broadbent against John M. Keith. Judgment for plaintiff, and defendant appeals. Appeal dismissed.

See, also, 15 Cal. App. 382, 114 Pac. 996.

Shaw, Ross & Dyke, for appellant. Conkling & Brown, for respondent.

PER CURIAM. This is an election contest involving the office of marshal of the city of Imperial, Cal. It appears from a statement in writing, filed by the attorneys for appellant herein, that plaintiff and respondent has voluntarily resigned the office of marshal of the city of Imperial, to which he was declared elected, and that defendant and appellant has been appointed by the board of trustees of said city of Imperial to fill said vacancy, which office he now holds, and it appearing by reason of the facts recited the public can have no interest in the result of said appeal, and the appellant having consented thereto.

It is therefore ordered that the appeal herein be, and the same is, dismissed.

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17 Cal. App. 368

PEOPLE v. TATE. (Cr. 162.)

(District Court of Appeal, Third District, California. Nov. 4, 1911.)

CRIMINAL LAW (§ 1109*) — APPEAL — DISMISSAL.

Where there is no evidence in the record of an appeal from the judgment or from an order denying a motion for a new trial, if such order was made, and no briefs have been filed, the record will be stricken from the files.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2897–2902; Dec. Dig. § 1109.*]

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

James Tate was convicted of an offense, and he appeals. Record stricken from files.

Charles de Legh and Fred A. Copestake, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

HART, J. This cause was on the October, 1911, calendar of this court, and submitted on the record.

There is no evidence in the record of an appeal having been taken from the judgment or an order denying the defendant a new trial, if such an order was made. Obviously, therefore, this court has not acquired jurisdiction to review the record. Moreover, there are no briefs filed in the cause, and, if an appeal had been taken, the same would have to be dismissed for a failure of appellant to file a brief, assuming that he would have omitted to do so, had he taken an appeal, either from the judgment or the order denying him a new trial, if a motion of that character was made and denied. People v. Perry, 117 Pac. 1036.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

For the foregoing reasons, the record will have to be stricken from the files of the court, and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

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17 Cal. App. 367

ERVING v. NAPA VALLEY BREWING CO. (CHURCHILL and JAS. H. GOODMAN & CO. BANK, Interveners).

(Civ. 871.)

(District Court of Appeal, Third District, California. Nov. 4, 1911.)

1. Courts (§ 212*)—Jurisdiction—Amount in Controversy.

Where appellate jurisdiction depends on the amount in controversy, the ad damnum clause of the complaint is the sole test.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 511–516; Dec. Dig. § 212.*]

2. Courts (§ 212*)—Jurisdiction—Amount in Controversy.

Under Const. art. 6, § 4, providing that the District Courts of Appeal shall have jurisdiction in cases at law, where the demand does not exceed $2,000, an appeal in an action to recover property alleged to be of the value of $6,000, and demanding judgment for that sum, if a delivery could not be had, should be taken directly to the Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 511–516; Dec. Dig. § 212.*]

Appeal from Superior Court, Napa County; H. C. Gesford, Judge.

Action by W. F. Erving against the Napa Valley Brewing Company and E. W. Churchill and Jas. H. Goodman & Co. Bank, interveners. Judgment for plaintiff, and the Brewing Company appeals. Transferred to the Supreme Court.

See, also, 116 Pac. 331.

N. F. Coombs, John T. York, and F. L. Coombs, for appellant. T. L. Coombs, for interveners. F. E. Johnston, H. L. Johnston, and L. E. Johnston, for respondent.

HART, J. This is a direct appeal to this court from the judgment on the judgment roll alone. The complaint alleges that the property, for the recovery of which the action was brought, is of the value of $6,000, and demands judgment for that sum in case a delivery thereof cannot be had.

[1] It is the settled rule in this state that, "where jurisdiction depends on the amount in controversy, the ad damnum clause of the complaint is the sole test." Henigan v. Ervin, 110 Cal. 37, 42 Pac. 457.

[2] This court has appellate jurisdiction in such cases at law only where "the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars, and does not amount to two thousand dollars." Article 6, § 4, Const.

The cause was therefore erroneously brought to this court by direct appeal and will have to be transferred to the Supreme Court.

Such is the order.

We concur: CHIPMAN, P. J.; BURNETT, J.

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17 Cal. App. 375

PEOPLE v. BARLOW. (Cr. 215.)

(District Court of Appeal, Second District, California. Nov. 6, 1911.)

1. Criminal Law (§ 1159*)—Appeal—Review—Question of Law.

On an appeal by defendant in a criminal case, the appellate court will reverse the judgment because unsupported by the evidence only where there is an entire absence of evidence to support the verdict, under the rule that on such appeals only questions of law will be considered, since, if the evidence against accused considered without regard to conflicting evidence tends to support the verdict, the question is one of fact on which the determination of the jury and the trial court is conclusive.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074–3083; Dec. Dig. § 1159.*]

2. Assault and Battery (§ 89*)—Abusing Children—Evidence.

In a prosecution for abusing a female child eight years of age, her evidence that defendant met her for the first time on a sidewalk near a roller coaster at an amusement park, gave her oranges and a sandwich, and told her to go down under the coaster, and that he would meet her there, that she did as requested, and that defendant shortly after joined her, but that she could not remember whether defendant put his hands on her, or what he did while they were down under the coaster, was admissible to show that the defendant and the witness prior to the meeting were strangers.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 128; Dec. Dig. § 89.*]

3. Assault and Battery (§ 92*)—Abusing Female Child—Evidence.

Evidence *held* to warrant a conviction of abusing a female child eight years of age.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 137–139; Dec. Dig. § 92.*]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

George Barlow was convicted of committing lewd and lascivious acts on a female child, and he appeals. Affirmed.

Tom L. Johnston, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was convicted upon an information charging him with the offense defined in section 288 of the Penal Code. He appeals from the judgment and an order of court denying his motion for a new trial.

[1] Appellant's sole contention is that the

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

evidence was insufficient to justify the verdict of the jury. The rule is well settled that upon an appeal by a defendant in a criminal case this court will pass only upon questions of law, and it is only where there is an entire absence of evidence to support a verdict that a question of law is presented. "If the evidence which bears against the defendant, considered by itself, and without regard to conflicting evidence, tends to support the verdict, the question ceases to be one of law—of which alone this court has jurisdiction—and becomes one of fact, upon which the decision of the jury and the trial court is final and conclusive." People v. Saunders, 13 Cal. App. 746, 110 Pac. 825. Under this rule, the question is whether the evidence offered by the prosecution—none whatever being adduced by the defendant—tended to support the verdict.

[2] The facts which the evidence tends to establish are as follows: That defendant for the first time met the prosecutrix, a girl of eight years of age, upon the sidewalk near what is known as the roller coaster at Long Beach; that he gave her some oranges and a sandwich, and told her to go down under the roller coaster, stating that he would meet her there. She did as requested, and defendant shortly afterwards joined her. She testified that she could not remember whether defendant put his hands upon her, or what he did, while they were down under the roller coaster. Nevertheless the child's testimony was material, in that it tended to prove the relation existing between herself and defendant prior to the meeting to be that of strangers.

[3] An officer connected with the police force saw defendant sitting with the girl under the roller coaster, which was to some extent at least protected from the view of passersby and others in the vicinity, and from a place of concealment 50 or 60 feet distant he watched them. His testimony was that defendant, among other things done by him, pulled the child's dress up above her knees, and repeatedly placed his hand up as far as he could get it under her dress. While he could not and did not state that the defendant placed his hand upon her privates, nevertheless, there could be no doubt from his testimony, if the jury believed it, as to the fact that defendant did commit lewd and lascivious acts with the child, as charged in the information, nor as to the intent with which the acts were done.

The jury appears to have been prompt in reaching a verdict of defendant's guilt, and, under the evidence, this court cannot say that it was not justified in its conclusion.

The judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

17 Cal. App. 353

HARVEY et al. v. MEIGS et al. (Civ. 850.)

(District Court of Appeal, Third District, California. Oct. 31, 1911.)

1. CORPORATIONS (§ 190*)—ACTION BY STOCKHOLDERS — MISAPPROPRIATION OF FUNDS — PLEADING—COMPLAINT.

Where a complaint by stockholders of a corporation alleges that the defendants have standing in their names on the books of the corporation more than a majority of its outstanding shares, and have combined and conspired to accomplish unlawful purposes, and to that end have elected directors subservient to their wishes who had no interest in the corporation except to work out the will and interests of defendants as their implements and representatives, and the defendants have, at all times mentioned in the complaint, dictated and do now dictate all the acts of the directors of the corporation; that the defendants "have, by virtue of their control of such corporation and its board of directors," appropriated and converted money belonging to it, and through such control of the board of directors have created a fictitious indebtedness against said corporation and in favor of defendants, etc.—although it does not show who were the directors or directly aver that directors were chosen at the organization of the corporation, or that they or their successors continued to act as such throughout the times mentioned in the complaint, such facts appear inferentially, and as it clearly appears that the defendants worked their purposes through the directors, it presents sufficient facts to constitute a cause of action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 730; Dec. Dig. § 190.]

2. CORPORATIONS (§ 190*)—ACTIONS BY STOCKHOLDERS—MISAPPROPRIATION OF FUNDS—PARTIES—DIRECTORS.

In an action by minority stockholders against the majority stockholders for wrongful acts and misuse of corporate funds, alleged to have been consummated with the aid and through the board of directors, the directors should have been made parties in order that complete relief might be afforded.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 729; Dec. Dig. § 190.*]

3. PLEADING (§§ 192, 356*) — DEMURRER — SCOPE—DEFECTS APPARENT ON FACE.

That an amended complaint was filed without previous leave of court obtained is a question which cannot be raised by demurrer, which goes only to the defects apparent on the face of the pleading; the proper method of raising the question being by motion to strike it.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 426, 1111; Dec. Dig. §§ 192, 356.*]

4. ACTION (§ 38*)—MISJOINDER OF CAUSES—ACTION BY STOCKHOLDERS.

Though a complaint in an action by stockholders of a corporation alleges a conspiracy on the part of majority members in control of the corporation and in pursuance thereto the misappropriation of the money of the corporation, the fraudulent issue of stock to the same parties charged with the misappropriation, and other acts of a similar nature, the acts are a part of a general design, and equity will relieve all in the same action, so that the complaint is not open to the objection that several causes of action have been improperly joined.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 549; Dec. Dig. § 38.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. CORPORATIONS (§ 190*)—ACTIONS BY STOCKHOLDERS — MISAPPROPRIATION OF FUNDS—RIGHT TO SUE.

Minority stockholders may bring an action against the majority members for the misappropriation of corporate funds, though plaintiffs became stockholders after such misappropriation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 723; Dec. Dig. § 190.*]

6. CORPORATIONS (§ 190*)—ACTIONS BY STOCKHOLDERS — MISAPPROPRIATION OF FUNDS — PLEADING.

A complaint by minority stockholders against the majority members charging a misappropriation of corporate funds is not ambiguous, though it does not show that the defendants were stockholders and owning a majority of the stock at the time of the alleged commission of the acts set forth therein, where it is alleged that defendants appeared on the books of the corporation to be the owners of such stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 730; Dec. Dig. § 190.*]

7. CORPORATIONS (§ 190*)—ACTIONS BY STOCKHOLDERS—MISAPPROPRIATION OF FUNDS—PLEADING.

Where a complaint in an action by minority stockholders against the majority members for a misappropriation of corporate funds alleges that the defendants, who appeared as majority stockholders on the books of the corporation, controlled the board of directors at all times since the corporation was organized, it is immaterial who were the board of directors, as the action is against the defendants, and the complaint is not ambiguous for failing to allege who were directors constituting a majority of the board at the time of the alleged commission of the acts complained of.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 730; Dec. Dig. § 190.*]

8. CORPORATIONS (§ 190*) — ACTIONS BY STOCKHOLDERS—MISAPPROPRIATION OF FUNDS—PLEADING.

Where a complaint by minority stockholders charges the majority members, who appear to practically constitute its managing body, with a misappropriation of the funds, an allegation that during the times mentioned the defendants have withdrawn and taken a certain sum of money belonging to the corporation, and have converted and appropriated the same to their own use and benefit, avers with sufficient certainty the manner and times of the alleged appropriation and conversion.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 730; Dec. Dig. § 190.*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by T. Norman Harvey and another against F. M. Meigs and others. From a judgment for defendants, on demurrer to an amended complaint, plaintiffs appeal. Reversed.

Charles C. Boynton, for appellants. J. C. Campbell and R. G. Hudson, for respondents.

CHIPMAN, C. J. A general and special demurrer to the fourth amended complaint was sustained without leave to amend, and defendants had judgment that plaintiffs take nothing by the action. The appeal is from the judgment.

In their said amended complaint the plaintiffs allege that they bring the action "on behalf of the said Carisa Chemical Company, and on behalf of themselves and all other stockholders of said Carisa Chemical Company; that the said company has been a corporation ever since the month of August, 1904, with a capital of 1,000,000 shares of the actual value of $1 each at the time of issue, and that the number of directors is and at all times has been 5; that plaintiff Harvey is and ever since a date prior to the commencement of the action has been a bona fide owner and holder of 100 shares of the stock of said corporation, and plaintiff Benedict is and ever since the month of February, 1906, has been the owner and holder of 1,900 shares of the capital stock of said corporation; that defendants F. M. Meigs and A. W. Meigs are, and at all times mentioned in the complaint have been, copartners under the name of Meigs & Co." (The original complaint was filed November 7, 1908.) It is then alleged that the individual defendants named "acquired, and at all times since the organization of the defendant corporation have controlled, and are controlling, and have, and have had, standing in their names on the books of said corporation a majority of the outstanding stock of said corporation, and said defendants at all said times have combined and conspired together to accomplish the unlawful and fraudulent acts and purposes herein alleged, and to that end to elect the directors and dictate the acts of the directors of said corporation and the acts of said corporation, and said defendants have at all said times, for the purpose of consummating the ends of said conspiracy, caused to be elected men constituting a majority of the board of directors of said corporation in every way subservient to the wishes and will of said defendants, and men who had no interest in the management and conduct of the affairs of said corporation except as the implements and representatives of the interests and will of said defendants, and at all said times defendants dictated, and do now dictate, all the acts of the directors of said corporation and all of the acts of said corporation."

It is then averred that by reason of the foregoing facts it "has been futile and useless for plaintiffs to make any demand upon the said corporation or its directors to commence this, or any, action against defendants," and that during the times mentioned in the complaint over $135,000 came into the ownership and possession of the corporation, and the defendants "have, by virtue of their control of said corporation and its board of directors, fraudulently and wrongfully taken and withdrawn from said corporation, and have appropriated and converted to their own use and benefit, without any consideration or benefit to the said corporation, in excess of ninety-four thousand dollars ($94,000) of said money of said corporation, which said money said defendants now retain and claim as their own property, and deny that said corporation has any interest in or right thereto."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is further averred that defendants, "as part of said conspiracy, and with intent to defraud said corporation and its board of directors, have sought and endeavored to create an indebtedness, and have created a fictitious and fraudulent indebtedness against said corporation and in favor of defendants" (other than defendant Upham). "That said defendants have caused such fictitious indebtedness to be inscribed on the books of the defendant corporation as an indebtedness of said corporation under and as of date August 31, 1908, and as on said day pretended balances appear on said books to the credit of the following-named firm and persons, and the amount to the credit of any firm or person immediately follows the name of the firm or person in whose favor said credit appears, as follows, to wit:" (Then follow the items aggregating over $49,000.) "That the fact is, there is not due, owing, and unpaid to F. M. Meigs, A. W. Meigs, R. L. Meigs, Meigs & Co., E. C. Dudley, L. Raymond Dudley, W. I. Wilcox, Charles L. Morgan, or any of them, from said corporation, nor was there due, owing or unpaid at such date as said balances appear, or at any prior date, or at all, to said persons, or any of them, any sum of money whatsoever from said corporation; and any indebtedness appearing upon the books of said corporation as due from said corporation to said persons, or either of them, is and has been at all times, fictitious, fraudulent and void, and without consideration, and has been created by said defendants for the purpose of transferring the assets of the corporation from the defendant corporation to themselves, with the purpose of enriching themselves, and that said defendants threaten to, and will, unless restrained, withdraw such sums appearing in said credits, and cause same to be paid to themselves, and will thereby injure the defendant corporation to an amount exceeding forty-nine thousand dollars ($49,000).

"(7) That said defendants, other than defendant corporation, with intent to defraud the defendant corporation, have claimed, and do now claim, to be the owners of, and have, by virtue of their said control of said corporation, caused themselves to appear upon the books of said corporation as the owners of more than four hundred thousand (400,000) shares of the subscribed and outstanding stock of the defendant corporation, and they do now appear as such owners, whereas the total subscribed and outstanding stock of said corporation does not exceed six hundred and eighty-two thousand and fifty-five (682,055) shares; that of said four hundred thousand more than three hundred and fifty thousand (350,000) shares have been issued fraudulently and without any consideration whatsoever to said corporation; that such improper issues of stock were made directly to these defendants, and were so made as to enable, and did enable, these defendants to control and manage the affairs and business of said corporation, and to continue in such control and management for the purpose of carrying out the fraudulent acts and the conspiracy herein alleged to the grievous injury of these plaintiffs and of the defendant corporation; that the value of said three hundred and fifty thousand (350,000) shares of stock fraudulently appropriated by said defendants and their agents was at the time of said appropriation three hundred and fifty thousand dollars ($350,000)."

It is then alleged that "plaintiffs herein and their transferrers, until within one month prior to the time of commencing this action, had no knowledge, nor ever had knowledge, of the acts, transactions and attempted transactions herein complained of; that they never authorized them or any part of them; that they never consented to them or any part of them; * * * that they have no redress through the corporate management, and that they are without any plain, adequate, certain and speedy remedy at law."

An accounting to the corporation by the defendants is prayed for; that a discovery be had of the amount of damage to said corporation; that defendants be compelled to refund to the corporation the money misappropriated by them, to wit, $94,000, with interest; that the alleged fraudulent credits appearing on the corporation books to defendants be canceled, that the alleged fraudulent shares, namely, 350,000 shares, of the said capital stock be canceled, or that defendants be required to pay to the corporation its value; that defendants be enjoined from paying to themselves, or causing to be paid to them, the said sums standing on the books of the corporation to their credit; also from voting said shares of stock alleged to have been fraudulently issued to them; from disposing of any of the money or property of the corporation; from acting in any trust capacity in the management of said corporation and for general relief.

Defendants not only challenge the sufficiency of the alleged facts but they assign numerous defects in the complaint which may be thus summarized: (1) That there is a misjoinder of parties, in that plaintiff Benedict was joined as plaintiff without leave of court, and, for like reason, defendants R. L. Meigs, Dudley, and Wilcox were joined as defendants. (2) That several causes of action are improperly united, namely, a cause of action for conspiracy; for moneys fraudulently appropriated and converted; for cancellation of fraudulent issues of stock; for an accounting and injunction. (3) That the complaint is ambiguous in that it cannot be ascertained therefrom whether plaintiffs Harvey and Benedict were stockholders at the time the alleged wrongful acts were committed; or that the defendants were stockholders of a majority of the stock at such time; or who were directors or a majority of the board at such time; or whether the alleged conspiracy was consummated by defendants as stockholders or as directors or officers of the corporation; or in what manner plaintiffs have been injured by any of the alleged wrongful acts of defendants; or in what manner or at what time defendants are alleged to have appropriated and converted the sum of $94,000 as alleged. Like grounds are set forth as showing the uncertainty and unintelligibility of the complaint.

We are without any assistance from the respondents, no brief having been filed by them. One of two inferences might seem to follow; either that the complaint is so obviously insufficient as to call for no explanation of its defects, or that, as obviously, its sufficiency is apparent. And yet we are not at liberty to indulge either inference. I take this opportunity to remark that it is due to the reviewing court that counsel should exend to it all possible assistance in its endeavor to reach right conclusions in cases brought before it. Briefs of counsel have a double value in that they serve to lighten the labor of the reviewing court, thus facilitating the decision of cases, and in that they often present points of view which might otherwise be overlooked. For myself, I may say that rarely, if ever, have I found a brief without value in the determination of the case in which it is filed, and I am glad to acknowledge the great service to the court which counsel generally extend by their presentation of points and authorities. I desire to add that where a plaintiff is sent out of court on his pleading, without a hearing on the merits of his case, the adversary party should support the grounds of his assault and not throw all responsibility upon the appellate court unaided.

[1] Passing for the moment the alleged imperfections of the complaint suggested by the special demurrer, I think enough appears in the complaint to withstand the general demurrer.

It appears from the amended complaint: That plaintiff Benedict was, in 1906, and ever since has been, a stockholder of the corporation, and plaintiff Harvey was such stockholder prior to and at the commencement of the action. That the Carisa Chemical Company became a corporation in 1904 with a capital stock of $1,000,000, of like number of shares of the value of $1 each, and that each share thereof at the time of issue had an actual value of $1. That the persons named as defendants have had standing in their names on the books of the corporation more than a majority of its outstanding shares ever since the organization of the corporation, and have combined and conspired to accomplish the unlawful purposes alleged, and to that end have elected directors subservient to their wishes who had no interest in the corporation except to work out the will and interests of defendants as their "implements and representatives," and the defendants have, at all times mentioned in the complaint, "dictated and do now dictate, all the acts of the directors of said corporation and all the acts of the said corporation. That during the times mentioned in the complaint the corporation came into the possession and ownership of the sum of $135,000, and that defendants "have, by virtue of their control of said corporation and its board of directors, fraudulently and wrongfully taken and withdrawn from said corporation, and have appropriated and converted to their own use and benefit, without any consideration or benefit to said corporation, in excess of $94,000 of said money," and still retain the same. That "as a part of said conspiracy and with intent to defraud said corporation," through their said control of its board of directors, defendants have created "a fictitious and fraudulent indebtedness against said corporation and in favor of defendants (naming all the defendants except defendant Upham), and in the execution of said fraudulent design have caused said fictitious indebtedness to be entered on the books of the corporation so as to show credits to certain named defendants. amounting to over $49,000, whereas in fact no such sum or any sum is due or owing to said defendants, but that the said credit entries are fraudulent and were made by defendants without any consideration to the corporation, and for the sole purpose of "enriching themselves" to the extent of such credits. That the entire issued shares of said corporation do not exceed 682,035 shares, of which defendants "caused themselves to appear on the books of said corporation as owners" of 400,000 shares, but that 350,000 of said shares have been issued fraudulently and without any consideration whatsoever to said corporation." That said shares were issued to defendants "so as to enable and did enable these defendants to control and manage the affairs and business of said corporation, and to continue in such control and management for the purpose of carrying out the fraudulent acts and the conspiracy herein alleged to the grievous injury of these plaintiffs and of the defendant corporation." That "the value of said 350,000 shares of said stock so fraudulently appropriated by said defendants and their agents was at the time of said appropriation $350,000."

It does not appear who were the directors, nor does it appear by direct averment that directors were chosen at the organization of the corporation, or that they, or their successors continued to act as such throughout the times mentioned, although these latter facts appear inferentially. As the business of the corporation could only be transacted through its directors the acts complained of could not have been consummated otherwise than by the aid of the directors, and it does appear very clearly that the defendants worked their purpose through the directors, from all which appearing in the complaint it may be inferred from the complaint that directors were in fact elected and were acting, during the period mentioned. The demurrer admits the truth of the facts pleaded and it seems to me that sufficient facts are sufficiently pleaded to constitute a cause of action for appropriate relief.

[2] I think, however, that the directors of the corporation should have been made parties to the action and as the personnel of the board has not changed so far as appears, complete relief cannot be afforded without their being brought in as codefendants. The special demurrer is next to demand notice.

[3] 1. A question is raised as to the right to include new parties plaintiff and defendant in an amended complaint under a claim that it was done without previous leave of court obtained. The answer to this objection raised by the demurrer is that the reviewing court deals only with the amended complaint, which it must be presumed was filed by leave of court, otherwise the proper proceeding on defendant's part was by motion to strike out. In Beattie Mfg. Co. v. Gerardi, 166 Mo. 142, 65 S. W. 1035, the court said: "When the amended petition was filed, the one of which it was amendatory was suspended; and as a demurrer goes only to some defect apparent upon the face of the pleading demurred to, this ground was in any event unavailing, and the question could only have been raised by motion to strike out."

[4] 2. It is claimed that several causes of action have been improperly united. The alleged conspiracy is not of the gist of the action; it is the acts done pursuant to the alleged confederation that constitute the cause of action. I can see no reason why a court of equity may not in the same action grant relief against the fraudulent misappropriation of money of the corporation, inquire into the fraudulent issue of stock to the same parties charged with such misappropriation, take an accounting to determine the extent of any misappropriation, and also grant an injunction if necessary to prevent similar acts. Especially must this be so when it appears that all the acts complained of are part of a common design. Taylor v. Bidwell, 65 Cal. 489, 4 Pac. 491; Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788. Said the court in the case last cited: "It is often necessary, in order that the plaintiff may obtain full justice, that the relief granted him be as varied and diversified as the means that have been employed by the defendant to produce the grievance complained of."

3. It is next claimed that it cannot be seen from the complaint that plaintiffs were stockholders at the time of the alleged commission of the acts therein set forth. The complaint shows that one of the plaintiffs (Harvey) was a stockholder at the commencement of the action, which was Nevember 7, 1908, and that the other, Benedict, was a stockholder in February, 1906. Whether plaintiff Harvey became a stockholder by purchase from one who was a holder of shares at the time of the alleged fraudulent transaction, or whether he became a stockholder by subscription to the stock, does not appear. Mr. Morowitz says that "less the plaintiff's right of action, if he have any, is derived by purchase and transfer from the former holder of the shares." Morowitz on Corporations, § 265. He further says: "It has been pointed out that the estate of a corporation is to be treated as that of a continuing institution, irrespective of the members at any particular time composing it. Each share represents an interest in the entire concern, and the several holders are entitled to equal rights irrespective of the time when they acquired their shares. Causes of action belonging to the corporation increase the value of the corporate estate and must be treated like other assets. When enforced they inure to the benefit of all the stockholders without distinction." Section 265. I cannot reconcile this statement with the author's other statement that "a shareholder who has acquired his shares after an unauthorized transaction has taken place certainly cannot base his complaint on the ground that he has suffered a wrong, or that his equitable rights have been infringed."

[5] However this may be, both plaintiffs in any view have, on the showing made in the complaint, a right to prevent the payment of the fraudulent credits shown to stand on the company's books in favor of defendants. And if the defendants have without consideration and fraudulently appropriated $94,000 of the corporate funds which should be restored to its treasury, I fail to see why they have not a cause of action to compel such return even though they acquired their shares after such misappropriation. See the question fully considered in Just v. Idaho Canal & Irr. Co., 16 Idaho, 639, 102 Pac. 381, 133 Am. St. Rep. 140.

[6] 4. Ambiguity is alleged also because the complaint does not show that defendants were stockholders "and owning a majority of the stock at the time of the alleged commission of the acts set forth." It does appear that at all times since the organization of the defendant corporation the defendants have had standing in their names on the books of the corporation a majority of the shares, and that they have controlled the directors and the corporation. The complaint

does not allege that defendants were the owners of these shares, but it alleges that they appear on said books to be the owners. Their relation to the corporation and the means of their control over it sufficiently appear.

[7] 5. It is alleged that the complaint is ambiguous because it cannot be ascertained therefrom who were directors constituting a majority of the board at the time of the alleged commission of the acts complained of. It does appear that defendants controlled the entire board at all times since the corporation was organized and so far as defendants are concerned it is not material who were directors, for the action is against the defendants and not against the directors. As already intimated the directors should be made parties, for complete relief cannot be had otherwise.

6. It sufficiently appears how and in what manner plaintiffs are being and have been injured by the alleged wrongful acts of the defendants.

[8] 7. The complaint is sufficiently certain in its averments as to the manner and times defendants appropriated and converted to their own use the $94,000 alleged to have been wrongfully withdrawn from the corporation by them. In Schaake v. Eagle Automatic C. Co., 135 Cal. 472, 63 Pac. 1025, 67 Pac. 759, the court said: "Faults consisting in ambiguities and uncertainties should be viewed, to a certain extent, in the light of the situation of the parties as to their knowledge of the facts; that is, as to facts of which the plaintiff cannot, from their nature, have as full information as the defendant. Less certainty is required in the allegations of the complaint, partly because a desirable degree of certainty may be impossible, and partly because the facts being known to the defendant he is not likely to be embarrassed or injured." The case here is one where the defendants practically constituted the managing body of the corporation, and must have had full knowledge of all the facts which they insist that plaintiffs must have alleged, though in no position to know or ascertain them.

I am unable to discover sufficient support for the judgment, and it is therefore reversed.

We concur: HART, J.; BURNETT, J.

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17 Cal. App. 395

BRANDT v. SALOMONSON. (Civ. 843.)

(District Court of Appeal, Third District, California. Nov. 8, 1911. Rehearing Denied by Supreme Court Jan. 5, 1912.)

1. PARTNERSHIP (§ 327*)—DISSOLUTION—ACCOUNTING—COMPLAINT.

A complaint, in an action for the dissolution of a firm and for an accounting, which alleges that defendant applied to his own use, from the profits of the business, money greatly exceeding the proportion thereof to which he was entitled, in the aggregate $3,000, more or less, and tools, building material, and machinery of the firm, to which he was not entitled, aggregating in value $3,000, more or less, proceeds on the theory that defendant has appropriated $3,000, more or less, more than he is entitled to, but states only an approximation of his appropriation, and does not preclude the court from finding the exact condition of the account.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 327.*]

2. APPEAL AND ERROR (§ 173*)—QUESTIONS REVIEWABLE—QUESTIONS NOT RAISED IN TRIAL COURT.

Where, in an action for the dissolution of a firm and for an accounting, evidence of the amount appropriated by defendant was received without objection, it was too late for defendant on appeal to urge that plaintiff was limited to a judgment in a less sum, in view of the allegations of the complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1120; Dec. Dig. § 173.*]

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by M. Brandt against Chris Salomonson. From a judgment for plaintiff, defendant appeals. Affirmed.

Austin Lewis, for appellant. F. V. Meyers, for respondent.

BURNETT, J. The action was for dissolution of partnership and for an accounting. The only controversy relates to the finding of the court that: "Defendant has taken and appropriated to his own use, and against the wish and without the consent of plaintiff, of the moneys and property of said partnership, exceeding the proportion thereof to which he was or is entitled, all as alleged in plaintiff's said complaint, money and property aggregating in value four thousand five hundred and thirty-four dollars and seventy-three cents."

[1, 2] The contention of appellant is that plaintiff has alleged in his complaint that defendant appropriated $6,000 belonging to the firm, and, since he was entitled to one-half of it as an equal partner, plaintiff is limited to a judgment for the recovery of only $3,000 against defendant. But in this appellant is in error. The allegation of the complaint is that: "The defendant applied to his own use, from the receipts and profits of said business, large sums of money, greatly exceeding the proportion thereof to which he was entitled, to wit, in the aggregate, the sum of $3,000, more or less, * * * and tools, building material, and machinery belonging to said partnership, to which he was not entitled, aggregating in value the sum of $3,000, more or less." As far as the allegation concerning the money is concerned, it is thus to be seen that the theory of the complaint is that defendant has appropriated $3,000, more or less, more than he is enti-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tled to, or, in other words, to which plaintiff is entitled. Conceding that the averment as to the tools, etc., should be interpreted as claimed by appellant, it would leave $1,500 of their value to be paid to plaintiff, which, with the other $3,000, would be substantially the amount of the judgment in favor of plaintiff. But it is apparent that the amount stated in the complaint is intended to be only an approximation of the indebtedness of defendant, and the allegations should not be held to preclude the court from finding the exact condition of the account. Indeed, it is too late for appellant to make the point, since the evidence as to the whole amount appropriated by defendant was received without objection, and respondent points out in the record substantial support for the conclusion that the amount unaccounted for by defendant is $9,833.65 and by plaintiff the sum of $739.04. The aggregate is $10,572.69. Of this it is apparent that each is entitled to $5,286.34. Subtract this last sum from the sum unaccounted for by defendant, and the balance is $4,547.31, which defendant should pay to plaintiff to equalize the account. Respondent's figures are not disputed by appellant, and, upon an examination of the transcript, we cannot say that they are incorrect.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

17 Cal. App. 393

DYER LAW & COLLECTION CO. v. SALISBURY et al. (Civ. 1,051.)

(District Court of Appeal, Second District, California. Nov. 7, 1911.)

Appeal and Error (§ 596*)—Taking Appeal—Requisites—Statutes.

Code Civ. Proc. § 953a, provides that any person desiring to appeal from the superior court to the Supreme Court or any of the District Courts of Appeal, in lieu of preparing and settling a bill of exceptions pursuant to section 650, may file with the clerk of the court from whose judgment the appeal is taken a notice of intent to appeal, and requesting that a transcript of the testimony and all rulings, etc., be prepared, which notice must be filed within 10 days after notice of entry of the judgment, order, or decree. *Held* that, in the absence of filing of such notice and request, no duty devolves on the clerk to prepare and send up the judgment roll, without which, or printed transcript of the papers required, authenticated under the rules of the appellate court, there is no record showing that any judgment has been rendered or order made from which an appeal will lie, or, if rendered or made, that any appeal has been taken therefrom.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 596.*]

Appeal from Superior Court, Los Angeles County; George E. Church, Judge.

Action by the Dyer Law & Collection Company against E. A. Salisbury and others. Judgment for plaintiff, and defendants appeal. Dismissed.

George L. Sanders, for appellants. Cleveland Schultz and Trusten P. Dyer, for respondent.

SHAW, J. Sections 950, 951, and 952, Code of Civil Procedure, designate the papers which the appellant is required to furnish the court upon an appeal. The only papers filed herein as constituting the record on appeal consist of a typewritten transcript of the evidence taken at the trial, certified by the trial judge to be correct, together with loose copies of the complaint and answer, attested by the clerk. It was doubtless appellants' intention, in lieu of preparing and settling a bill of exceptions pursuant to the provisions of section 650, Code of Civil Procedure, to be used on appeal, to avail themselves of the provisions of section 953a of said Code, which provides that: "Any person desiring to appeal from any judgment, order or decree of the superior court to the Supreme Court or any of the District Courts of Appeal, may, in lieu of preparing and settling a bill of exceptions pursuant to the provisions of section six hundred and fifty of this Code, file with the clerk of the court from whose judgment, order or decree said appeal is taken, or to be taken, a notice stating that he desires or intends to appeal, or has appealed therefrom, and requesting that a transcript of the testimony offered or taken, evidence offered or received, and all rulings, instructions, acts or statements of the court, also all objections or exceptions of counsel, and all matters to which the same relate, be made up and prepared. Said notice must be filed within ten days after notice of entry of the judgment, order or decree." So far as shown by the record, no attempt was made by appellants to comply with the provisions of the section with reference to the filing of the notice and request for a transcript of the evidence and papers necessary to be used on appeal. In the absence of the filing of such notice and request, as prescribed by section 953a (and assuming that the judgment roll, as defined by section 670, Code of Civil Procedure, need not be printed), no duty devolved upon the clerk to prepare, authenticate, and send up the judgment roll, without which, or a printed transcript of the papers required for use on appeal, authenticated as required by the rules of this court, there is no record showing that any judgment was rendered or order made from which an appeal would lie, or, if rendered or made, that any appeal was taken therefrom.

For the reasons given, the attempted appeal is dismissed.

We concur: ALLEN, P. J.; JAMES, J.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

17 Cal. App. 377

GREGORY v. LANTZ (Civ. 989.)

(District Court of Appeal, Second District, California. Nov. 7, 1911.)

1. Evidence (§ 99*)—Relevancy to Issue.

Where defendant, in an action for the rental on a lease of personal property, offered a writing, claimed by him to have been signed by plaintiff when the lease was made, but which was not pleaded, and there was nothing in it or in the evidence offered tending to show that it had any connection with the transaction, or was relevant to the issue involved, it was properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 137-143; Dec. Dig. § 99.*]

2. Appeal and Error (§ 1002*)—Review—Findings—Conflicting Evidence.

The Supreme Court cannot say that findings on conflicting evidence were without sufficient support.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by William Gregory against Charles Lantz. Judgment for plaintiff, and defendant appeals. Affirmed.

Walton J. Wood and Charles Lantz, for appellant. Tipton & Cailor, for respondent.

SHAW, J. Action to recover the balance of an amount agreed to be paid by defendant to plaintiff pursuant to the terms of a lease of personal property. Judgment went for plaintiff, from which, and an order denying his motion for a new trial, defendant appeals.

The lease, set out in the complaint in hæc verba, is for one 5 horse power White & Middleton engine No. 1891, one pump jack, 80 feet of 7-inch casing, 45 feet of 4-ply belting and fittings, etc., which the lessor agreed to furnish for the term of 6 months from July 9, 1908, for the use of which defendant covenanted and agreed to pay plaintiff the sum of $580, payable $250 cash upon delivery, and the balance in installments, as therein specified. It was further provided that, should suit be brought to enforce any covenant contained therein, defendant should pay a reasonable attorney's fee in such suit. The lease contains no covenants on the part of the lessor, other than an option therein given to purchase, for a stipulated sum, the leased property at any time during the term of the lease, provided the specified rental shall have been paid at the times and in the manner therein contained. The complaint alleges delivery of the property to defendant and the performance of all the covenants thereby imposed upon plaintiff, but that defendant, retaining possession of the leased property, has paid the sum of $139.37 only, leaving a balance of $440.63 unpaid, and which he refuses to pay. It also alleged that plaintiff had employed attorneys to prosecute the suit, on account of which he had incurred a liability in the sum of $75 for attorney's fees. Defendant answered, admitting the execution of the lease, but denying that any sum was unpaid thereon, or that plaintiff had been compelled to employ attorneys, as alleged. By separate answer and cross-complaint, he alleged that by said contract of lease plaintiff was to install the property so leased, so that the same could be used for the pumping of water for the summer irrigation of 1908, and that he neglected and failed to do so until December, 1908, by reason whereof he was damaged.

It is not alleged that the contract as executed was other than what the parties intended it to be; hence the only question is whether plaintiff performed the covenants thereby imposed upon him. The court upon ample evidence found that he did. Measuring the rights of the parties by the terms of the contract, no duty devolved upon plaintiff to install the pumping plant for use in the summer of 1908, or at any other time, or at all. He simply leased the property to defendant, and if plaintiff installed it such act, so far as shown by the record, was voluntary and without consideration, or by virtue of some agreement not pleaded. Neither did plaintiff make any covenant of warranty as to the capacity of the engine or pump when installed; hence, if it be true, as claimed by appellant, that the plant when installed failed to do the work which he expected it to do, he cannot now complain, since he did not exact any covenant from plaintiff with regard to the efficiency of the engine or capacity of the pump.

Appellant claims there was a failure on the part of plaintiff in complying with the terms of the contract in this: That whereas, he agreed to deliver 80 feet of casing, he furnished but 60 feet. While we think that under the circumstances disclosed by the record the delivery of the 60 feet of casing would constitute a substantial compliance with the contract, the evidence clearly shows that plaintiff delivered the full 80 feet, and defendant retained and used the same for about 5 months—almost the entire term of the lease—when, owing to the fact that the plant failed to work satisfactorily, plaintiff, at defendant's request, undertook to remedy the trouble, and removed from the well 20 feet of the casing installed therein, for the reason that it was thought the reduction in the length of the casing placed in the well would increase the efficiency of the plant. The removal of the 20 feet of casing was in the nature of repairs, and it does not appear that defendant objected to the change until January 11, 1909, which was after the expiration of the term of the lease. While plaintiff may be liable to defendant for the conversion of the 20 feet of casing, it cannot be said that such conversion 5 months after the delivery thereof showed a lack of substantial compliance with the contract.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] During the trial, defendant offered in evidence a writing, claimed by him to have been signed by plaintiff at the time the contract here sued upon was executed. Plaintiff's objection to its reception in evidence was sustained. The instrument was not pleaded by defendant, and there is nothing in the writing itself, nor in the evidence offered, tending to show that it had any connection with the transaction, or was relevant to the issue involved. There was no error in excluding it from the evidence.

[2] The theory of defendant seems to have been that, by the terms of the contract, plaintiff agreed to install the plant and guaranteed a certain degree of sufficiency. While there is nothing in the record upon which to base such theory, nevertheless, if it should be adopted, we could not, owing to a conflict of evidence, say the findings were without sufficient support.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

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17 Cal. App. 426

PEOPLE v. HAROLD. (Cr. 337.)

(District Court of Appeal, First District, California. Nov. 9, 1911.)

LARCENY (§ 14*) — FALSE PRETENSES — EVIDENCE.

Prosecutor was induced by the fraud, trick, and device of defendant to agree to purchase from D. moving picture films of little or no value for $150. Prosecutor went with defendant to D.'s room to complete the purchase, and there handed defendant $145 to be paid to D. for the films. Defendant handed some of the money to D., but put the balance in his pocket. It appeared that defendant and D. were operating together to defraud prosecutor, and that, when defendant obtained and received the same, he intended to steal it. *Held* sufficient to show larceny, and not obtaining money by false pretenses, though prosecutor testified that when he delivered the money to D. he intended to part with it in payment for the films.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 34–38; Dec. Dig. § 14.*]

Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Arthur R. Harold was convicted of grand larceny, and he appeals. Affirmed.

P. M. Walsh, for appellant. Attorney General Webb, for the People.

HALL, J. This is an appeal from a judgment and order denying defendant's motion for a new trial. Defendant was convicted upon a charge of grand larceny for the stealing of $145 from one W. H. Ranes. The only point urged for a reversal is that the evidence establishes a case of obtaining money by false pretenses rather than a case of larceny.

There is no merit in appellant's contention. The evidence shows that through the fraud, trick, and device of defendant the prosecutor was induced to agree to purchase from one Davidson certain moving picture films of little or no value for $150. The prosecutor went with appellant to a room occupied by said Davidson to complete the purchase, and there the prosecutor handed to appellant the sum of $145 to be paid to Davidson for the films. Appellant handed some of the money to Davidson, but put the balance, probably half of it, in his own pocket. The evidence justifies the conclusion that appellant and Davidson were fellow conspirators operating together to fleece the prosecutor out of his money, and that when appellant obtained and received the money from the prosecutor he intended to feloniously steal the same. The claim of appellant that title passed when the prosecutor handed the money to appellant is based principally upon the answer made by the prosecutor to a question put to him upon cross-examination. He was asked, "You intended at the time you transferred this $145 to transfer the money to Davidson in payment of the films, didn't you?" to which he answered "Yes."

Undoubtedly such was his general intention; that is, he intended that title to the money should be finally transferred to Davidson. But the answer must be understood in the light of the circumstances shown to exist by the whole record. The prosecutor was not buying films from appellant, and handed the money to appellant only that appellant might hand the same to Davidson in payment for the films which the prosecutor had agreed to buy from Davidson. Appellant purported to be acting with and for the prosecutor. So long as the money remained in the hands of appellant, it was the money of the prosecutor. There is no pretense that the evidence shows that the prosecutor intended to transfer title to the money to appellant. The evidence shows without doubt that appellant intended when he obtained possession of the money to steal it, and accomplished his purpose.

The facts in this case are entirely similar to the facts in People v. Arnold, 118 Pac. 729, and People v. Delbos, 146 Cal. 737, 81 Pac. 131, where it was held that convictions for grand larceny were sustained by the evidence.

The judgment and order are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

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17 Cal. App. 369

PEOPLE v. LEDERER. (Cr. 214.)

(District Court of Appeal, Second District, California. Nov. 6, 1911.)

1. FRAUDULENT CONVEYANCES (§ 331*)—CRIMINAL RESPONSIBILITY—INTENT.

In a prosecution for fraudulently conveying and concealing property with intent to defraud creditors, evidence *held* to show that defendant's intent in holding an auction sale of his stock and making promises to pay in the future, which he did not keep, was to dispose of his stock and leave the creditor without means of satisfying the debt.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 1019–1024; Dec. Dig. § 331.*]

2. Fraudulent Conveyances (§ 329*)—Criminal Responsibility—Transfer.

Where, notwithstanding an alleged transfer of a jewelry business from defendant to his father, defendant continued to conduct the business in his name and for his own benefit, and it appeared that prosecutor, a creditor, looked to him for the payment of his account for merchandise sold, though such account was kept on prosecutor's books in the name of the father, such alleged transfer was no defense to a prosecution of defendant for fraudulently conveying, assigning, and concealing the property with intent to defraud prosecutor.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 1016–1018; Dec. Dig. § 329.*]

3. Criminal Law (§ 1122*)—Appeal—Record—Questions Presented—Instructions.

Where there is no evidence in the record of the existence of an alleged fact, the court on appeal cannot consider whether there was error in the instructions given referring to such fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2940–2945; Dec. Dig. § 1122.*]

4. Criminal Law (§ 543*)—Evidence—Testimony on Preliminary Examination—Absent Witness.

A witness who had testified on preliminary examination was not present at the trial, and the sheriff testified that he had made a search for him, and had been unable to find him. There was evidence that he had not been seen in the county for several weeks prior to the trial, and had announced his intention to go to the Philippine Islands. An acquaintance produced a letter to which was attached the witness' initials, which appeared to have been posted from a town in Ohio some days prior to its receipt, containing references to a business matter about which the absent witness had talked with the addressee about three weeks previously. *Held* that, though the handwriting of the latter was not identified as that of the absent witness, still the letter, in connection with the other testimony, afforded some ground to sustain a finding that the witness could not, with due diligence, be produced on the trial, so as to authorize the admission of the reporter's record of the testimony of the witness at the preliminary examination.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1236; Dec. Dig. § 543.*]

5. Criminal Law (§§ 543, 1153*)—Appeal—Review—Matters of Discretion.

Pen. Code, § 686, provides that the testimony of a witness, taken at a preliminary examination, may be read at the trial on its being satisfactorily shown to the court that he is dead, or insane, or cannot with due diligence be found within the state. *Held*, that whether the showing of due diligence is sufficient to lay a foundation for the admission of the record of the testimony of an absent witness on the preliminary examination is within the discretion of the trial judge, the exercise of which will not be reviewed, if there is any evidence to support the conclusion reached.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1236, 3066; Dec. Dig. §§ 543, 1153.*]

6. Criminal Law (§ 1169*)—Appeal—Review—Prejudice.

In a prosecution for fraudulently disposing of a stock of goods with intent to defraud creditors, defendant was not prejudiced by evidence of an auctioneer employed by defendant to sell a large part of the stock at auction that, while be was engaged in selling the stock, defendant had a conversation with a traveling salesman, and finally adjusted it by giving the salesman a check, "dated ahead," which was objected to as allowing parol evidence of the contents of a written instrument.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137–3143; Dec. Dig. § 1169.*]

7. Criminal Law (§ 1172*)—Appeal—Harmless Error.

Where, in a prosecution for fraudulently conveying a stock of goods with intent to defraud creditors, there was ample proof of defendant's indebtedness to prosecutor, and uncontradicted evidence that when a statement was presented to defendant, showing the total amount of its indebtedness, he did not question its correctness, but promised to secure funds to satisfy it, defendant was not prejudiced by an objectionable instruction as to the character of evidence which a promissory note furnishes of the debt which it represents.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3154–3163; Dec. Dig. § 1172.*]

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

H. C. Lederer was convicted of fraudulently conveying and concealing property with intent to defraud, and he appeals. Affirmed.

L. A. Enos and Carpenter & Gibbons, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted of fraudulently conveying, assigning, and concealing his property with intent to defraud Nordman Bros. Company, which was then his creditor in a large sum of money, as that crime is described in section 154 of the Penal Code. He was sentenced to pay a fine in the sum of $1,005, from which judgment, and from an order made by the trial court denying his motion for a new trial, he has appealed.

[1] From the reporter's transcript of the testimony, it appears that the defendant was in charge of a jewelry store in the city of San Luis Obispo for at least 1½ years prior to the date of his arrest, and that he assumed to be the owner thereof; his name appearing upon signs placed about the place of business and upon a large safe which he kept in the store for the purposes of that business. The complaining creditor had furnished merchandise to the amount of more than $2,000 in value for the defendant's use. A short time prior to the date of defendant's arrest, a representative of this creditor called upon defendant at his place of business, and made known the state of his account with the complainant. This account

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

was then in the form of a book charge in part, and in part was evidenced by two promissory notes, signed by the defendant and one Charles F. Lederer, the father of defendant. When the representative of the creditor made the request upon defendant that he discharge at least a part of the indebtedness, defendant promised to do so within a short time, which promise, and several others of like intent, he utterly failed to keep. Shortly before his arrest, he employed an auctioneer to sell off the stock of jewelry, and sales were had during several days until the merchandise on hand was reduced to an amount which represented but a small part of the stock theretofore kept on hand. None of the money received from these sales did the defendant apply upon his indebtedness. Again a representative of the creditor called upon him and requested payment of the account, and again defendant promised that he would obtain some money. He told the creditor's agent at the time of the latter's last visit that he had made an arrangement with a bank to obtain money, and that if he would call later in the day he expected to have it ready for him. This agent discovered that defendant had made no arrangement with the bank to obtain any money. After this last conversation with this agent, defendant left his store and prepared immediately to take the afternoon train for Los Angeles, telling an employé to say to the agent when he inquired for him that he (defendant) had gone to the country to obtain $1,000 or $1,500, which he intended to pay over to the creditor. The defendant was arrested at the railway depot when about to take the train to leave San Luis Obispo. Considering all of the facts and circumstances shown in evidence, it was very clearly established that the intent of the defendant was to dispose of the jewelry stock and leave his creditor without any means of satisfying the debt.

[2, 3] While it does appear that the charge account kept by Nordman Bros. Company was carried upon their books in the name of Charles F. Lederer, it is equally clear that the defendant was conducting the jewelry business at San Luis Obispo in his own name and for his own benefit, and that the creditor looked to him for payment of the account. Moreover, it appears further that the defendant at no time questioned the correctness of the account as to its amount or his own responsibility as to the payment thereof. An attempt was made on the part of the defense to show that in July, 1909, defendant and one Curtis transferred the jewelry business to Charles F. Lederer, father of defendant. Defendant testified that on a certain day in the month mentioned he executed a notice of intention to sell and a bill of sale. It appears that this notice of intention to sell was intended to be given to satisfy the requirements of section 3440 of the Civil Code, but we are left altogether in the dark as to what its contents were; for, while the record shows that it was read in evidence, it is not brought before this court in any way, and by stipulation entered into between counsel it constituted one of the exhibits which it was agreed should not be set out in the transcript. There is therefore no testimony shown from which we can properly infer that a notice of intention to sell the jewelry business was ever executed, or that the bill of sale which was said to have been made referred in any wise to the business then being engaged in by the defendant. For this reason, it is not proper for us to consider as to whether the court erred in giving any of the instructions which referred to the matter of the alleged sale of the jewelry stock and business in 1909 to Charles F. Lederer. In addition to all of this, as we have before noted, it appeared without contradiction that the defendant, from July, 1909, down to the date of his arrest, had conducted the business in his own name, that he assumed to be the sole proprietor thereof, and that the complaining creditor looked to him for the payment of its debt.

[4] It is argued that the trial court erred in admitting the reporter's record of the testimony of a witness named Lamphere, which was taken in due form at the preliminary examination of the charge against defendant. This witness was not present at the trial, and there was evidence before the court that he had not been seen in San Luis Obispo for several weeks prior to the date of the trial, and that he had theretofore announced it as his intention to leave the state and go to the Philippine Islands. An acquaintance of his, who was sworn as a witness, produced a letter to which was attached the name and initials of Lamphere; this letter appearing to have been posted from a town in the state of Ohio some days prior to its receipt. The handwriting appearing in the letter was not identified as being that of Lamphere, but the letter contained references to a business matter about which Lamphere had talked with the witness who received the missive, about three weeks prior thereto. Lamphere had been served with a subpœna early in April, 1911, to attend on May 16th at the trial. Before May 16th arrived, the district attorney and defendant agreed to continue the trial to May 31st, which continuance was ordered by the court. While it was not shown that Lamphere had notice of this continuance, it was testified to by another witness that he (Lamphere) had never reported at the courthouse in response to the subpœna; and the sheriff of San Luis Obispo county testified that after the commencement of the trial he had made a search for Lamphere at San Luis Obispo and had failed to find him. Under the circumstances, we think that, while the handwriting in the letter was not identified as being that of Lamphere, still that document, in connection with the other testimony referring to his

then absence from the city, afforded some ground upon which the trial court might properly base its conclusion that the witness could not, with due diligence, be produced at the trial.

[5] Section 686 of the Penal Code provides that the testimony of a witness taken at a preliminary examination may be read at the trial, "upon it being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found within the state." It has been held that under the provisions of this section the trial judge has discretion in determining whether or not a sufficient foundation has been laid, entitling such testimony to be read in evidence, and that, where there is any evidence to support the conclusion affecting that matter, the ruling cannot be disturbed on appeal. People v. Nelson, 85 Cal. 421, 24 Pac. 1006; People v. Witty, 138 Cal. 576, 72 Pac. 177; People v. Lewandowski, 143 Cal. 574, 77 Pac. 467.

[6] The alleged error complained of, arising upon the ruling of the court allowing the auctioneer employed by defendant to state his recollection as to the date appearing upon a check given by defendant to a traveling salesman, seems to us to have been without prejudicial effect upon the rights of the defendant. The auctioneer was allowed to testify, against objection made by defendant, that, while he was engaged in selling the jewelry stock, defendant had some controversy with a traveling man, and that finally the controversy was adjusted, and that defendant had delivered to the traveling salesman a check which was, as the witness said, "dated ahead" about 10 days. Apparently defendant was owing money to the employer of the traveling salesman, and he settled his debt by giving a check dated as the witness described. We do not understand how the jury could have reasonably drawn any inference from this occurrence unfavorable to defendant; and therefore the ruling of the court in allowing oral testimany of the contents of a written instrument, if erroneous, was without prejudice.

[7] The instruction given by the trial judge as to the character of evidence which a promissory note furnishes of the debt which it represents appears to be properly subject to the criticism which counsel urge against it. Whether the instruction was erroneous or not seems immaterial in the face of the uncontradicted testimony going to show the existence of the debt itself. As we have before stated, not only was there ample proof of the amount of the debt which was owing to the complaining creditor at and prior to the arrest of defendant, but there was the further testimony, which stood uncontradicted, that when a statement was presented to defendant, showing the total amount of his indebtedness, he made no question as to the correctness of that statement, but promised and agreed that he would secure funds with which to satisfy it.

In our opinion, defendant was convicted upon sufficient evidence, and no errors were committed by the trial court such as to warrant an order of reversal.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

17 Cal. App. 387

WAGNER v. EL CENTRO SEED & NURSERY CO. (Civ. 1024.)

(District Court of Appeal, Second District, California. Nov. 7, 1911.)

1. TRIAL (§ 395*)—FINDINGS—SUFFICIENCY.

Where the findings determined that the amount for which judgment was entered was due prior to the commencement of the action, defendant could not complain because of a want of a specific finding of the exact date of the maturity of the debt.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 395.*]

2. SALES (§ 365*)—ACTIONS—FINDINGS—INCONSISTENCY.

Where, in an action for the price of merchandise, defendant relied on a counterclaim, a finding that the merchandise was sold at a price agreed on between the parties, and a finding covering the issue presented by the counterclaim that the seller was to receive a specified per cent. of the wholesale price of the entire amount of the merchandise, without finding the amount of the wholesale price at the date of delivery, were not inconsistent, but the ultimate facts proposed by the pleadings were sufficiently determined to support a judgment for the seller.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 365.*]

3. TRIAL (§ 404*)—FINDINGS—CONSTRUCTION.

The findings must be so construed as to support the judgment, if possible, and any apparent inconsistency between different parts of them must be reconciled so as to give effect to the judgment where the same can be done on any reasonable construction of the language used.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 957-962; Dec. Dig. § 404.*]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by A. F. Wagner against the El Centro Seed & Nursery Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Conkling & Brown, for appellant. D. V. Noland, for respondent.

JAMES, J. Appeal by defendant from a judgment entered against it in favor of plaintiff for the sum of $471 and costs. The appeal is presented on the judgment-roll.

In plaintiff's complaint it was alleged: "That within two years last past, to wit, between the 1st day of October, 1910, and the 1st day of February, 1911, said defendant became and was indebted to said plaintiff, upon an account for goods, wares, and merchandise, to wit, nursery stock and nursery pots, sold and delivered to said defendant within two years last past, in the city of El Centro, county of Imperial, state of California, in the sum of $583; that said nursery stock was sold to said defendant by said plaintiff at defendant's instance and request; that said defendant agreed to pay plaintiff the sum of $583 for said nursery stock and pots. That the said amount became due and payable on the 11th day of January, 1911; that no part of said sum has been paid, except the sum of $97; that there is still due, owing and unpaid from said defendant to said plaintiff upon said account the sum of $486." Defendant denied all of the material allegations of the complaint, and set up by way of counterclaim an alleged cause of action growing out of the transaction upon which the action was brought. The trial court found the facts to be as alleged in plaintiff's complaint, except that the amount found due to plaintiff was the sum of $471.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] There was no finding as to the particular day when this sum became due, but the finding of the court sufficiently determined that the amount for which judgment was entered had become due prior to the commencement of the action. This being true, no complaint can be made by the defendant because of the want of a specific finding fixing the exact date when the debt became due and payable.

[2] It is contended by defendant that there is an inconsistency in the findings of the court, inasmuch as in that part of the findings which covers issues presented by the counterclaim it was determined that plaintiff was to receive 60 per cent. of the wholesale price of the entire amount of nursery stock delivered, and the court failed to find what the amount of the wholesale price was at the date of delivery. We think that the findings as made are not inconsistent, and that the ultimate facts proposed by the pleadings of the parties were all fully and legally determined. The court did find clearly and unmistakably that the merchandise was sold at a price agreed upon between the parties, and if this price was the wholesale price of the stock, it was, nevertheless, the price agreed to be paid by defendant.

[3] It is a familiar rule, too well settled and fixed to require citation of authority to sustain it, that the findings of a trial court must be so construed as to support the judgment, if possible, and that any apparent inconsistency between different portions of such findings must be reconciled in such a way as will give effect to the judgment, where this can be done upon any reasonable construction and interpretation of the language used. In this case we think that the findings fully sustain the judgment and that the objections made thereto by the appellant are without merit.

The judgment is therefore affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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17 Cal. App. 409

LAURELLE v. BUSH, Tax Collector.

(Civ. 972.)

(District Court of Appeal, First District, California. Nov. 8, 1911.)

1. Theaters and Shows (§ 3*)—Licenses—Ordinances — Construction — "Panorama"—"Kinetoscope."

While a city ordinance imposing a license fee on and prescribing the location of museums, panoramas, cycloramas, kinetoscope, or phonograph parlors, does not specifically refer to the motion picture business, it is sufficiently covered by the words, "panorama" and "kinetoscope," and must be held to be within the contemplation of the ordinance.

[Ed. Note.—For other cases, see Theaters and Shows, Cent. Dig. § 3; Dec. Dig. § 3.*

For other definitions, see Words and Phrases, vol. 5, p. 3934.]

2. Theaters and Shows (§ ½,* New, Vol. 13, Key No. Series)—"Panorama"—Nature.

A "panorama" is a picture which, representing scenes too extended to be seen at once, is exhibited a part at a time by being unrolled continuously before the spectators.

3. Theaters and Shows (§ ½,* New, Vol. 13, Key No. Series)—"Kinetoscope"—Nature.

A "kinetoscope" is a machine for producing animated pictures, a mechanical contrivance involving, among other things, a transparent or translucent narrow film on which a series of photographs consecutively represent the continuous development of movement or action in the persons or things which are the subject of such photographs.

4. Municipal Corporations (§ 116*)—Ordinances—Implied Repeal.

Where a city ordinance imposing a license fee upon the owners of museums, panoramas, cycloramas, kinetoscopes, or phonograph parlors and its amendment requiring a permit from the board of police commissioners for, and prohibiting the location of, such exhibitions within certain limits, is not repealed expressly by a later ordinance which made it unlawful to conduct a moving picture exhibition without first receiving a permit from the board of police commissioners, and as such later ordinance does not purport to fully cover the subject-matter of nor appear to be a substitute, but merely adds additional requirements, it cannot be held to repeal it by implication.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 268-271; Dec. Dig. § 116.*]

5. Licenses (§ 7*)—Ordinances—Validity.

A general grant of power unaccompanied by specific directions as to the manner of exercise implies the right and duty to adopt and employ such means and methods as may be reasonably necessary, so that a city ordinance providing for licensing moving picture exhibitions is not invalid because it vests in police commissioners power to grant or refuse a permit for the conduct of the business which is arbitrary and dependent solely upon their whim or caprice, because it does not restrict the power or prescribe methods for its application.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-15; Dec. Dig. § 7.*]

6. MUNICIPAL CORPORATIONS (§ 603*)—ORDINANCES—VALIDITY—REASONABLENESS.

In view of the danger of fire and panic from the close proximity of moving picture exhibitions to schools or churches, a city ordinance which prohibits the future location of such exhibitions within 200 feet of a church or schoolhouse is not invalid as prescribing unreasonable or unnecessary conditions upon the business.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1334; Dec. Dig. § 603.*]

7. LICENSES (§ 7*)—ORDINANCES—VALIDITY—REASONABLENESS.

Where a city ordinance provides for the licensing of moving picture exhibitions, etc., and prohibits the location of such businesses within certain districts, a requirement therein that the applicant for a permit to engage in such business shall specify by street and number the precise premises in which he desires to locate is reasonable and necessary to an intelligent and effective enforcement of the ordinance, and will not render it invalid as prescribing unreasonable or unnecessary conditions.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-15; Dec. Dig. § 7.*]

8. MUNICIPAL CORPORATIONS (§ 591*)—DELEGATION OF POWER.

Where a city ordinance provides that a license to run moving picture exhibitions shall be granted only when a permit therefor has been granted by the board of police commissioners, but directs that no other restriction than as to the location of such places shall be considered by such board, the restriction is mandatory, and imposes upon the board the duty of granting a permit upon ascertaining that the conditions precedent have been complied with, and, as the refusal of a permit in such case would be an abuse of power, rather than the exercise of a discretion, which could be reached and remedied by mandamus, the ordinance is not invalid as a delegation of power.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1310; Dec. Dig. § 591.*]

9. MANDAMUS (§ 14*)—GRANTING OF LICENSE—COMPLIANCE WITH CONDITIONS.

Where an ordinance regulating moving picture exhibitions, etc., provides that a permit therefor be obtained from the board of police commissioners, and that the right to have such a permit shall be absolute upon compliance with certain conditions as to the location of the business, issuance of the permit is a condition precedent to the granting of the license, and the determination as to whether the premises comply with the requirement is for the board, not for the applicant, so that a petition for mandamus to require the issuance of a license by the license collector which alleges that the premises comply with the requirement of the ordinance is insufficient; the only right to relief by mandamus being upon a showing that the board ignored the petition for a permit entirely, or arbitrarily refused a permit in the face of the undisputed or established fact that the specified restrictions did not apply.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 44-46; Dec. Dig. § 14.*]

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Mandamus by Otis Laurelle against David Bush, Tax Collector. From a judgment for plaintiff, defendant appeals. Reversed, with directions.

Percy V. Long, City Atty., and J. F. English, Asst. City Atty., for appellant. Edgar C. Levey and George M. Lipman, for respondent.

LENNON, P. J. The plaintiff in the above-entitled proceeding petitioned the superior court for a writ of mandate, requiring and compelling the defendant, as the tax collector and ex officio license collector of the city and county of San Francisco, to issue to plaintiff a license to engage in the moving picture business. The petition for the writ in the main alleged that on the 3d day of March, 1911, the plaintiff tendered to defendant in his official capacity as tax and license collector the sum of $25, the amount fixed by ordinance as a license fee for opening and operating a moving picture exhibition. Thereupon plaintiff demanded of defendant a license to carry on said business at the premises known and designated as No. 452 Castro street in said city and county. It was further alleged in the plaintiff's petition that said premises were not within a distance of 200 feet from the front line of any church or school, or within 100 feet of the property line of the sides or rear of any church or school, that the defendant refused to issue said license, and that by reason thereof plaintiff is prohibited from engaging in a lawful and useful business.

The plaintiff in his petition, and here, bases his claim of right to the license in question solely upon the provisions of Ordinance No. 777 of the city and county of San Francisco, which requires, in substance, that every person, firm, or corporation maintaining or conducting any museum, panorama, cyclorama, kinetoscope, or phonograph parlor, wherein an admission fee is charged, and operated for the entertainment or amusement of the public, shall pay a license fee of $25, per quarter. The ordinance provides, further, that the tax collector shall not issue a license to any person, firm, or corporation to conduct such business unless the applicant therefor shall have first obtained from the board of police commissioners a permit to conduct the same, and that the board of police commissioners shall not issue any permit to any person who proposes to maintain said business within a distance of 200 feet from the front line of any church or school, or within 100 feet of the property line of the sides or rear of any church or school. Provision is then made that these restrictions shall not apply to buildings already erected or in course of construction, and especially designed to be used for kinetoscope or other similar exhibitions, and that no other restrictions as to the location of such business shall be considered by the board of police commissioners.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Although plaintiff's petition makes specific reference by title and number to the ordinance just referred to, no mention is made of the fact that the ordinance requires a permit from the board of police commissioners before the defendant is authorized to issue a license. In this connection it appears that Ordinance No. 777, which was enacted and approved in 1903, related only to the imposing of a license fee upon the owners of "museums, panoramas or cycloramas or any kinetoscope or phonograph parlor," and did not purport to regulate the conduct or restrict the location of such business. In the year 1908 this ordinance was amended solely by including within its provisions the clauses which required a permit from the board of police commissioners and prohibited the location of the designed exhibitions within the limits hereinbefore specified.

It should be noted in passing that the board of supervisors in 1909, by a supplementary ordinance known as "No 761, New Series," made it unlawful for any person to conduct or carry on any "moving picture" exhibition without first making application for and receiving a permit from the board of police commissioners. The only additional requirement of this ordinance, in so far as the procurement of a permit is concerned, is that the applicant must file his application in writing, which shall be signed by him, give his address, and specify by street and number the place where the proposed "moving picture" exhibition is to be located. Other provisions of the ordinance give immediate supervision and censorship of all pictures which may be exhibited, after a permit is granted and a license issued, to the police commissioners, and provision is also made for the revocation of permits in the event of a violation of certain prescribed rules not mentioned in the first ordinance, which are intended to keep the moving picture business within the limits of ordinary decency and morality. The validity of those rules is not assailed in this proceeding, and therefore they need not be further mentioned or considered.

The answer of the defendant set out in hæc verba the original ordinance relied upon by the plaintiff, together with the amendatory and supplementary ordinance just referred to, and then pleaded as a defense to the action that the plaintiff at no time obtained the required permit in writing to engage in the kinetoscope or any similar business, and that for this reason alone the defendant refused to issue a license to plaintiff. The plaintiff interposed a demurrer to the defendant's answer upon the ground that the facts therein stated did not constitute a defense. This demurrer was sustained without leave to amend. Thereupon judgment for plaintiff was entered in effect upon the pleadings, and the mandate of the court issued compelling the defendant to grant the license prayed for. The defendant appeals from the judgment.

The trial court, in sustaining the demurrer to the defendant's answer, proceeded presumably upon the theory advanced by plaintiff that the ordinances in question are unconstitutional, in this: (1) That they are unreasonable, discriminatory, and oppressive, and an unlawful interference with and an unnecessary restraint of a useful and lawful occupation; and (2) that they attempt to delegate legislative powers and functions from the board of supervisors, a legislative body, to the police commissioners, an administrative board.

[1] In support of this theory, it is assumed by plaintiff's counsel that the ordinances under consideration do not attempt in any way or form to regulate or restrict the business of exhibiting moving pictures, and therefore it is argued that the ordinances are but the grant of an arbitrary power to the police commissioners, whereby they are given the sole and unrestricted authority to grant or refuse any application for the permit required by the ordinances.

If the assumption upon which this argument is founded were true, the result contended for might follow as a matter of law; but, as we read and understand the several ordinances, they are not susceptible of any such construction. "Moving picture" exhibitions are not specifically designated in the category of amusements required to be licensed by Ordinance No. 777, nor is any mention made of "moving pictures" in so many words by the amendment thereto, which purports to regulate "cycloramas, kinetoscope" and other similar entertainments.

[2] A "panorama," however, is defined to be "a picture which, representing scenes too extended to be seen at once, is exhibited a part at a time by being unrolled continuously before the spectator."

[3] A "kinetoscope" is defined to be "a machine for producing animated pictures" (Webster's Dict.), and has been judicially described as "a mechanical contrivance involving, among other things, a transparent or translucent narrow film of very great length, on which a series of photographs consecutively represent the continuous development of movement or action in the persons or things which are the subjects of such photographs. This film by a photographic device is caused to pass with great rapidity by a set of lenses, through which, by use of a powerful electric light, the scenes which are the subject of the series of photographs are much enlarged and thrown upon a white screen. As one picture of the scene photographed succeeds another upon the screen with great rapidity, the impression produced upon the retina of the eye by the preceding picture continues longer than does the existence on the screen of the picture which produces the impression. As a result

the impression produced by one picture lasts approximately until the impression produced by the next succeeding picture occurs. The result is substantially that one sees a continuous moving picture, reproducing the action and movement of the scenes photographed upon the film." Barnes v. Miner (C. C.) 122 Fed. 480, 487. It must be conceded, therefore, that the character of the business contemplated by the plaintiff and for which he seeks a license comes as directly within the provisions of the original ordinance and its amendmoent as if "moving pictures" had been definitely named and described therein.

[4] In our opinion Ordinance No. 777, as originally enacted and subsequently amended, is still in force, and full effect may and should be given to its several requirements, notwithstanding the enactment and existence of Ordinance "No. 761, New Series." The last-mentioned ordinance does not purport to fully and completely cover the subject-matter of, or appear to be a substitute for, the earlier ordinance. The two ordinances are not in any wise conflicting. One does not purport to repeal the other either expressly or by implication. On the contrary, they are in complete harmony; and, as the last ordinance appears to be purely an auxiliary of the original ordinance, both must be read and construed together. When so read and construed, it is manifest that they formulate a reasonable, harmonious, municipal regulation of all forms of panoramic, kinetoscope, and moving picture exhibitions, not only in regard to the location and character of the buildings in which such exhibitions may be given, but in regard as well to the kind and character of pictures which may be produced.

[5] The contention of plaintiff's counsel that the power to grant or refuse a permit for a license is arbitrary and dependent solely upon the mere whim and caprice of the police commissioners is readily refuted by a casual reading of the ordinances. It is a well-recognized rule of statutory construction that a general grant of power, unaccompanied by specific directions as to the manner in which the power is to be exercised, implies the right and duty to adopt and employ such means and methods as may be reasonably necessary to a proper exercise of the power. 2 Lewis' Sutherland, Statutory Construction, § 508; DuPage County v. Jenks, 65 Ill. 275; Ex parte McManus, 151 Cal. 331, 90 Pac. 702.

If, therefore, the ordinances under consideration did no more than denounce the issuance of a license without the previous procurement of a permit from the board of police commissioners, this in itself would imply and require an inquiry as to the propriety of granting a permit in any given case. Goytino v. McAleer, 4 Cal. App. 655, 88 Pac. 991.

Tested by this rule, it cannot be said that the board of police commissioners is vested with an undefined and whimsical discretion in the matter of granting or refusing a permit. It is not necessary, however, to invoke this rule in aid of the validity of the ordinances here assailed, for they in express terms prescribe and limit the conditions under which a permit for a license may be applied for and granted.

[6] Neither can it be said that the conditions to be complied with are unreasonable or unnecessary. The manifest menace of fire and panic likely to result to school children and church congregations from the close proximity of kinetoscope exhibitions is a valid and commendable reason for the proviso found in the amended ordinance prohibiting such exhibitions within 200 feet of a church or school unless at the time of the passage of such amended ordinance they were housed in buildings already erected or in the course of erection, and specially designed for that purpose; and the requirement of the supplemental ordinance that the applicant for a permit to engage in such business shall specify by street and number the precise premises in which he desires to locate is a reasonable and necessary expedient plainly intended and devised to aid in an intelligent and effective enforcement of the ordinance.

[7] These conditions apply equally and uniformly to all persons alike, and the direction that "no other restriction of such places as to the location of such places shall be considered by the board of police commissioners * * *" is mandatory, and clearly contemplates that no discretion is given to withhold a permit if it be found that the location or building selected for the proposed enterprise conforms to the requirements of the ordinance. In other words, the ordinances impose upon the board of police commissioners the plain duty of granting a permit upon ascertaining that the conditions precedent to the performance of such duty exist; and the refusal of a permit in such a case would be an abuse of power rather than the exercise of a discretion, which could be reached and remedied by mandamus. Ex rel. Coffey v. Chittenden, 112 Wis. 575, 88 N. W. 587; Reed v. Collins, 5 Cal. App. 494, 90 Pac. 973; 2 Abbott's Municipal Corp. 985,

[8] The contention of plaintiff that the ordinance violates the rule of law which prohibits the delegation of legislative powers is untenable. As heretofore indicated, it is clear that the ordinances designate all of the conditions under which a permit for a license may be issued, and the requirement that a license shall issue only after a permit therefor has been granted by the board of police commissioners confers no power upon that board to determine the necessity for a license, or legislate as to the terms and conditions upon which it may be issued by the defendant as license collector. The require-

ment is but a preliminary step in the procedure prescribed for the procurement of a license, and in no sense can it be said to be an improper delegation of power. In re Guerrero, 69 Cal. 99, 10 Pac. 261; In re Bickerstaff, 70 Cal. 39, 11 Pac. 393; Ex parte Fiske, 72 Cal. 125, 13 Pac. 310; In re Flaherty, 105 Cal. 564, 38 Pac. 981, 27 L. R. A. 529; County of Los Angeles v. Spencer, 126 Cal. 673, 59 Pac. 202, 77 Am. St. Rep. 217; Ex parte Quong Wo, on Habeas Corpus, 118 Pac. 714.

[9] It may be true, as plaintiff alleges in his petition, that the premises selected by him are not within 200 feet of a church or school; but the determination of this fact is vested in the board of police commissioners, and not in the plaintiff; and if it be true, as alleged in the answer of the defendant, that the plaintiff has ignored the provisions which require a permit as a condition precedent to the issuance of a license, the defendant cannot by mandamus be coerced into doing that which his plain duty under the law prohibits him from doing. The plaintiff, before he will be accorded any relief, must first submit to the jurisdiction of the board of police commissioners; and even then will not be heard to complain except upon a showing that the board ignored his petition entirely, or arbitrarily refused him a permit in the face of the undisputed or established fact that the specified restrictions did not apply to his case.

The judgment is reversed, and the lower court directed to overrule the plaintiff's demurrer to the answer of the defendant, and then proceed to a trial and determination of the issues raised by the pleadings in the case.

We concur: HALL, J.; KERRIGAN, J.

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17 Cal. App. 390

WILSON et al. v. FIRST NAT. BANK OF LONG BEACH. (Civ. 1,047.)

(District Court of Appeal, Second District, California. Nov. 7, 1911.)

1. Municipal Corporations (§ 353*)—Improvement Contracts—Assignment—Liability of Assignee.

That a municipal contractor assigned his contract to defendant bank, upon its agreement to collect the money to become due thereon, to pay the materialmen and subcontractors from the proceeds, and to apply the balance to the contractor's debt to the bank, requires the bank to satisfy claims of materialmen and subcontractors before applying any of the proceeds to its own claim.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 885; Dec. Dig. § 353.*]

2. Municipal Corporations (§ 376*)—Municipal Construction Contracts—Action Against Assignee—Pleading.

A complaint, stating that a municipal contractor assigned a contract to defendant bank, on its agreement to pay materialmen and subcontractors from the proceeds, and to apply the balance to the contractor's debt to the bank, that plaintiffs, as subcontractors, refused to proceed until assured by defendant that it would pay over to plaintiffs moneys falling due under the contract, etc., which defendant did, whereupon plaintiffs performed their work should be construed to charge the defendant as assignee, and not as guarantor.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 376.*]

3. Pleading (§ 406*)—Uncertainty—Waiver of Objection.

An objection to a complaint for uncertainty is waived by failure to demur on that ground.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1355–1359; Dec. Dig. § 406.*]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Earl A. Wilson and others, partners as the Electric Supply & Fixture Company, against the First National Bank of Long Beach. Judgment for defendant, and plaintiffs appeal. Reversed.

Denio & Hart, for appellants. John E. Daly, for respondent.

JAMES, J. [1] A general demurrer to an amended complaint, filed by plaintiffs, was sustained, and leave to further amend was denied. Thereupon judgment was rendered for defendant, from which plaintiffs appeal. In this amended complaint it was alleged that one E. L. Plantico, on August 1, 1906, entered into a contract with certain property owners of the city of Long Beach, wherein it was agreed that Plantico was to construct certain bulkheads and sidewalks and erect electrical street lamps along a boulevard in front of the property of the other contracting parties; that Plantico then engaged plaintiffs, as subcontractors, to do certain of the electrical work, and that, before plaintiffs entered upon the doing of this work, Plantico assigned the main contract, which he had made with the property owners, to the defendant bank. Plaintiffs then allege, on information and belief, that the assignment so made by Plantico to the bank was "upon the consideration and understanding that said defendant corporation would hold said contract and collect the moneys to become due thereunder from the respective property owners as the same became due under the terms of said contract, and pay materialmen and subcontractors from the proceeds thereof, and apply the balance, if any, to certain obligations owed by said E. L. Plantico to said defendant bank." This allegation follows: "That thereafter, and before commencing work under their said contract with said E. L. Plantico, these plaintiffs went to said defendant corporation, and refused to proceed with said work, except upon the condition that said defendant corporation collected the moneys to become due under the terms of said contract, and would pay over to these plaintiffs the moneys to become due to them upon the completion of said contract by them, made with said E. L. Plantico, as aforesaid, and were assured by said defendant corporation that it would do the same; that upon such assurance plaintiffs thereupon commenced work under their said contract, made with said E. L. Plantico, as aforesaid, and completed the same according to its terms." There was the further allegation that the amount which had become due to plaintiffs under their contract was the sum of $2,465.84, and that of this amount $1,240, and no more, had been received by way of credit from defendant bank, and that the defendant had refused to make further payments thereon. It was also alleged on information and belief that the defendant bank had collected on account of money due under the contract assigned to defendant by Plantico more than enough money to pay all claims of subcontractors and materialmen. Under the alleged terms of the assignment made by Plantico to the bank, the latter became charged with the responsibility of satisfying the claims of the materialmen and subcontractors before applying any of the proceeds received upon that contract to its own account.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[2] As we view the amended complaint, sufficient facts are stated to constitute a cause of action, although there appears to be some uncertainty as to whether plaintiffs intended to rely upon the assurance of the bank that it would see them paid, as a distinct and original contract on the part of the bank, or upon the agreement of the bank, which formed a part of the consideration for the assignment made by Plantico, that moneys collected upon the main contract should be first applied in extinguishment of the claims of the materialmen and subcontractors. We think, however, that the pleading is reasonably susceptible of the construction that plaintiffs did not intend to allege a separate contract on the part of the bank, made with them by way of guaranty, but that, all of the allegations considered, the pleading should be construed as intending to set forth only the cause of action based upon the liability of the bank under the assignment of Plantico, which was made in part for the benefit of these plaintiffs. Construed in that way, no other effect need be given to the allegations, referring to the assurance given by the bank to plaintiffs, that it would see them paid, than to treat that allegation as meaning only that the defendant assured plaintiffs that it would comply with the terms of its agreement with Plantico to first pay out of moneys collected on the contract assigned to it the demands of the materialmen and subcontractors.

[3] A demurrer for uncertainty might properly have been urged against the complaint, but no such ground of demurrer was made by the defendant, and that objection must therefore be deemed to have been waived. We think that the demurrer should have been overruled.

The judgment is reversed.

We concur: ALLEN, P. J.; SHAW, J.

161 Cal. 610

SAN PEDRO, L. A. & S. L. R. CO. v. HAMILTON et al.

HAMILTON et al. v. SAN PEDRO, L. A. & S. L. R. CO.

(L. A. 2,539, 2,540.)

(Supreme Court of California. Dec. 19, 1911. Rehearing Denied Jan. 18, 1912.)

1. NAVIGABLE WATERS (§ 37*)—"TIDELANDS."

Const. art. 15, § 3, provides that all tidelands within two miles of any incorporated city or town in the state fronting on the waters of any harbor, estuary, bay, or inlet used for navigation shall be withheld from grant or sale to private persons, partnerships, or corporations. *Held*, that the word "tidelands," as so used, was not limited to lands covered and uncovered by daily efflux and reflux of the tide, but embraced lands properly described as submerged lands.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201–227; Dec. Dig. § 37.*

For other definitions, see Words and Phrases, vol. 8, p. 6970.]

2. STATUTES (§ 104*)—CURATIVE OR VALIDATING ACT—SPECIAL LEGISLATION.

St. 1907, p. 987, confirming and validating leases of any tide or submerged lands belonging to the state within the municipal boundary of any county or municipality, or over which the county or municipality at the time of executing the lease was acting in de facto authority, for a period of not more than 50 years, etc., was not unconstitutional as special legislation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 116; Dec. Dig. § 104.*]

3. NAVIGABLE WATERS (§ 37*)—TIDELANDS—"GRANT OR SALE"—LEASE.

Const. art. 15, § 3, provides that all tidelands within two miles of any incorporated city or town, and fronting on the waters of any harbor, estuary, bay, or inlet used for navigation, shall be withheld from "grant or sale" to private corporations, partnerships, or corporations. *Held* that, while the word "grant" has sometimes been used to include a lease for a term of years, the constitutional provision should be construed in its ordinary sense to refer to a conveyance of the title to property; and hence such provision did not prevent a lease of tidelands belonging to the state to private persons or corporations for a term of years.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201–227; Dec. Dig. § 37.*

For other definitions, see Words and Phrases, vol. 4, pp. 3151–3156; vol. 8, p. 7674.]

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Actions by the San Pedro, Los Angeles & Salt Lake Railroad Company against Louise M. Hamilton and husband and by Louise M. Hamilton and husband against the same railroad company. Judgment for the railroad company in each case, and the Hamiltons appeal. Affirmed.

Grant Jackson, Keefer & Bowers, John W. Shenk, City Atty., and Leslie R. Hewitt, Sp. Counsel, for appellants. Anderson & Anderson, amici curiæ. A. S. Halsted, Miner P. Goodrich, and W. C. Petchner, for respondent. Benjamin E. Page, amicus curiæ.

HENSHAW, J. The above-entitled cases involve a consideration of the same legal questions. The former case is an action to quiet title, the latter an action in ejectment, both between the same parties.

The facts found by the court, over which there is no controversy, may be briefly stated. In 1903 the government of the United States was engaged in the improvement of the harbor of San Pedro. The work contemplated a deepening of the "inner harbor" (an estuary or arm of the sea), the rectification of the inner harbor lines, the construction of jetties delimiting those lines, and to the seaward the construction of an enormous breakwater which, in a great sweep or curve, extends across the entrance to the inner harbor, and, while protecting it, affords safe anchorage to vessels on its landward side. Much dredging was necessary to deepen the inner harbor. The disposition of the material dredged was important. If cast into the ocean, the refluent tides would carry it back to the inner harbor. This being the condition, in April, 1903, the United States government entered into a contract with the San Pedro Railroad Company, by which it was agreed that the corporation would build in the Pacific Ocean, east of the inner harbor and of the government jetty bounding that harbor upon the east, a sea wall and retaining wall which would protect and confine not less than 2,500,000 cubic yards of the material dredged by the government from the inner harbor, and permit the government to pump its dredged material onto the corporation's land. The object to be attained was one of mutual benefit to the contracting parties. The government, upon the one hand, would thus safely and economically dispose of the dredged material, and the corporation, upon the other hand, would receive the benefit of this dredged material in the contemplated reclamation of tide and submerged lands fronting on the Pacific Ocean. Thereafter the railroad company obtained a lease from the city of Long Beach, a municipality of the sixth class, whose jurisdiction then extended over the territory in question, to a tract of land including the lands in controversy. It then proceeded, at an expense of $30,000, to build the retaining wall. The government deposited the materials dredged from the inner harbor within the confines of the wall, and thus were reclaimed from the Pacific Ocean the lands here in controversy. Thereafter, on March 23, 1907, the Legislature of the state of California passed a validating act, ratifying leases of a certain class, within which class this lease admittedly comes. Of the greater part of the lands in controversy, the railroad company has been in possession under its lease. To a minor portion of the lands, in the possession of Louise M.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Hamilton and her husband, the railroad company has claimed the right of possession.

The foregoing outlines the railroad company's claim of title. Louise M. Hamilton, defendant in the one action, plaintiff in the other, claimed a right of possession to a portion of the lands by virtue of her attempt to comply with the provisions of the possessory act of 1852. Stats. 1852, p. 158. Without regard to the question whether this act has been repealed, it is sufficient to say that the act contemplates the occupation of public lands "for the purpose of cultivating or grazing the same." The court found that none of the lands was suitable for purposes of cultivation or grazing—a finding which, under the circumstances, will excite no surprise. In truth, no serious attempt is made to support the asserted claim of title of the Hamiltons; their possession of a small portion of the land, however, affording sufficient standing ground from which to attack the title of the railroad company.

It was made to appear that the city of San Pedro had made leases similar to the one here in question, and that the city of San Pedro had subsequently become annexed to or amalgamated with the city of Los Angeles. The city of Los Angeles had also from the state acquired certain rights to the lands contiguous to the harbor of San Pedro, which rights, it is asserted, include the lands here in question. The city of Los Angeles, however, did not connect itself with this litigation, but was permitted through its representatives to file a brief. Other briefs were filed in answer thereto by others interested in the principal question here to be considered.

That question may be thus broadly stated: When the Constitution (article 15, § 3) declares: "All tidelands within two miles of any incorporated city or town in this state, and fronting on the waters of any harbor, estuary, bay, or inlet used for the purposes of navigation, shall be withheld from grant or sale to private persons, partnerships or corporations"—does this language forbid the leasing for a term of any part of such lands?

[1] For the consideration of the question thus broadly stated, "tidelands," as thus used in the Constitution, will be construed more broadly than in the ordinary signification of lands covered and uncovered by the daily efflux and reflux of the tide. It will be construed to embrace lands properly described as submerged lands (Ward v. Willis, 51 N. C. 183, 72 Am. Dec. 570), such as, in major parts, the lands here in controversy unquestionably were. The phrase will be so construed to carry out the manifest intent of the framers of the Constitution to protect the harbors of cities and towns from falling into private monopolistic ownership. People v. Kerber, 152 Cal. 731, 93 Pac. 878, 125 Am. St. Rep. 93. Such being the undoubted purpose, it would result in the absolute destruction of that purpose to hold that a city might not convey its tidelands proper, but might convey into private ownership all of the submerged lands beyond the tidelands proper. For there thus might be erected an impassable barrier between the city and its own harbor waters, with the resulting monopolistic control of the harbor itself. It will further be assumed that the lands here in controversy front on a "bay." They certainly do not front upon the harbor of San Pedro, for the maps in evidence in the case establish that between these lands and the harbor of San Pedro is a wide jetty, wholly under the ownership and control of the government of the United States. To seaward these lands front upon the Pacific Ocean. They do not even front upon the outer harbor, but upon the open sea. The slight indentation in the shore line upon which they do front is San Pedro Bay, and, as has been said, it will be assumed that this bay is used for purposes of navigation, so as to bring the lands within the purview of the language of the Constitution.

[2] The Legislature, by its general validating act, as has been said, admittedly confirmed the lease made by the city of Long Beach. Stats. 1907, p. 987. If this confirmatory act is valid, it, of course, cures any defects in the lease from the town of San Pedro which may be thought to exist by reason of the lack of power in that municipality. Against the validity of the act, it is contended that it is special legislation. But this contention is completely answered by Upham v. Hosking, 62 Cal. 250, Baird v. Monroe, 150 Cal. 560, 89 Pac. 352, and Redlands v. Brook, 151 Cal. 474, 91 Pac. 150. The principle of decision is that such curative acts do not come within the constitutional inhibition against special legislation. Elsewhere the same principle of decision is uniformly applied. Read v. Plattsmouth, 107 U. S. 568, 2 Sup. Ct. 208, 27 L. Ed. 414; State v. Brown, 97 Minn. 402, 106 N. W. 477, 5 L. R. A. (N. S.) 327; State v. Squires, 26 Iowa, 340.

[3] This conclusion, then, is a declaration that the Legislature did not violate this particular constitutional inhibition against special legislation in the passage of the curative act, and thus clears the way for the consideration of the ultimate question first above stated. In passing, it may be said that it is, of course, recognized that the legislative department of the state, like the Congress of our national government, has plenary power over the management and disposition of state lands, subject, of course, in the case of lands under navigable waters, to the paramount right of the national government to exercise a control in the interest of commerce and navigation, and subject, also, to the trust for the whole public upon which these lands are held by the state—a trust which would forbid the alienation into

private ownership of any such considerable part of them as would interfere with the proper exercise of the public trust upon which they are all held. But with none of these questions does this case concern itself. The question before us is a much narrower one. It is the question of the extent of the limitation of this general power imposed upon the Legislature by the constitutional mandate. The Constitution has clearly forbidden the Legislature from granting or selling lands of the character of those here in controversy. The question is: Did the Constitution by this language mean to forbid the Legislature from leasing, as contradistinguished from disposing of the fee, any such lands?

Over the meaning of these words "grant or sale," as thus employed in the Constitution, many niceties of reasoning are indulged in, and many authorities upon either side are cited. Thus it is pointed out that section 1053, Civil Code, provides that a transfer in writing is called a "grant," or "conveyance," or "bill of sale," and that the term "grant" in that section and in the succeeding articles includes all these instruments. Again, it is pointed out that section 1091, relating to the transfer of real property, provides that an estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument in writing; that section 1092 provides that a "grant of an estate in real property may be made in substance as follows"; and that this contemplates a leasehold interest exceeding one year. Again, section 1105 provides that a fee-simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended, and that by this section the lesser estate referred to must be a life estate or a leasehold estate for years. Again, section 1108 deals with "a grant made by the owner of an estate for life or years." Still further it is pointed out that in S. F. & O. R. R. Co. v. City of Oakland, 43 Cal. 502, it is declared that at the present day the word "grant" is effectual to convey an estate in a corporeal hereditament; that the word has now become a generic term, applicable to the transfer of all classes of real property; and that in Commercial Bank v. Pritchard, 126 Cal. 600, 59 Pac. 130, a lease of land for a term of five years is construed to be a conveyance of real property, within the meaning of section 1215, Civil Code. Upon the other hand, respondent points out that these interpretations have to do generally with recordation acts, and that, while section 1053, as above set forth, declares that "a transfer in writing is called a grant or conveyance or bill of sale," a transfer, itself defined by section 1039 of the same Code, is "an act of the parties or of the law by which the *title to property* is conveyed from one living person to another," and that in the case of leases the title is not transferred. Attention is directed to such cases as Simonson v. Burr, 121 Cal. 582, 54 Pac. 87, where it was contended that the lease of the homestead was an abandonment of the homestead right, under section 1243 of the Civil Code, which declares that a homestead is abandoned "by a grant thereof," and this court held that a lease was not embraced within the meaning of "grant," as there employed; and Mott v. Ruckman, 3 Blatchf. 71, Fed. Cas. No. 9,881, where the statute provided that no conveyance of a vessel should be valid, unless recorded, and the vessel had been leased, the United States Circuit Court held that a lease was not included in the word "conveyance"; and Des Moines Co., etc., v. Tubbessing, 87 Iowa, 138, 54 N. W. 68, where the court declared: "We are unable to find a single instance where the word 'grant' is construed as a 'lease,' without other words to control its meaning." And, finally, the American & English Encyclopedia of the Law (2d Ed.) vol. 7, p. 487, is cited to the following effect: "Blackstone enumerates leases as among the primary 'conveyances' at common law, and in several cases the term 'conveyance' has been held to include a 'lease'; but the weight of authority is to the effect that in its ordinary significance the term does not embrace a chattel interest in realty."

Enough has been said to show that the meaning of the word "grant" has by judicial interpretation been narrowed or enlarged to meet the exigencies of specific cases and the spirit of the law in which the word is employed. We are still left to determine the specific meaning as employed in the Constitution. And here resort first must be had to the rule of construction that, in interpreting the Constitution, as in construing a legislative statute, unless a special definition has been given to a word, the word shall be taken in its ordinary and generally accepted sense. Harris v. Reynolds, 13 Cal. 514, 73 Am. Dec. 600; Houghton's Appeal, 42 Cal. 35. These cases have to do with the construction of statutes. The applicability of the same rule in constitutional interpretation is declared in Oakland, etc., Co. v. Hilton, 69 Cal. 491, 11 Pac. 3. Indeed, even if the word have a technical, as well as popular, meaning, the latter will be given it, unless the context forces the conclusion that it was otherwise used. Weill v. Kenfield, 54 Cal. 111. It cannot be gainsaid but that in the ordinary and general acceptation of the word "grant" and of the word "sale," and particularly where the two are used in conjunction, as here, they convey the idea of parting with the fee for a monetary or other consideration, and do not embrace the concept of a lease. It would require no explanation if a man declared that he had granted his farm. But it would require explanation if he desired to be understood thereby that he had merely leased it. It would require no explanation if a man should desire to convey the idea that he had sold his horse or his house, but it would require much explanation if he said that by the use of the word "sold" he meant to convey the idea that he had leased his house or let his horse. Only by a resort to meanings given to the words in extreme cases, and not to their generally accepted meaning, can they be stretched to cover and include the idea of leasing.

A resort to the constitutional debates to which we are invited throws no light upon the question. An amendment to the provision as it now stands was offered, authorizing boards of supervisors to lease for a limited period of years, excepting from this provision the board of supervisors and the water front of the city and county of San Francisco. In the debate which followed, little light is thrown upon the question, because the attack was directed principally to the whole section, with or without its amendment. It cannot be determined from the debates, under any consensus of opinion expressed by the debators, why the amendment was stricken out, and, for aught that appears to the contrary, it might have been under the view that the section as it now appears authorized leases without the amendment. It might have been because the term of leasing in the proposed amendment was deemed too great or too small; or it might have been because the city and county of San Francisco was excluded from the operation of the provision. It might have been for any of these or for a multitude of other reasons.

Much more light, however, is thrown upon the question by the interpretation put upon it by the body which first declared it, and which, saving for the constitutional restrictions, has supreme charge and control over the public lands, namely, the Legislature. The constitutional provision itself was originally a legislative enactment. It will be found in the early statutes (see Pol. Code, § 3488), which, making provision for the sale of swamp, marsh, and tide lands, excluded from the operation of the law all such lands within five miles of the corporate limits of either San Francisco or the city of Oakland, or within two miles of any other incorporated city or town. The advocates of the constitutional amendment declared in debate that by subdivision 3 they were merely putting into the Constitution what for years had been upon the statute books of the state. As this provision originated with the Legislature, its interpretation of its own enactment is peculiarly persuasive. Throughout it will be found that the Legislature has never regarded its provision or the constitutional declaration as forbidding the leasing of such lands. The act of the Legislature ratifying this lease does not stand alone. An act of the Legislature in 1889 (Stats. 1889, p. 305) creates a board of state harbor commissioners for the bay of San Diego. By this act certain sections were added to the Political Code, and one of them (section 2605) declares: "The commission shall have the right to lease said lands under such established rules and regulations as it may adopt." In 1901 (Stats. 1901, p. 601) the lease of China Basin in the bay of San Francisco was ratified and confirmed by the state. By act of March 26, 1895 (Stats. 1895, p. 194), the state board of harbor commissioners of San Francisco was authorized "to lease such portion or portions of the sea wall as they may deem expedient for such purposes solely, as will be most advantageous to the commerce of the port." The Legislature of 1909 ratified and approved amendments to the charter of the city of Los Angeles. Stats. 1909, p. 1289. And herein was the provision that the city may "lease by ordinance from the water front in excess of said 10,000 feet so owned by the city * * * alternate frontages," etc. While in an act granting to the city of Los Angeles the tidelands and submerged lands of the state within the boundaries of the city (Stats. 1911, p. 1256), it is declared "that said city or its successors may grant franchises thereon for limited periods for wharves and other public uses and purposes, and *may lease* said lands or any part thereof for limited periods for purposes consistent with the trusts upon which said lands are held by the state of California." And prior to the adoption of the Constitution of 1879 authority to make leases of the tidelands had been frequently granted by the Legislature to the harbor commissioners of San Francisco. Stats. 1863, p. 406; Stats. 1865–66, p. 853; Stats. 1867–68, p. 408; Stats. 1869–70, pp. 799–800. Finally, it may be said that by this court there has been a judicial acceptance of the soundness of this interpretation expressed in Pac. Coast Steamship Co. v. Kimball, 114 Cal. 414, 46 Pac. 275, where the city of Monterey had leased land to a steamshhip company, which had erected thereon its private wharf; the land being within the corporate limits of the city. In discussing the power of the municipality to make such a lease, the court, speaking through Justice Temple, said: "Wharves are often appropriated to the use of an individual or a company, and it cannot be doubted that Monterey could lease small portions of its water front for bathing grounds, or for any lawful purpose, not injurious to the harbor or an inconvenience to commerce. This being so, I see no reason why it might not lease a small portion to a steamship company for its special use."

But if, after all this, doubt can be entertained, that doubt must be resolved in favor of the power of the state so to lease, from the manifest benefits which will follow such construction, as contrasted with the most obvious detriments to commercial development which would attend the other. The purpose of the constitutional provision was not to blight commercial development, but to foster it. It designed to foster it by preventing the alienation into private ownership of the fee of such lands, whereby all might be acquired and held in private ownership to the destruction of the public use. But it did not mean to abort commerce in embryo or to strangle it in its infancy by putting a ban upon the activities of private commercial enterprises. Saving in San Francisco, most of the improvements of our harbors have been made by private capital. The case last referred to in 114 Cal. 414, 46 Pac. 275, is typical of it, where the sole wharf of the town of Monterey, at which five steamers a week landed, was due wholly to private enterprise and private capital. To hold that the state, or that municipalities acting as its mandatories, may not lease, with proper restrictions of time and proper regard to public and quasi public use, lands such as these, so that private enterprise and capital may build up the commerce of our seaport cities, is to declare that all such commerce must await the slow and frequently incompetent initiative of the municipalities themselves—municipalities which frequently are unwilling to incur the expense and risk which would be accepted under reasonable terms by private enterprise. If municipalities may not so lease these lands, they may not even grant franchises in connection with them; for, notwithstanding the well-recognized legal distinctions existing between a lease of land and a franchise involving the use of land for specific purposes, in practical effect the franchise is nothing other than a lease, with a right of possession and use for the indicated purposes. Pol. Code, § 2911. Nor need the slightest apprehension be felt that the power so to lease may result in a monopoly comparable to that which might follow the power to sell. In the case of sale, the title and control over the land are gone. In the case of leases, all proper restrictions may be cast about the use. An entry by the lessor may be had for breach of covenant; possession of the land, with its improvements, after the term of years, returns to the municipality and state, and in the meantime the interests of navigation and commerce are not impaired, but are in the highest degree stimulated and fostered. The lease in this instance is typical. Vast expenditures were made which the lessor would never have made, and to a portion of land—a mere fragment of all of the like water front lands—access is given to a transcontinental railroad for all purposes of inland and marine commerce, while at the expiration of the term of the lease the possession of the lands returns to the state. What policy more beneficial to the state itself than this, it would not be easy to point out. No other matters call for special mention.

For the foregoing reasons, the judgments and orders appealed from are affirmed.

We concur: SHAW, J.; SLOSS, J.; ANGELLOTTI, J.; MELVIN, J.; LORIGAN, J.

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161 Cal. 720

SAN PEDRO, L. A. & S. L. R. CO. v. NELSON et al. (L. A. 2,759.)

(Supreme Court of California. Dec. 19, 1911. Rehearing Denied Jan. 18, 1912.)

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by San Pedro, Los Angeles & Salt Lake Railroad Company against Gussie Nelson and others. From a judgment for plaintiff and from an order denying defendants a new trial, they appeal. Affirmed.

Dian R. Gardner, for appellants. A. S. Halsted, Miner P. Goodrich, and S. M. Johnstone, for respondent.

PER CURIAM. This is an appeal from the judgment and from an order denying the defendants' motion for a new trial. The case is in all essential particulars identical with the cases entitled San Pedro, Los Angeles & Salt Lake Railroad Company v. Hamilton et al. (L. A. No. 2,539), and Hamilton et al. v. San Pedro, Los Angeles & Salt Lake Railroad Company (L. A. No. 2,540), 119 Pac. 1073, which have been this day decided in bank upon an opinion filed.

Upon the authority of those cases, and for the reasons given in the opinion aforesaid, the judgment and order herein appealed from are affirmed.

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161 Cal. 566

McPHEE v. RECLAMATION DIST. NO. 765 et al. (Sac. 1,930.)

(Supreme Court of California. Dec. 14, 1911. Rehearing Denied Jan. 13, 1912.)

1. JUDGMENT (§ 432*) — ENFORCEMENT — INJUNCTION.

Where a defense existed in favor of a party, but could not be interposed in the action in which a judgment complained of was rendered, equity would restrain the enforcement of the judgment until such proceeding could be taken to render the defense available.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 816–819; Dec. Dig. § 432.*]

2. DRAINS (§ 91*) — JUDGMENT — ENFORCEMENT.

In an action to enforce an assessment levied by a reclamation district, a landowner denied that the district was legally created; but on appeal it was held that the validity of the organization of the district could not be questioned in an action on the assessment, if, when the assessment was levied, the district had a de facto existence. The court then decided that the validity of the organization of the district could be tested only on quo warranto, and that at the time the assessment was levied it had a de facto existence. The landowner immediately instituted quo warranto proceedings to test the validity of the organization of the district, and while these proceedings were pending other proceedings were instituted to sell her land for nonpayment of the assessments. *Held*, that such owner was not entitled to an injunction restraining the prosecution of such proceedings until the quo warranto case was determined, since, even if a judgment of ouster against the district was rendered, it would not annul or affect the acts performed by the district prior to the judgment; such judgment of ouster not being retroactive so as to affect or destroy acts or contracts made prior to its rendition.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 91.*]

3. JUDGMENT (§ 713*) — RES JUDICATA — DEFENSES—ESTOPPEL.

A suit having been instituted by a reclamation district to sell a landowner's property for nonpayment of an assessment, she defended on the ground that the district was without legal organization. On appeal, it was held that the district was a de facto corporation, and the assessment therefore enforceable. The owner thereafter brought quo warranto to test the validity of the district. *Held*, that the landowner in such prior action either litigated the question of the district's de facto existence and was defeated thereon, or had an opportunity to show want of de facto existence and failed to do so; in either of which events, the prior judgment, finding that the district had a de facto existence, was res judicata.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1234–1241; Dec. Dig. § 713.*]

In Bank. Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Action by Anna McPhee against Reclamation District No. 765 and others. Judgment for defendants, and plaintiff appeals. Affirmed.

See, also, 13 Cal. App. 382, 109 Pac. 1106.

Hudson Grant and U. S. Webb, Atty. Gen. (E. A. Bridgford, of counsel), for appellant. A. L. Shinn and Shinn & Shinn, for respondents.

SLOSS, J. Plaintiff is the owner of certain lands in Yolo county. She is seeking to free these lands from the lien of assessments levied by the defendant Reclamation District No. 765. Her contention is that the proceedings leading up to the attempted formation of said district were void for want of jurisdictional prerequisites. A proceeding in quo warranto has been instituted in the name of the people of the state against said district to test its right to corporate existence. The present action is one in equity, and is brought to enjoin the enforcement of the assessment liens until the conclusion of the quo warranto proceedings shall have determined whether or not there is a reclamation district authorized to levy assessments. The court below sustained a demurrer to the amended complaint, and, the plaintiff declining to amend further, judgment was entered in favor of defendants. From this judgment the plaintiff appeals.

The amended complaint begins by setting forth the steps taken in the attempt to form Reclamation District No. 765. We need not undertake to state these matters in detail. It is enough to say that there was a failure to publish the petition for the organization of the district for the period required by the statute (Pol. Code, § 3447), and that this failure, as is conceded by the respondents, went to the jurisdiction of the board of supervisors to form the district, and is fatal to the de jure existence of such district.

The pleading then goes on to describe the various steps leading up to the levy of an assessment on the lands within the district (including the lands of plaintiff) to pay the cost of reclamation work. All of this was done without the knowledge of the plaintiff. Upon her refusal to pay, an action was begun against her in the name of said Reclamation District No. 765, to enforce said assessment. In that action said defendant (plaintiff herein) attempted to defend by denying the allegation, contained in the complaint therein, that said pretended district was duly organized and existing as a reclamation district and constituted a public corporation and agency, and relied, in support of such denial, upon the facts above stated, showing that there never had been a valid organization of the district. But the superior court refused to entertain the defense, and gave judgment for the plaintiff in said action. On appeal, the judgment was affirmed by the District Court of Appeal for the Third Appellate District, on the ground that in that action the corporate existence of the plaintiff therein could not be questioned, but such existence could only be questioned in proceedings in quo warranto, at the suit of the state. A petition to have the cause heard in the Supreme Court was denied and the judgment in favor of the district became final. Thereafter the defendant in that action, and plaintiff herein, Anna McPhee, applied to the Attorney General for leave to institute proceedings in quo warranto against the said district. Such leave was granted, and an action, entitled "People of the State of California, on the relation of Anna McPhee v. Reclamation District No. 765 et al.," was instituted and is now pending. In that action the right of the defendant to exist as a corporation or public agency is involved. After the commencement of such proceedings in the name of the people, and notwithstanding the pendency thereof, the defendants caused execution to be issued upon the judgment theretofore obtained against the plaintiff, and pursuant thereto the sheriff of Yolo county gave notice that plaintiff's lands would be sold on such execution on the 14th day of January, 1911. This action was commenced on the 13th day of January, 1911, for the purpose of obtaining an injunction restraining the district and the sheriff from selling plaintiff's lands under said execution until the proceeding in quo warranto could be heard and final judgment therein be rendered. The court below denied a temporary restraining order, and on the day set for the sale the sheriff offered plaintiff's lands for sale under the execution. and said property was struck off to Lizzie H. Glide, one of the defendants herein, for the amount of the judgment, interest, and costs. A certificate of sale was executed and delivered by the sheriff to said purchaser. After such sale, the plaintiff, with leave of court, filed her amended complaint, in which she set forth, in addition to the foregoing facts, the commencement of a second action against her by the defendants to enforce a second assessment against her lands. The prayer of the amended complaint is for an injunction restraining the execution of a sheriff's deed under the sale made, and the prosecution of the action on the second amendment, until the determination of the proceeding in quo warranto.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The position of the appellant is that inasmuch as she was, in the litigation instituted by the district to foreclose the alleged lien, precluded from showing in defense that the district was never legally organized, but was remitted to the remedy of quo warranto, she should in equity and justice be entitled to protect her land from forced sale under such assessment until the question of the legality of the existence of the district can be determined in the only proceeding by which she may have it tested. The effect of the decision in the action brought by the district against the plaintiff was, it is argued, to hold that any set of persons acting without authority of the statute may assume to be a reclamation district, may levy assessments upon land, and then enforce such assessments by actions in which their want of power to proceed cannot be questioned. Unless the property owner can, by some other form of proceeding, litigate the question of the right of such persons to so proceed, he is, says the appellant, deprived of his property without due process of law. If the only opportunity of the landowner to raise this question is in quo warranto, and he diligently proceeds to seek this remedy, he must be protected in the possession of his land until the quo warranto proceedings can be brought to a determination.

The opinion of the District Court of Appeal affirming the judgment against plaintiff is reported in 13 Cal. App. at page 382, 109 Pac. 1106, under the title of "Reclamation District No. 765 v. Anna McPhee." If it were true that, in that case, the Court of Appeal had held that, in an action brought in the name of a pretended reclamation district, the landowner could not defend upon the ground that there was no such district, and that the only way in which the existence of the district could be questioned was by quo warranto, the position of the appellant would be unanswerable, for certainly, as was said in Piper v. Rhodes, 30 Ind. 309, "there must be a corporation to authorize the collection of assessments," and the law must, in some form of proceeding, give to such appellant an opportunity to deny the existence of a district authorized to levy assessments before her land is finally taken from her. If her only remedy against an attempt to burden her land with assessments levied by unauthorized persons assuming without right to act as a reclamation district is by quo warranto, and she is proceeding as diligently as may be to assert this remedy, she is entitled in the interim to the protection of a court of equity.

[1] The fact that the judgment foreclosing the lien has gone against her would not affect her right, if the facts entitling her to attack the assessment were of such a nature that she was, by reason of some rule of law, precluded from asserting them in defense to the foreclosure suit. Where a defense existed in favor of a party defendant, but could not be interposed in the action in which the judgment complained of was rendered, equity will restrain the enforcement of that judgment. N. Y. & H. R. Co. v. Haws, 56 N. Y. 175; Scott v. Shreeve, 12 Wheat. 607, 6 L. Ed. 744; Hibbard v. Eastman, 47 N. H. 507, 93 Am. Dec. 467; Ferrell v. Allen, 5 W. Va. 43.

[2] But an examination of the opinion in Reclamation District v. McPhee shows that the court did not lay down the rule as broadly as the appellant claims. What was held was that the validity of the organization of the district could not be questioned by the defendant in an action on the assessment, *if at the time of levying the assessment the district had a de facto existence.* As appears by that opinion, the court decided that the reclamation district, plaintiff herein, although not validly organized, was a de facto corporation, and it was for this reason that it was held that its de jure existence could not be collaterally questioned in a proceeding brought by it to enforce its assessments. It was not held that in an action on an assessment, brought by a pretended reclamation district, the landowner could not show in defense that the body or persons assuming to assess his land and to bring an action to enforce the assessment had no existence, either de jure or de facto, as a corporation. On the contrary, it was stated that, if the pretended corporation had had no de facto existence, its right to exist might have been attacked collaterally in an action on the assessment. But, concluding that the district was shown to have had a de facto existence, the court held that the legality of the steps taken for its formation could not be attacked in the action to enforce the assessment. This was based upon the rule that the validity of an assessment levied by a de facto corporation of this character does not depend upon the fact of the de jure character of the corporation. Anything contrary to this rule that may have been said in Reclamation District v. Burger, 122 Cal. 442, 55 Pac. 156,

must be disregarded as conflicting with a long line of earlier and later decisions, many of which are cited by the District Court of Appeal in its opinion (13 Cal. App. at page 388, 109 Pac. 1106).

Under these circumstances it is difficult to see how an injunction restraining the execution of a sheriff's deed until the determination of the quo warranto proceedings would be of any benefit to plaintiff. If the reclamation district was a de facto corporation, a judgment in quo warranto, even though it should determine that the district had not been legally organized, would not annul or affect the acts performed by it before the judgment in quo warranto. People v. Flint, 64 Cal. 49, 28 Pac. 495; 23 Am. & Eng. Ency. of Law, 628, 629; Gaff v. Flesher, 33 Ohio St. 115; Schaefer v. People, 20 Ill. App. 605. "A judgment of ouster is not retroactive so as to affect or destroy acts done or contracts made prior to its rendition." 23 Am. & Eng. Ency. of Law, 629. If the assessments when levied were valid because of the de facto character of the corporation, their validity could not be destroyed by a subsequent adjudication, in an action at the suit of the state, that the alleged district had no legal right to corporate existence.

[3] But, argues the appellant, the facts alleged by her in the present complaint show that the reclamation district never had even a de facto existence. We need not enter into any discussion of this point. The supposed de facto existence of the district was the only ground upon which this plaintiff as defendant in the action to enforce the assessment was precluded from showing the want of legal authority of the assumed district. Under the law laid down by the Court of Appeal, it was certainly open to her to show in defense that there was neither a de jure nor a de facto corporation. One of two things must then be true: Either she litigated in that action the question of the de facto existence of the district, and, having been defeated on this issue, is estopped by the final judgment from again raising the same question in this action; or else, having had the opportunity to show the want of de facto (in addition to de jure) existence in defense to the former action, she failed to show it. If the court in the suit on the assessment did actually determine that the plaintiff therein was a de facto corporation, and the question was in issue, the plaintiff cannot now urge that the determination on this point was erroneous. When a judgment has once become final, its conclusive effect upon the parties with respect to the matters adjudicated does not depend in any degree upon the correctness of the adjudication. On the other hand, if the plaintiff failed, in the former action, to plead and show that there was no de facto corporation, she is equally precluded from raising the point now. Equity will not relieve against a final judgment upon any ground which might have been asserted as a defense in the action in which the judgment complained of was rendered. 25 Cyc. 1006; Agard v. Valencia, 39 Cal. 292; Ede v. Hazen, 61 Cal. 360.

In what we have said, we have confined ourselves to a discussion of the plaintiff's prayer for an injunction restraining the enforcement of the judgment obtained on the first assessment. If the grounds for sustaining the denial of this relief be sound, the plaintiff is in no better position to restrain the prosecution of the action to enforce the second assessment. The want of de facto existence is available to the appellant in defense of that action, unless she is estopped by the judgment in the first action. We express no opinion as to which of these alternatives be correct; but, in either view, there is no ground for the interposition of equity. Furthermore, the granting of an injunction to stay proceedings in the pending action on the second assessment would be directly contrary to the provisions of subdivision 1 of section 3423 of the Civil Code. Spreckels v. Hawaiian C. & S. Co., 117 Cal. 377, 49 Pac. 353; Wright v. Superior Court, 139 Cal. 469, 73 Pac. 145.

It would seem, therefore, that the court below rightly sustained the demurrer.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

(161 Cal. 641)

WELCH v. WARE, County Auditor.

(S. F. 5,629.)

(Supreme Court of California. Dec. 21, 1911.)

1. WOODS AND FORESTS (§ 7*)—COUNTY FIRE WARDENS—POWER OF COUNTY SUPERVISORS.

Under St. 1905, p. 235, authorizing the state forester to appoint county fire wardens, who may receive payment from the county or from private sources, an order of the board of supervisors removing as "fire, fish and game warden" one who held both offices of fire warden and fish and game warden, while invalid so far as it attempts to remove him as fire warden, does operate to deprive him of right to any compensation from the county.

[Ed. Note.—For other cases, see Woods and Forests, Dec. Dig. § 7.*]

2. FISH (§ 11*)—GAME (§ 6*)—FISH AND GAME WARDENS — REMOVAL — POWER OF SUPERVISORS.

Under Pol. Code, § 4149b, authorizing the removal of a county fish and game warden for cause, an order attempting to remove one as such officer without charges, notice thereof, and opportunity to be heard is void, entitling him to the compensation fixed for the office.

[Ed. Note.—For other cases, see Fish, Dec. Dig. § 11;* Game, Dec. Dig. § 6.*]

In Bank. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Petition by Walter R. Welch for writ of mandate against Willett Ware, Auditor of the County of Santa Cruz. Judgment granting a peremptory writ, and respondent appeals. Modified and affirmed.

Benj. K. Knight, Dist. Atty., for appellant. Charles B. Younger, for respondent.

LORIGAN, J. This is an appeal from a judgment granting petitioner a peremptory writ of mandate.

[1] On April 30, 1907, petitioner was appointed by the state forester of the state of California a voluntary fire warden for Santa Cruz county. He qualified as such, and has since continued to perform the duties of such fire warden. On January 4, 1909, he was by a single order of the board of supervisors of Santa Cruz county appointed the fish and game warden of said county and also fire warden thereof for the ensuing two years with a general salary fixed at $100 a month, and he duly qualified as such fish and game warden under said appointment. On May 18, 1909, the members of said board of supervisors called a special meeting of said board for that same date, setting forth in the call, among other business to be transacted at such special meeting, "to take action in reference to the appointment of W. R. Welch [petitioner] as the fire, fish, and game warden of the county of Santa Cruz," and at said called meeting an order of the board was made and entered reciting that "it appearing to the board that W. R. Welch, the fire, fish, and game warden of Santa Cruz county has not been acting for the best interests of this county for the protection of fish and game, and good and sufficient cause appearing therefor, * * * it is by unanimous vote ordered that the office of fire, fish, and game warden of the county of Santa Cruz be declared vacant on and after June 1, 1909," and about June 7, 1909, appointed one Al Malott as fire, fish, and game warden of the county. No notice was given petitioner by the board that it contemplated his removal from the said office or offices; and no charges were ever preferred against said petitioner by or before the board for violation or alleged violation of the duties of said offices or any of them, and after said attempted removal petitioner continued to perform and discharge the duties of fire, fish, and game warden for said county. On July 3, 1909, petitioner demanded of the appellant, auditor of the county, that he draw a warrant upon the treasurer thereof for the sum of $100 or any other sum in payment of the salary of petitioner as fire, fish, and game warden of the county for the month of June, 1909, but appellant declined to draw said warrant for said sum or any other sum, and on his refusal petitioner brought this proceeding in mandamus in the superior court of Santa Cruz county to compel the auditor to draw said warrant, alleging the above facts as a basis therefor. After answer by appellant, which substantially admitted all the allegations of the petition, and a hearing thereon, the superior court awarded the petitioner a peremptory writ against appellant as prayed for, directing him to issue a warrant in favor of respondent for $100 as salary for the said month of June as fire, fish, and game warden.

The main question involved on this appeal is the validity of the order of the board of supervisors of May 18, 1909, removing the respondent from office. In considering this question it will have to be borne in mind that the respondent while appointed by the board of supervisors on January 4, 1909, generally as fire, fish, and game warden of the county for the ensuing two years, was in effect appointed to two different offices, one as fire warden of the county, the other as fish and game warden thereof, if it really can be said that the order of the board of supervisors appointing him fire warden had even that effect. There is nothing in the statutes authorizing the appointment by a board of supervisors of a fire warden. Under the act "providing for the regulation of fires" (Stats. 1905, p. 235), it is provided that "the state forester shall appoint in such number and localities as he deems wise, public spirited citizens to act as public fire wardens, who may receive payment for their services from the county or from private sources." Under this provision of the act, it is conceded by appellant that the board of supervisors of Santa Cruz county had authority to provide for the payment of compensation for respondent as the appointee of the state forester as fire warden of Santa Cruz county, but this is the only authority given the board; hence, as far as the order of the board appointing respondent fire warden is concerned, it can only be taken as evidencing an election on the part of the board under the forestry act to pay him as the appointee of the state forester for his services in the discharge of his duties under such appointment. There is no provision of the law, however, which requires the board to make compensation to him in any given amount or if compensation is allowed him by the board, that it shall continue for any given time or term.

[2] The situation, however, is different as to the appointment of a fish and game warden. Section 4149b of the Political Code provides that "the board of supervisors of each county may in the discretion of the board * * * appoint a suitable person to serve for the period of two years from the date of his appointment as fish and game warden of the county. Such fish and game warden may be removed by the board of supervisors for intemperance, neglect of duty or other good and sufficient reasons." And section 4149d provides that the salary of the fish and game warden shall be in counties of the thirteenth class (to which Santa Cruz county belongs) the sum of $50 per month. In addition, he

shall be allowed a sum not to exceed $25 a month for expenses incurred by him in the performance of his duties. "Said salary and expenses must be paid monthly from the county treasury." Having directed attention to these provisions of the law respecting the dual offices held by respondent, we proceed to a consideration of the merits of the appeal.

The claim of the appellant is that, as far as the appointment of respondent as fire warden is concerned (treating the order of January 4, 1909, as an appointment), the board had authority to remove him at any time, as no term for his appointment is provided by law, and the provisions of section 4149d of the Political Code have no application, and that this latter provision of the Code relating to the removal of the fish and game warden for certain causes or any good or sufficient reason left it entirely to the board of supervisors to remove him summarily for any reason satisfactory to itself without any charges made or hearing thereon, and that the contrary view taken by the trial court was erroneous. In support of this latter position appellant relies on the Matter of Carter, 141 Cal. 316, 74 Pac. 997.

As far as the attempted removal of respondent from the office to which he was appointed as fish and game warden is concerned, we are satisfied that the conclusion of the trial court was correct. This point is thoroughly settled by the recent decision of this court in Bannerman v. Boyle, 116 Pac. 732. In that case the charter of the city and county of San Francisco provided that the board of education shall be composed of four school directors appointed by the mayor whose term of office shall be four years, so classified that the term of one of them should expire each year. Bannerman was appointed in 1909 to hold for the remainder of an unexpired term ending January 8, 1911. On February 15, 1910, the mayor without any notice or hearing removed or attempted to remove him from office and attempted to appoint another to fill the assumed vacancy. Bannerman refused to vacate the office, denied the validity of the action of the mayor in attempting to remove him, and in due time brought an original proceeding in mandamus in this court to compel the auditor to pay his monthly salary which had accrued subsequent to the attempted removal. The charter of the city of San Francisco (section 18) provides that "any elected officer except supervisors may be suspended by the mayor and removed by the supervisors for cause; *and any appointed officer may be removed by the mayor for cause.* The mayor shall appoint some person to discharge the duties of the office during the period of such suspension." It was sought to sustain the action of the mayor under this provision of the charter; that it conferred upon him authority to summarily remove any appointive officer without the formulation of any charges or notice or a hearing thereon. On the other hand, it was contended that the mayor had no power to proceed against such appointive officer without charges preferred against him constituting "cause" and giving the officer notice and an opportunity to be heard in defense before conviction and removal. In disposing of this question this court said: "Upon this question, the great weight of authority is to the effect that where an officer is appointed for a fixed term, and it is provided that he may be removed during the term 'for cause,' without other qualifying words, such removal cannot be made except after notice and a hearing. Mr. Throop states it thus: 'The doctrine that an officer can be removed only upon notice, and after a hearing, where the tenure of his office is during good behavior, or until removal for cause or for a definite term, subject to be removed for cause, * * * may be regarded as settled law in this country.' Throop on Public Officers, § 364. Mr. Mechem says: 'Where the appointment or election is made for a definite term or during good behavior, and the removal is to be for cause, it is now clearly established by the great weight of authority that the power of removal cannot, except by clear statutory authority, be exercised without notice and hearing, but that the existence of the cause, for which the power is to be exercised, must first be determined after notice has been given to the officer of the charges made against him and he has been given an opportunity to be heard in his defense.' Mechem on Officers, § 454. The same is said to be the rule by Mr. Dillon. Dillon, Mun. Corp. § 250. A large number of decisions are cited in support of this doctrine. The following apply the doctrine to cases like the present one, where the tenure is for a fixed term." Here a number of cases are cited by the court sustaining the doctrine. "Many of these are cases where the power to remove was qualified, as here, simply by the words, 'for cause'; in others particular causes are specified, such as 'official misconduct,' 'inability or misbehavior,' and the like. The distinction is not material. The words 'for cause,' without more, imply good cause; the existence of some facts which would constitute a reasonable cause for the removal." There is no difference between the terms of the charter provision construed in the foregoing decision and the terms of the provision of section 4149b allowing the removal of a fish and game warden appointed for a fixed term under the law only for cause. Under such provision of the Code, the respondent could only be legally removed after an opportunity to be heard on charges preferred against him. Nor is it necessary to discuss the Carter Case because it is fully considered in the Bannerman Case and the doctrine announced there is shown to have no application to a provision of law with reference to the removal of officers for cause such as is involved here.

It therefore follows under the foregoing decision that the action of the board of supervisors in as far as it attempted to remove plaintiff from the office of fish and game warden, without charges made and notice thereof and an opportunity to be heard, was void, and petitioner still held the office of fish and game warden during the month of June, was entitled to whatever amount his salary as such was, and to a writ compelling the auditor to draw a warrant on the treasurer therefor. But, while the attempt of the board to remove him as fish and game warden was void, we are satisfied that the order of the board, in as far as it was directed against him as fire warden, was valid. Of course, the board of supervisors could not revoke his appointment as fire warden because that came officially from the state forester. The board had, however, on January 4, 1909, when it made the order appointing him fish and game warden also formally appointed him fire warden for two years at an aggregate salary in his dual capacities of $100 a month. The only purpose of designating him an appointee of the board as fire warden for the county of Santa Cruz was to authorize payment for his services as such from the county, which was all the board was authorized to do. It was a matter of volition with the board, however, whether in the first instance it would compensate a fire warden at all and in what amount and for how long. It might provide for it at pleasure and revoke it at any time it saw fit, and all that the order of the board of May 18, 1909, amounted to, as far as it affected petitioner's office as fire warden, was to withdraw any further compensation to him as such warden after June 1, 1909, and this the board had undoubtedly the right to do. Even treating respondent as an appointee of the board to the office of fire warden, as the law does not fix any term for which such appointment is to be made, he could hold it only during the pleasure of the board, as he would come within the general rule that, where no definite time of appointment is fixed by law for which an appointee shall hold, the board or officer who makes it may revoke the appointment at pleasure without notice or charge; that the pleasure of the appointing officer or board is the measure of the appointee's term. Throop on Pub. Officers, § 354; Mechem on Officers, § 445.

Now as to the validity of the judgment requiring the auditor to draw a warrant in the amount of $100 in favor of petitioner for the month of June, 1909.

It is quite obvious from the conclusion that we have reached that the court should not have ordered the warrant drawn for that amount. The office of the fish and game warden is a county office (Pol. Code, § 4013), having a fixed term and a definite salary of $50 a month, with the additional proviso that the board may further allow the expenses of the said fish and game warden in an amount not exceeding $25 monthly. As a county officer petitioner was entitled to have a warrant drawn for his salary for each month, as a warrant for the salary of other county officers is drawn. Any amount claimed by him as expenses must be presented to the board of supervisors for allowance, which it is conceded in the case at bar was not done by the petitioner. In fixing the compensation of petitioner at $100 a month, the board of supervisors, as the salary of fish and game warden could only be $50 a month, must have allowed the additional sum of $50 for his compensation as fire warden. But as the order revoking his allowance as such fire warden, which was the practical effect of the order of May 18, 1909, was valid, and the order revoking his appointment as fish and game warden void, he was only entitled to have drawn in his favor a warrant for $50 for the month of June, 1909, for the salary fixed by law as fish and game warden, and a warrant for that sum is all that the court should in its judgment have directed the auditor to draw.

The judgment is therefore reversed, with instructions to the superior court to modify its judgment by directing the auditor to draw a warrant on the treasurer in favor of petitioner for $50 only for his salary as fish and game warden for the month of June, 1909, and as so modified the judgment is affirmed. The appellant to recover his costs.

We concur: SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

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161 Cal. 636

PEOPLE v. SZAFCSUR. (Cr. 1,645.)

(Supreme Court of California. Dec. 21, 1911. Rehearing Denied Jan. 18, 1912.)

1. CRIMINAL LAW (§ 404*)—EVIDENCE—INSTRUMENT USED—IDENTIFICATION.

Evidence in a homicide case *held* sufficient prima facie evidence of the identity of a revolver as that with which the killing was done to authorize its admission in evidence.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 404.*]

2. CRIMINAL LAW (§ 656*)—TRIAL—REMARKS OF COURT.

After the court had suggested to defendant's counsel the proper method of impeaching witness, by her statements at the preliminary examination, and, on his claiming the right to pursue the method he was following, because of the incompetency of the interpreter, had stated that another interpreter would be provided, said counsel expressed a desire to make a statement to the court, whereon it said: "Never mind what your statement is. This is a small matter. I want to straighten it out, I don't want any dilly-dallying about small matters." *Held*, this remark of the court was not a comment on the weight of any evidence of the witness, but referred to useless discussion of the incompetency of the interpreter.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1524–1533; Dec. Dig. § 656.*]

3. WITNESSES (§ 246*)—INTERROGATING BY COURT.

The interrogating by the court of witnesses on behalf of the people, being for the purpose of bringing out more clearly some facts which their testimony on the subject had left rather indefinite, cannot be complained of as showing an active sympathy with the prosecution.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 246.*]

4. CRIMINAL LAW (§ 1166½*)—TRIAL—ABRUPTNESS OF COURT TO DEFENDANT'S COUNSEL.

It being impossible to say that it tended to prejudice defendant, the fact of the court being abrupt in its proper rulings on procedure and emphatic in its remarks to defendant's counsel in respect thereto is not subject to review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3125; Dec. Dig. § 1166½.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Alex Szafcsur was convicted of murder, and, denied a new trial, appeals. Affirmed.

Henry F. Marshall, for appellant. U. S. Webb, Atty. Gen., George Beebe, Deputy Atty. Gen., C. M. Fickert, Dist. Atty., James F. Brennan, Asst. Dist. Atty., and E. A. Lane, Asst. Dist. Atty., for the People.

LORIGAN, J. Appellant was convicted of the murder of his wife and sentenced to death, and from the judgment and an order denying his motion for a new trial he appeals.

Trouble had occurred between appellant and his wife, and she had instituted divorce proceedings. The evidence shows that prior to the killing appellant had contemplated the death of his wife and his own suicide. The parties lived on Frederick street in the city of San Francisco near Golden Gate Park. On the morning of April 4, 1910, appellant purchased a pistol and ammunition, and about 7:30 in the evening went home and deliberately fired three shots therefrom into the body of his wife causing her instant death. He immediately ran from the house to Golden Gate Park and there shot himself in the head, inflicting, however, a scalp wound from which he readily recovered. A police officer, immediately notified of appellant's attempted suicide, found him lying in the park, wounded as stated, but conscious, and with a five-chamber revolver in his hand, three chambers being empty and the other two containing shells—one exploded, the other intact. On the trial the appellant did not take the stand. The killing of his wife by him was not denied; the sole defense interposed in his behalf being that he was insane at the time he killed her.

On this appeal the following points are made for a reversal: That the court erred in admitting in evidence the revolver found in the possession of the defendant in the park and which was taken from him by the police officer, because it was not sufficiently identified as the weapon with which he killed his wife; that for the same reason it erroneously allowed testimony by the same officer of statements by defendant concerning the purchase of a revolver and ammunition on the morning of the killing; that the court erred in commenting before the jury on the weight of certain evidence; and that both the court and the district attorney were guilty of misconduct prejudicial to the cause of the defendant. None of these points have any merit and in ordinary cases might be disposed of with short notice. As, however, this is a capital case, we will consider them separately.

[1] That the deceased was killed by shots fired from a revolver by appellant there can be no question. There is no room for dispute in the case on that subject, and this being true, under ordinary circumstances, whether the court erred in admitting on insufficient proof of identity a particular revolver with which it was claimed a killing took place could work no prejudice. Appellant's claim of prejudicial error, is based, however, on the nature of his defense—insanity. He insists that admitting the revolver in evidence which was found in possession of appellant in the park, together with the showing of its condition as to the absence and presence of shells, afforded a basis for an argument by the district attorney to the jury, and which was in fact made, that appellant on his way to the park after the firing of the three shots at his wife had extracted that number of empty shells from the revolver, and that this action hardly comported with the act of an insane man. We simply state the reasoning of counsel for appellant to show that if the court erred there might be some plausibility in his claim that the error was prejudicial. But we think there was sufficient proof tending to show that the revolver which was found in the hand of appellant by the officer was the same weapon with which the killing had been done, and its admission in evidence was proper for the very reason which appellant now assigns against its admissibility. That appellant killed his wife with a revolver was, as we have said, at no time in the case open to question. Immediately after shooting her, he ran to the park, and within a short interval of time after the killing of his wife attempted suicide, and is found in the possession of a revolver with three chambers emptied which would rep-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

resent the chambers discharged at his wife, if it was the same weapon he had used on her, with an exploded shell used in his attempted suicide and an unexploded shell. The police officer took him to the county jail and seated together there on a bench the officer interrogated him about the revolver and the killing of his wife. The officer was not inquiring about an indefinite revolver, but about the very one he had taken from him and in connection with the killing of his wife. He admitted killing her. About the revolver he was asked, "Did you purchase it (the revolver) previous to that time of the shooting (referring to the shooting of his wife)?" and defendant answered that he had purchased the revolver the same day; that he had gone downtown and purchased it and the ammunition at a pawnshop. This evidence on the part of the police officer, while it does not point with clearness or certainty to the identity of the revolver as the one with which the killing was done, was sufficient prima facie evidence to warrant its admission in evidence as the revolver with which it was accomplished. Nowhere in the case was there any effort to overcome this showing.

[2] Now, as to the other points: There is no merit in the claim of appellant that the court commented on the weight of the evidence. During the cross-examination, through an interpreter, by counsel for defendant of a witness produced on behalf of the prosecution, the court said: "Never mind what your statement is. This is a small matter. I want to straighten it out. I don't want any dilly-dallying about small matters." Counsel for defendant was endeavoring to impeach the witness by calling her attention to what purported to be testimony given by her on the preliminary examination of the defendant as appeared in the printed record thereof which counsel had. Counsel and the court had some discussion as to the proper method of proceeding to do so. The court suggested that the proper method for counsel to pursue was to read the question and answer to the witness, as counsel claimed it had been given at the preliminary examination and then ask the witness if the question so purporting to have been asked and answered by her was so asked and answered by her. Counsel for defendant claimed that he was entitled to pursue the method he was following on account of the incompetency of the interpreter not permitting the proper method. The court then remarked that another interpreter would be provided, and, counsel for defendant expressing a desire to make a statement to the court, the judge used the language complained of. This remark by the court was not a comment on the weight of any evidence given by the witness then being examined. The "dilly-dallying" had reference to further discussion by counsel of his inability to proceed in the method suggested by the court, which was undoubtedly the correct one, on account of the incompetency of the interpreter, after the court had announced that another interpreter would be called so that the difficulty could be obviated. It had reference to frittering away time in useless discussion about the incompetency of the present interpreter, when another one was to be procured, and had no relation to the testimony of the witness.

Assignments are made of misconduct on the part of the court and district attorney to the prejudice of the rights of the defendant. Only one assignment is made of misconduct on the part of the district attorney in asking a question to which an objection of counsel for defendant was sustained. This assignment is entirely without merit.

[3, 4] It is claimed that the court interrogated witnesses on the part of the people, thereby showing an active sympathy with the prosecution, that it entered into unnecessary controversy with counsel for defendant, was abrupt in its rulings against him, and in several instances unreasonably reproved counsel and showed hostility to the position of counsel for the defendant in the method of presenting his client's case, all of which tended to embarrass and humiliate counsel and prejudice the cause of his client before the jury. But none of these points is well taken. The interrogation of witnesses by the court was for the purpose of bringing out more clearly some facts which the testimony of the witnesses upon the subject had left rather indefinite. As to the other matters complained of, when the record is examined, it is found that they do not amount in any degree to misconduct on the part of the court or show any hostility to either counsel, his client, or his cause. While in some instances the rulings of the court were abrupt and its remarks to counsel emphatic, they were directed to matters respecting testimony and procedure, and directed solely to points and propositions of law involved, and the discussion between court and counsel had reference to the orderly method of procedure in which the court was right. It is true the court might in some respects have been more urbane and proceeded with a nicer regard to the sensibilities of counsel, who was respectful and courteous to the court throughout the trial, and was defending the accused under appointment by the court. This, however, is a temperamental and ethical matter addressed to the court's own sense of propriety, and its conduct in that respect is not subject to review by the appellate court save to consider whether it has tended to prejudice the defendant. People v. Oliveria, 127 Cal. 383, 59 Pac. 772; People v. Modina, 146 Cal. 142, 79 Pac. 842. The court was insisting, when the rulings and remarks complained of were made, on having certain proceedings conducted in what it deemed a prop-

er and orderly way, and, while somewhat brusque and emphatic in insisting that counsel should proceed as directed by the court, these rulings were proper, and made without any intention of injuring counsel or the cause of his client, and cannot be said to have had any such effect.

The judgment and order appealed from are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; MELVIN, J.; HENSHAW, J.; SLOSS, J.

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17 Cal. App. 418

DULEY v. PEACOCK. (Civ. 859.)

(District Court of Appeal, Third District, California. Nov. 8, 1911.)

1. COSTS (§ 12*)—NATURE AND GROUND OF RIGHT—DEPENDENT ON STATUTE—DISCRETION OF COURT.

The right to recover costs is purely statutory, and whether a court can exercise any discretion in the awarding of costs depends on whether the Legislature has committed such discretion to the court.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 20; Dec. Dig. § 12.*]

2. ELECTIONS (§ 307*)—CONTEST—CONSOLIDATION—COSTS.

Code Civ. Proc. § 1125, provides that if the proceedings in election contests are dismissed for insufficiency or want of prosecution, or the election is confirmed, a judgment for costs must be rendered against contestant, and, if the election is annulled or set aside, judgment for costs must be rendered in favor of contestant, and that, where two or more contested elections are joined for the purpose of recounting votes, "the costs shall be apportioned among the parties in the discretion of the court." Actions to contest elections for supervisor of a district of a county and for county clerk were consolidated under authority of the statute. In an order granting a nonsuit in the contest of the election for supervisor, the court decreed that each party to the action pay his own costs. *Held*, in a contest to but one office, the statute clearly makes it the duty to award costs to the victorious party, and, as the reason for the legislative authorization of consolidation was merely to decrease the expense to the parties and the trouble to the court by the clause vesting the court with discretion to apportion the costs, the Legislature evidently intended to fix no new rule, but merely contemplated that costs in such cases would be different in each case consolidated, and intended to provide the court with power to adjust the costs equitably among the unsuccessful parties, and, as any other construction would permit the court to determine whether it would tax an unsuccessful party, the division of the costs between the parties to the contest was erroneous.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 333; Dec. Dig. § 307.*]

Appeal from Superior Court, Del Norte County; J. L. Childs, Judge.

Election contest by West Duley against Thomas E. Peacock. From a decree entered upon a nonsuit requiring each party to pay his own costs, defendant appeals. Reversed, with directions to modify.

James F. Quinn and James McNulty, for appellant. Geo. W. Howe, for respondent.

HART, J. The contestant and contestee were rival candidates for the office of supervisor for the Fourth supervisor district of Del Norte county at the general election held on November 8, 1910. The official canvass of the ballots cast in the several precincts of said supervisor district disclosed the election of the contestee to said office, and his election thereto was thereupon officially declared by the board of supervisors of said county, sitting as a board of canvassers. On December 17, 1910, the contestant filed his complaint, contesting the election of the contestee. At the same election one Ashley Cooper and one W. L. Nichols were opposing candidates for the office of county clerk of Del Norte county, and the latter, upon the official canvassing of the ballots by the board of supervisors of said county, was officially declared to have been elected to said office. Later and in due time Cooper filed a contest against Nichols for the said office of clerk.

The court, having been duly notified by the clerk of the filing of the contests in the two cases mentioned, ordered a special session of the court to be held on the 27th day of December, 1910, for the opening and recounting of the ballots cast for the respective offices so contested. On the day on which the contests came up for hearing, the court, on motion of the attorney for respondent, ordered a consolidation of the two contests for the purpose of counting the ballots. Section 1125, Code Civ. Proc. A motion for a nonsuit was granted by the court in the case at bar and the contest dismissed. In its judgment entered upon the order granting the nonsuit the court decreed that "each party to this action pay his own costs and disbursements incurred." The appeal here is by the contestee from that portion of the judgment binding each party to the contest to pay his own costs, etc.

The single question submitted for determination by this appeal is therefore whether the court erred in adjudging that each party should pay his own costs, etc., the contestee claiming that, having won the contest, he was entitled to judgment for his costs.

[1] The right to recover costs is purely statutory, and, in the absence of a statute, no costs could be recovered by either party. Fox v. Hale & Norcross S. M. Co., 122 Cal. 223, 54 Pac. 731. And it is equally true that, assuming that the Legislature would have the constitutional right to enact such legislation, whether the matter of awarding costs in a given case rests in the discretion of the court must depend upon whether the Legislature has committed such discretion to the court.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[2] In the case at bar, whether the court was authorized, by its judgment, to compel each party to the contest to bear his own costs, is a question which in its solution must of necessity rest upon the proposition whether there is, in the class of cases to which this case belongs, any statutory warrant for such a judgment, again assuming that such a statute would not infringe upon the provisions of the Constitution inhibitory of class and special legislation. The court below, of course, planted its judgment as to the costs on its construction of the language of section 1125 of the Code of Civil Procedure, which reads: "If the proceedings are dismissed for insufficiency, or for want of prosecution, or the election is by the court confirmed, judgment must be rendered against the party contesting such election, for costs, in favor of the party whose election was contested; but if the election is annulled or set aside, judgment for costs must be rendered against the party whose election was contested, in favor of the party contesting the same; *provided, that where two or more contested elections are joined for the purpose of recounting votes as in this title provided, the costs shall be apportioned among the parties in the discretion of the court.* Primarily each party is liable for the costs created by himself, to the officers and witnesses entitled thereto, which may be collected in the same manner as similar costs are collected in other cases" The language of the foregoing section italicized by us was added to said section by the Legislature of 1907 (Stats. 1907, p. 643), there having been previously to said amendment no specific provision as to costs in cases where two or more contested elections were joined. And it was undoubtedly upon that particular language that the court founded its conclusion that it is in its discretion to apportion the costs where two or more election contests are consolidated among the parties, contestants and contestees.

We think the court's construction of the language of the amendment of that section is erroneous. It is not disputed, nor could it be, that in a single contest or a contest wherein the right to but one office was contested it would be the duty of the court, under the plain mandates of the section, to award costs to the victorious party. Campbell v. Free, 7 Cal. App. 151, 93 Pac. 1060. In the case at bar, in other words, if the contest had not been joined with another election contest, it would have been the duty of the court to have "rendered judgment against the party contesting such election, for costs, in favor of the party whose election was contested." The principle of which this provision of the section is predicated is equitable and just. When the board of canvassers, after an official canvass of the ballots cast at an election officially declares a certain person to have received the highest number of votes cast for the office for which he has been a candidate and has therefore been elected to such office, the person so declared to have been elected is at once vested with a prima facie title to the office. On the other hand, any elector, to conserve the rights of the public or the people, who are entitled to be protected against usurpation of public offices by those not legally entitled to exercise the duties thereof, may, and it is his duty, if there exist probable grounds therefor to challenge, through an appropriate proceeding, the right of a person to hold and discharge the duties of a public office. The Legislature, therefore, deemed it only just to authorize the court to which the adjudication of such differences is confided to impose upon the losing party in such a contest the burden of reimbursing the victorious party for the costs which the latter has necessarily incurred by reason of such contest. Now, then, this being clearly and unquestionably the law as to costs as the Legislature has laid it down in those cases where there is but a single office concerned in the proceeding before the court, such law obviously involving the only just rule as to the awarding of costs in such cases, the first question that suggests itself to the mind, when examining the amendment of section 1125 of the Code of Civil Procedure, is: Upon what just principle can there be founded any different rule as to costs where the proceeding involves the contest of more than one office from that prescribed in those cases where the proceeding involves but a single office? Or, to put the question in another form, why should not the victorious party in a contest of this character be equally as entitled, from a just view of the proposition, to his costs in a proceeding wherein and whereby the right to other offices has been contested as he confessedly would be had his contest been fought out in a proceeding in which the right to hold the office involved was the sole and single issue? These questions follow from the ambiguity of the language added to section 1125 by the Legislature of 1907, upon which the court below obviously based its judgment in the matter of the costs, and the meaning of which must be ascertained by construction.

There is but one answer to the questions propounded. There is no just reason why the victorious parties in a single proceeding involving the right to several offices should not be awarded their costs as they would be if their respective contests were each tried alone or not joined with other similar contests in the same proceeding. The manifest purpose of authorizing two or more contests for offices growing out of the same election to be joined in one proceeding and thus to be heard at one and the same time by the court was to minimize the expense to the parties and the trouble to the court. These contests are usually based upon propositions calling for a review or recount of the ballots cast at the election for the contested office, and where, in the same county, it is claimed that the election officers have improperly counted the ballots or so conducted their duties as that the returns made by them do not involve a true expression of the wishes of the electors with regard to several county or township offices, the investigation of a charge of that sort may just as easily be made in a single proceeding as to all the offices so contested as it may be as to one office. The bulk of the expense incurred in such contests flows from the necessity of employing special clerks to examine, count, and tally the ballots under the supervision of the court, and, as before suggested, the object the Legislature had in view in authorizing the joinder of such contests, where there were more than one arising from the same election, was to make the expense in prosecuting the same less onerous on each of the losing parties than it would be if each contest were prosecuted singly, and, furthermore, to save time and trouble to the court, which would otherwise be compelled to hear several different contests in as many different proceedings where all may just as conveniently be heard in one. This, we say, was the primary and paramount object of the amendment, and, while the language as to the apportionment of the costs "among the parties in the discretion of the court" is, upon its face, somewhat ambiguous, yet we think that, upon a fair consideration of it and the unjust result which would inevitably follow the construction given it by counsel for the respondent and the court below, it is clear that the legislature merely intended to say that, where there were several election contests joined and heard in the same proceeding, "the costs shall be apportioned among the losing parties, according as the court, in the exercise of a sound discretion, founded upon all the circumstances as disclosed, may deem fair and just as between such parties." In other words, the discretion vested in the court by the amendment was not intended to commit to the court the power or right to require the victorious parties to bear the necessary costs or expense to which they have been put by the contest, but to merely make an equitable and just apportionment of all the costs accruing by reason of the proceeding among those who have failed, whether the contestants or the contestees, or the contestant in the one case or the contestee in another, to sustain the grounds of contest or to refute them, it being plainly apparent that, although two contests may be joined in one proceeding, the expense attendant upon the investigation of the contest with respect to one office may be largely in excess of the expense incurred in the investigation of that of the other—as, for example, where, as here, one of the contested offices is a township and the other a county office, therefore requiring perhaps the examination and counting of more ballots to determine the contest of the right to the latter office than the contest as to the former.

The conclusion at which we have arrived is in accord with the views of the Supreme Court as expressed through Mr. Justice Shaw prior to the adoption of the amendment in question in the case of Coghlan v. Alpers, 140 Cal. 650, 74 Pac. 146, as follows: "Costs would be allowed and judgment given therefor in the same manner as if the cases had not been consolidated, except that if any item should be incurred by two or more parties jointly the court should either apportion the amount equitably among them, or provide in the judgment that there should be but one payment by the party held liable in case separate judgments were given, for the same sum in favor of different parties. In either event, the consolidation would not be prejudicial to the appellant." Any other construction of the amendment than that with which we are in accord would place it in the power of the court in cases where there were several different contests originating out of the same election to deny to the victorious parties, who would be as of right entitled to their costs if their respective contests were heard independently of and separately from the others, reimbursement at the hands of the vanquished parties for the costs which have accrued against them by reason of the contests. In other words, the effect of respondent's contention, if sustained, would be to leave it entirely in the discretion of the court to say whether the parties winning their contests should or should not have their costs, since the right to consolidate the contests rests wholly in the court's discretion, upon the manner of the exercise of which would necessarily hinge the determination of the question whether the prevailing parties would or would not be entitled to reimbursement for their costs.

There is much force in the contention of the appellant (though the point need not be decided here) that, if the construction of the statute in question by respondent be tenable and should be sustained, the result would be that the enactment would be in violation of several provisions of the Constitution. Section 11, art. 1; subdivision 33, § 25, art. 4; Bloss v. Lewis, 109 Cal. 496, 41 Pac. 1081; Darcy v. Mayor, etc., 104 Cal. 645, 38 Pac. 500.

It follows from the foregoing views that the judgment, in so far as it undertakes to adjudicate the matter of costs by apportioning them among all the parties to the contest, is erroneous. The part of the judgment appealed from is therefore reversed, with directions to the court below to so modify it as to allow to the contestee the costs legitmately accruing against him by reason of the contest.

We concur: CHIPMAN, P. J.; BURNETT, J.

17 Cal. App. 331

PEOPLE ex rel. SPIERS v. LAWLEY et al.

(Civ. 866.)

(District Court of Appeal, Third District, California. Oct. 30, 1911. On Petition for Rehearing, Nov. 29, 1911. Rehearing Denied by Supreme Court Dec. 29, 1911.)

1. Turnpikes and Toll Roads (§ 30*)—Duration of Franchise—Construction.

While a franchise for a toll road is to be strictly construed, where there are no express words of limitation or law fixing the duration of franchises, a court will not, except in a very clear case, declare as the result of a mere construction that such a franchise had terminated.

[Ed. Note.—For other cases, see Turnpikes and Toll Roads, Cent. Dig. § 19; Dec. Dig. § 30.*]

2. Turnpikes and Toll Roads (§ 23*)—Franchises as "Property."

A franchise to one and to such persons as he might associate with him to construct and maintain a turnpike road and to collect tolls thereon, subject to supervision by county officers, granting a right of way, and fixing a time for the completion of the road, is "property" within Civ. Code, § 1044, providing that "property of any kind may be transferred except as otherwise provided by this article," and as such is transferable by assignment or in any other authorized mode of transferring real property.

[Ed. Note.—For other cases, see Turnpikes and Toll Roads, Cent. Dig. §§ 67–70; Dec. Dig. § 23.*

For other definitions, see Words and Phrases, vol. 6, pp. 5693–5728; vol. 8, pp. 7768–7770.]

3. Turnpikes and Toll Roads (§ 23*)—Franchise—Right of Assignment—"Associate With."

Under a franchise to one "and such persons as he may associate with him" to construct and maintain a turnpike and toll road with a grant of a right of way, and the requirement that the road should be constructed within two years, the grantee named had an implied right to transfer or assign certain interests in the franchise, since he could not otherwise associate persons with him; the term "and such persons as he may associate with him" not meaning persons employed to assist in the construction and maintenance of the road, but persons in whom he might vest an interest and franchise.

[Ed. Note.—For other cases, see Turnpikes and Toll Roads, Cent. Dig. §§ 67–70; Dec. Dig. § 23.*

For other definitions, see Words and Phrases, vol. 1, p. 584.]

4. Execution (§ 27*)—Property Subject—Toll Road—Franchise.

In the absence of any provision therefor, a toll road franchise may be levied upon and sold under execution for the satisfaction of any judgment against its owners, and Civ. Code, § 388, expressly so provides.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 64; Dec. Dig. § 27.*]

5. Turnpikes and Toll Roads (§ 23*)—Interest of Grantee—Property in Fee—Statutes.

In view of Civ. Code, § 1072, providing that words of inheritance or succession are not requisite to transfer the fee in real property, and section 1105, providing that a fee-simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended, the grant of a toll road franchise not expressly limited by the grant itself vests in the grantee named and his associates an estate in fee in the real property so granted.

[Ed. Note.—For other cases, see Turnpikes and Toll Roads, Cent. Dig. §§ 67–70; Dec. Dig. § 23.*]

6. Turnpikes and Toll Roads (§ 23*)—Franchise—Transfers—Consent of State.

Where a grant of a franchise to construct and maintain a toll road contained in itself no provision requiring that the consent of the state should first be obtained before the right to sell or transfer the franchise could be exercised, or any statute to that effect, it might be transferred without the consent of the state.

[Ed. Note.—For other cases, see Turnpikes and Toll Roads, Cent. Dig. §§ 67–70; Dec. Dig. § 23.*]

7. Turnpikes and Toll Roads (§ 33*)—Power to Control and Regulate.

The state always retains or reserves the power to regulate and control toll road franchises wherever they may be or to whomsoever's hands or ownership they may be transmitted, and to see that they shall not only be used for the purposes which they were created to subserve, but so used as not to injure the public.

[Ed. Note.—For other cases, see Turnpikes and Toll Roads, Dec. Dig. § 33.*]

8. Turnpikes and Toll Roads (§ 31*)—Forfeiture of Franchise.

The state may forfeit a toll road franchise and all the rights acquired thereby, where it is not used or where it is misused.

[Ed. Note.—For other cases, see Turnpikes and Toll Roads, Cent. Dig. §§ 79–89; Dec. Dig. § 31.*]

9. Trial (§ 404*)—Finding—Construction.

A finding that defendants' predecessor "never associated with him in the construction and maintenance of said toll road any person or persons whatsoever," as he was authorized by his grant to do, involves a conclusion of law as well as a finding of fact; since it is necessarily founded on a construction of the legal effect of the language of the grant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 957–962; Dec. Dig. § 404.*]

10. Turnpikes and Toll Roads (§ 9*)—Transfer—"Such Persons as He May Associate with Him.

Defendants' predecessor and "such persons as he may associate with him" were authorized by grant to construct and maintain a turnpike road, and to collect tolls thereon with the requirement that the road be constructed within two years, but he never associated any one with him in the construction of the road. Defendants' rights therein rested upon a promise of the original grantee to devise to a part of them an interest in the franchise if they would help maintain the road, and upon a decree of distribution in the estate of the widow of the original grantee. *Held*, that defendants were, within the terms of the grant, "such persons as he may associate with him," since it was requisite that such persons be associated with the grantee both in the construction and in the maintenance of the road.

[Ed. Note.—For other cases, see Turnpikes and Toll Roads, Cent. Dig. §§ 12–18; Dec. Dig. § 9.*]

11. Turnpikes and Toll Roads (§ 38*)—Constitutional Provisions.

Civ. Code, § 516, enacted in 1872, which required the owner of a toll road to post up at or over each gate or in some conspicuous place a printed list of the rates of toll levied and demanded, was amended by Acts 1900–01, p. 5, to require that the printed list show the date when the franchise or privilege under which the right to collect tolls was claimed as granted, and the term of duration of such franchise, and the date upon which the rates of toll were last fixed by the board of supervisors. *Held*, that the requirements of the amendment were not intended to apply to perpetual franchises, or those as to which no limit as to duration have been prescribed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Turnpikes and Toll Roads, Cent. Dig. §§ 102–105; Dec. Dig. § 38.*]

On Petition for Rehearing.

12. TURNPIKES AND TOLL ROADS (§ 23*)—FRANCHISE—TRANSFER—CONSENT OF STATE.

The state has the right to require as a condition to the transfer of a toll road franchise that its consent be procured.

[Ed. Note.—For other cases, see Turnpikes and Toll Roads, Cent. Dig. §§ 67–70; Dec. Dig. § 23.*]

Appeal from Superior Court, Lake County; Thos. J. Lennon, Judge.

Action by the People by U. S. Webb, Attorney General, on the relation of William Spiers against Charles A. Lawley and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Chas. H. Shurtliff, John T. York, and Theo. A. Bell, for appellants. U. S. Webb, Atty. Gen., F. E. Johnston, and E. J. Talbott, for respondent.

HART, J. This is a proceeding in quo warranto.

The complaint charges that the defendants have "usurped, intruded into and unlawfully held and exercised," and so continue wrongfully and without right to exercise, a certain franchise for the construction and maintenance of a toll road starting from a certain point in Napa county, and extending into and terminating at a certain point in Lake county, and for the collection of tolls thereon, and asks the judgment of the court that said franchise be declared to have ceased and terminated on the death of the original grantee, "that the defendants herein be adjudged as usurping and intruding into and unlawfully holding said franchise," and that they be excluded therefrom, etc. Judgment passed for the plaintiff, and this appeal is prosecuted by the defendants from said judgment and from the order denying them a new trial.

The franchise involved here was granted to one "John Lawley and his associates" by an act of the Legislature of 1865–66. Said act reads as follows:

"Section 1. John Lawley, and such persons as he may associate with him, are hereby authorized to construct and maintain a turnpike road from Edward Ebey's residence, in the county of Napa, through St. Helena Cañon, and over the St. Helena range of mountains, to Sigler Valley, by Sigler Cañon, in Lake county, a distance of about twenty miles.

"Sec. 2. That said grantees, upon the construction and completion of said road, are hereby authorized to charge and collect such rates of toll for travel and passage upon the same, in the county of Lake, as the board of supervisors of said county may fix and establish, and in the county of Napa, as the board of supervisors of Napa county may fix and establish; and the said boards of supervisors shall have authority to regulate and charge such rates of toll annually.

"Sec. 3. The right of way for said road is hereby granted to John Lawley and his associates; provided, that in case the lands of private persons are taken for said road, the right of way may be obtained in the same manner and by the same mode of proceeding as is provided by law for railroad companies.

"Sec. 4. After the expiration of five years from the time of the completion of said road, the said counties of Napa and Lake shall have the right to take, possess, and own said road, by payment to said grantees such sum as three appraisers, one to be selected by the board of supervisors of Napa county, one by the board of supervisors of Lake county, and one by said grantees aforesaid, may determine the value thereof to be; and in case one of said parties should fail to select such appraiser after reasonable notice so to do by the other parties, then such valuation as may be made by the two appraisers chosen as aforesaid.

"Sec. 5. The rights herein granted are conferred upon the express condition that said road shall be completed, with requisite and proper bridges, culverts and embankments, in good order, within two years from the passage of this act." Stats. of Cal. 1865–66, p. 277.

The Legislature of 1867–68 amended section 1 of said act so as to read as follows: "Section 1. John Lawley and his associates are hereby authorized to construct and maintain a turnpike road from Edward Ebey's residence, in the county of Napa, through St. Helena Cañon and over the St. Helena range of mountains, to a point in Loconoma Valley, where the road leading from Calistoga to Lower Lake intersects the road from Calistoga to Lakeport via Cobb Valley." St. 1867–68, p. 138.

Lawley, the grantee, alone completed the construction of the road during the year 1868, and operated it alone, according to the findings, until March, 1871, when John Lawley, in consideration of the indebtedness owing by him to one William Patterson, executed and conveyed to the latter an undivided one-quarter interest in said toll road "and all the franchises and rights granted to him by the aforesaid acts of the Legislature." On the 6th day of January, 1877, John Lawley executed a conveyance purporting to transfer all his right, title, and interest in and to the said toll road and the right to collect tolls thereon to one W. C. Watson, then cashier of the bank of Napa. The purpose of this conveyance was to secure said bank in a large indebtedness due from said John Lawley to said bank. Watson subsequently conveyed to the bank. In the year 1880, so the court finds, "the defendants, Harry B. Lawley and Charles A. Lawley, who were then of the ages of 21 and 23 years, respectively, declared to their father, the said John Lawley, that they intended to leave home and work for themselves, and thereupon the said John Lawley, who was then insolvent, stated to said defendants that if they would continue to assist him in the conduct and operation of said toll road, and other properties then owned by said John Lawley, and assist him in paying off certain indebtedness existing against said toll road and the other properties, he would give to each of them an undivided one-fourth of his interest in said toll road and franchises, whereupon the said defendants accepted said proposal, and from 1880 to the time of the death of the said John Lawley they each contributed their labor and certain moneys toward the maintenance and operation of said toll road, and the other said properties, and assisted in paying off all indebtedness against the same." In the year 1884 "William Patterson by deed of conveyance transferred all his interest in and to said toll road and the right to collect tolls thereon, to Cynthia A. Lawley, wife of said John Lawley," and thereafter said Cynthia A. Lawley died, administration was duly had upon her estate, and, under the decree of distribution therein entered, all her interest in and to said toll road and the right to collect tolls thereon was distributed to Charles A. Lawley, Harry B. Lawley, Ada W. Neal, and Mary F. Patton, children of said John Lawley and Cynthia A. Lawley. On the 17th day of August, 1889, John Lawley executed a conveyance purporting to transfer all his right, title and interest in and to the said toll road, and right to collect tolls thereon, to his four children above named. There were some subsequent conveyances involving said franchise—one by the bank of Napa and one by a referee appointed by the superior court of Napa county in a certain action in that court between the children of John Lawley—but these are of no material importance in their bearing upon the questions presented here for decision. John Lawley, the father of defendants, died some time prior to January, 1906.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The main contention of the respondent is that the life of said franchise was coextensive only with the lives of John Lawley and his associates, if any he had within the contemplation of the terms of the grant from the state, and that, John Lawley having never had any associate or associates, said franchise ceased to exist immediately upon his death. It is further contended that the franchise was forfeited by reason of the transfer of the same by John Lawley without the consent of the state, and also by reason of noncompliance with the requirements of section 516 of the Civil Code. The court found as a matter of fact, as well as a conclusion of law, that "John Lawley never at any time associated with himself in the construction and maintenance of said toll road any person or persons whatsoever." The court further found that while the defendants Harry B. and Charles A. Lawley "did affix, and at all times kept up, at or near the said toll gate on said toll road, a list showing the rates of toll last theretofore duly fixed and determined by the said board of supervisors of the county of Napa," they failed to comply with the provisions of said section 516 of the Civil Code, "other than as specified in this paragraph." The judgment, however, is founded entirely on the fact of the death of John Lawley and the asserted termination of the franchise by reason thereof.

The appellants contend that the franchise in question is property in the sense that it may be transferred the same as any other kind of property; that, there being no limitation provided in the franchise as to the time during which it should run, the state granted to John Lawley and his associates, if any he had, an estate in fee in said franchise and toll road; that, consequently, the franchise did not cease to exist or terminate with the death of John Lawley.

It is further contended that the grant, properly construed, contemplates that the "associates" of John Lawley are such persons as he might associate with him either in the construction or the maintenance of the toll road or both.

As to the claim that the franchise was forfeited by the failure of the appellants to comply with certain of the provisions of section 516 of the Civil Code, the position of appellants is that those particular requirements of said section with which the court found that they had omitted to comply, having been added to the section subsequently to the granting of the franchise, are, as applied to the toll road in question, in the nature of legislation impairing the obligations of a contract, and are therefore void. The theory upon which the issues were decided by the court below is predicated of the assumption that the franchise granted by the acts of the Legislature referred to is a mere license or personal privilege to collect tolls; but it is very clear to my mind that such a construction of such franchises as the one here involved would result in working the rankest sort of injustice in many cases. It would certainly open up opportunity for the destruction of valuable rights acquired thereby and thereunder, and this no rational or well-poised system of laws ought to tolerate in any case or under any circumstances. If, for example, the life of the franchise here were intended to be determinable upon the death of John Lawley, assuming that he had no associates within the meaning of the grant, then obviously it would cease to exist, however soon after the completion of the toll road—whether a year, a month, or a day would be immaterial—that he might die. Thus it may readily be seen, that, after he had expended thousands of dollars in the construction of the road and perhaps created an indebtedness against it in necessarily borrowing large sums of money to build it, the franchise would cease to exist immediately upon his death, the rights acquired thereby would become vested in the counties through which the road traversed, and Lawley's creditors whose money had been employed in the construction of the road perhaps left without resources from which they might recoup themselves.

It is a proposition within the compass of the common history of California that in the infancy of the state the only means of transportation either of freight or passengers or as a means of traveling from point to point were over the wagon roads constructed and maintained either by the taxpayers or private individuals or corporations organized for the purpose of building and maintaining such thoroughfares. Railroad transportation, as a financially feasible scheme, had, at the time of the granting of the franchise in question, scarcely more than entered the minds of the people of California as a serious proposition, and even now, in many of the mountainous regions of the state, it appears to be regarded as financially impracticable to build and maintain railroads. It goes without saying that the general prosperity of a state, if such prosperity would be developed and maintained up to the full measure of its capacity in resources, must depend very largely on whether all the sections of the commonwealth are brought into reasonably close touch with commercial, industrial, and financial centers. Without wagon roads in the earlier periods of the state's history commercial intercourse to any important extent between the people of the various sections of the state would have been impossible. In fact, public roads, even with all the facilities for railroad transportation which later years have brought to California, are an absolute necessity to the general welfare and prosperity. The building and maintenance of public highways is, under the most favorable conditions, a very heavy burden on the taxpayers, and it is safe to say that few, if any, of the roads originally established and maintained under a toll road franchise, would ever have been constructed if the taxpayers had been required to bear the cost of their construction. In other words, to encourage and promote the building of highways, particularly in the earlier history of the state, it was necessary to grant toll road franchises vesting the grantees with the right to build and maintain public highways, and to enjoy the right to claim and appropriate to themselves the emoluments thereof as rewards or compensation for performing those public duties which it is the essential part of government to perform, but which it is often financially impracticable for the latter to execute. It was therefore in the pioneer days of the state, as, indeed, it is now as to counties to which that power has been committed, where the necessity therefor is found to exist, only in line with an enlightened and necessary policy of the state to grant these franchises and thus minimize the difficulties of general commercial and business intercourse between the inhabitants thereof.

[1] The state should not, therefore, be deemed to have intended to so restrict or hamper the rights of its grantees under such franchises as to permit the destruction of those rights except upon very substantial reasons or for very material causes. In other words, while the general rule is that such grants are to be strictly construed, it should be a very clear case—one admitting of little, if any, doubt of the correctness of such a construction—of an intention on the part of the granting power to limit the life of such a franchise upon an event which may happen at any moment, where, as here, there are no express words of limitation and no law, as now, expressly fixing the period of time during which it shall run, before a court should feel justified in declaring, as the result of a mere process of construction, that such a franchise has ceased to exist.

There is, as will be observed, no limit fixed by the grant upon the time during which the franchise involved here shall run, and the conclusion reached by the learned court below that it ceased to exist synchronously with the death of John Lawley proceeds from the theory that the franchise is a personal trust, and therefore could not survive after the death of the person to whom the same had been specially granted.

[2] In my opinion the question whether franchises of the character of the one involved here are assignable must depend upon the proposition whether they are property within the meaning of that term as used in section 1044 of the Civil Code, which provides that "property of any kind, may be transferred, except as otherwise provided by this article." If the word "property" as so used was not intended to be broad enough to include franchises of the sort involved here, then manifestly the franchise under attack in this case would have to be construed and held to be a mere personal privilege or trust, and, assuming that John Lawley left no associate or associates within the meaning of the term, "associate," as employed in the grant, the same expired and passed out of existence coincidentally with his death. If, on the other hand, the franchise is property within the purview of section 1044 of the Civil Code, then obviously it is, like any other species of property, subject to transfer, and may be, even in the absence of an ex-

press provision of law to that effect, sold on execution in satisfaction of any judgment which might be obtained against the owner thereof.

That the franchise in question is property within the meaning of section 1044 of the Civil Code, is a proposition concerning which I entertain no kind or degree of doubt. While there are some early cases which seem to hold that ferry franchises are nothing more than a personal trust, and not the subject of levy, sale or delivery under execution (Munroe v. Thomas, 5 Cal. 470; Thomas v. Armstrong, 7 Cal. 286; Wood v. Truckee Turnpike Co., 24 Cal. 474; People v. Duncan, 41 Cal. 507; and Gregory v. Blanchard, 98 Cal. 313, 33 Pac. 199), still, I think, there are other California authorities which support the view that they are real property, to be governed by the same rules by which other real property is regulated. Indeed, I know of no principle or reason why they should be regarded in any other light. There are many reasons why they should be so classified and treated. While the government ought always to subject the exercise of such rights—rights flowing from the bestowal of certain functions of government upon corporations or natural persons—to such restrictions and regulations as will prevent their abuse or their use against the interests of the public, which they are created to serve, it will not render them practically worthless or undesirable by placing such unreasonable restrictions upon their exercise as to make it possible that rights acquired thereby and thereunder may be unjustly destroyed. To do so would inevitably result in greatly handicapping the government in the execution of its paramount end, viz.: The promotion of the safety, comfort, convenience, the prosperity, and happiness of the inhabitants of the state; for who would ask for a franchise, the execution of the purpose of which would necessitate the outlay of a vast sum of money, if the privilege or right so granted could, upon the merest pretext, deduced entirely through construction, be divested, and the property acquired thereby and thereunder practically confiscated?

[3] It seems to me that the power or right in John Lawley to transfer or assign certain interests in the franchise here is clearly implied from the language of the grant itself. The person or persons whom John Lawley is thus authorized to associate with himself in the construction and maintenance of the road are not specifically named in the grant. Who they are or may be is a matter left solely to the determination or election of John Lawley. It is obviously true that John Lawley could not associate with himself another person or other persons in the construction and maintenance of the road without assigning to such person or persons some interest in the franchise. This would, of course, be just as true before the construction of the road as after its completion, and, if thus it is necessarily to be implied that he may assign certain interests in the franchise before the road is constructed, what language is there in the grant that may reasonably be so construed as to justify the conclusion that he was without right to assign such interests after the completion of the road? Of course, it will not be contended that the language, "and such persons as he may associate with him," means anything less than persons in whom he might vest an interest in the franchise. In other words, no one will say that the mere employment of persons to assist in the construction and maintenance of the road would amount to an association of such persons with Lawley within the contemplation of the grant. But there are cases which sustain my position, and I will now refer to a few thereof.

Although, as I have shown, some of the California cases have declared that franchises of the character of the one concerned here involve mere personal trusts and others that they are real property, yet the question as it is presented in its present form has never before been urged before and decided by the higher courts of this state. The precise question submitted here is, therefore, new in California. But, as I have already indicated, I am in accord with those cases which hold that such franchises constitute property. In the case of Powell v. Maguire, 43 Cal. 11, speaking of a ferry franchise, Justice Rhodes, in a concurring opinion, said: "I am of the opinion that the franchise in question is real estate; that in its transfer it is to be governed by the rules applicable to the transfer of title to other real estate." It is held in the case of Stockton Gas, etc., Co. v. San Joaquin County, 148 Cal. 319, 83 Pac. 56, 5 L. R. A. (N. S.) 174, that franchises authorized by section 19 of article 11 of the Constitution to lay pipes and conduits, or erect poles and supply the inhabitants of a city with artificial light, are incorporeal hereditaments appurtenant to the land. The court says: "The principle that franchises of the character here involved are treated as incorporeal hereditaments finds ready support from the authorities." And in support of this announcement it quotes approvingly from Bowman v. Wathen, 2 McLean, 376, 3 Fed. Cas. No. 1,740, in which it is decided that a ferry franchise is real property and passes by deed; that it "is assets in the hands of heirs, and in all respects is subject to the laws which regulate real estate"; that "there would seem to be no doubt that the ferry franchise, with all that belongs to it, may be taken by descent or by conveyance the same as other interests which pertain to realty. * * * In this respect no difference is perceived between a ferry franchise, the franchise of a toll bridge, a turnpike or railroad, or any other franchise of the same nature." In many of the other jurisdictions of this country the same rule is firmly established. In Wilmington & R. A.

Co. v. Downward (Del.) 14 Atl. 721, it is said that "a franchise is property, and it cannot wantonly or of whim be taken away by legislative act and transferred to another." "A franchise," says the Supreme Court of Connecticut, Norwich Gas Light Co. v. Norwich City Gas Co., 25 Conn. 19, "is property which may be transferred by sale or devise, and it will descend to heirs like other property." "The grant was of a franchise, which had the legal character of an estate or property. 'An estate' said Chancellor Kent (3 Kent's Com. 458), 'in such a franchise and an estate in land rest upon the same principle, being equally grants of a right or privilege for an adequate consideration.'" Oakland R. Co. v. Oakland B. & F. V. R. Co., 45 Cal. 365, 373, 13 Am. Rep. 181. "A franchise," said Justice Daniel, in West River Bridge v. Dix, 6 How. 507, 534, 12 L. Ed. 535, "is property and nothing more. It is incorporeal property, and is so defined by Justice Blackstone when treating in his second volume (chapter 3, p. 20) of the rights of things. It is its character of property which imparts to it value, and alone authorizes in individuals a right of action for invasion or disturbance of its enjoyment. A franchise, therefore, to erect a bridge, to construct a road, to keep a ferry, and to collect toll upon them, granted by the authority of the state, we regard as occupying the same position, with respect to the paramount power and duty of the state, to promote and protect, as does the right of the citizen to the possession and enjoyment of his land, under his patent or contract with the state, and it can no more interpose any obstruction in the way of their just exertion." In the same case Justice McLean said: "It is objected that this bridge, being owned by a corporation, and used by the public, does not come within the designation of private property. All property, whether owned by an individual or individuals, a corporation aggregate or sole, is within the term. In short, all property not public is private." See Welch v. County of Plumas, 80 Cal. 338, 22 Pac. 254; Lippencott v. Allander, 27 Iowa, 460, 1 Am. Rep. 299; Dufour v. Stacey, 90 Ky. 288, 14 S. W. 48, 29 Am. St. Rep. 374; Johnson's Appeal, 95 Pa. 79; Evans v. Hughes County, 3 S. D. 580, 54 N. W. 603; Greer v. Haugabook, 47 Ga. 282.

I could well rest the conclusion at which I have arrived that a franchise of the kind involved in the case at bar is property—real property—within the full meaning of section 1044 of the Civil Code, upon the foregoing authorities, by which the proposition seems to be conclusively established. Still the case of Lippencott v. Allander, supra, as to the facts, so closely resembles the present case that I feel justified in quoting from the opinion therein in extenso. The Iowa Supreme Court in that case, among other things, says: But one question is presented by the record for our determination. It is this: Is a ferry license vacated or the franchise lost by the death of the party to whom it was granted? "The right acquired under a ferry license is called a franchise, and is conferred by grant from the government, and with an implied covenant, on the part of the government, not to invade the right vested, and, on the part of the grantee, to perform the duties and conditions prescribed by the grant. * * * The fact that it is conferred by grant from the government, and may be forfeited for misuser or nonuser does not argue that it is not property, or that it may be lost in a way or manner which will not deprive the owner of other property or his rights therein. * * * Hence it is thought that the death of the grantee terminates the franchise. The answer to this is: That, if the person exercising the franchise fails to perform the duties appertaining thereto, the license, by proper proceedings, may be revoked. Rev. § 1212. And that this position of appellee is not in accordance with the policy of our statutes is made very plain by the provisions permitting and regulating the sales of the franchise upon execution. In such case the purchaser, by substitution, assumes the duties of the original grantee, and acquires all his rights. No reason can be given why the law will permit this, and yet prohibit the exercise of the franchise, in case of the death of the grantee, by his representatives. The doctrine contended for leads to another inconsistency, namely, the franchise may be subjected to the payment of the debts of the grantee in his lifetime, but is not assets for the payment of the same debts after his death. The grant of a ferry franchise is made for a specified time, not less than three nor more than ten years, with no reservation that it shall terminate upon the death of the grantee. Being, as we have seen, property, it would not, upon every analogy of the law, be lost by the death of the grantee. At common law it was granted as other real property, in estates for years, for life, or in perpetuity, and was so held. Under our statute, it is granted in an estate for years only; and the death of the grantee can no more terminate it than the death of a tenant can terminate a like estate in lands. The above hardship, and injustice of the rule contended for, support a powerful argument against it. These franchises often require great outlays for boats, improvement of roads, etc., in order to render them remunerative to the owners, and useful to the public. The property thus acquired is valuable only in connection with the franchises; and, if they are forfeited by the death of the grantees, great loss and gross injustice would thus be wrought their estates. The doctrine contended for by defendant's counsel is not supported by the authorities they cite, viz., Munroe v. Thomas, 5 Cal. 470, and Thomas v. Armstrong, 7 Cal. 286. These cases hold that ferry franchises are not the subjects of levy and sale under execution. The decisions appear to be based upon the grounds that a ferry franchise involves a personal trust, granted by the sovereign, upon conditions imposed upon the grantee, alone; and his liability cannot be removed by substitutions. Such sales, as we have seen, are recognized by our statutes, and the ground of these decisions seems to be unsupported by reason and principles of law."

[4] It thus being clearly established that the franchise involved here is property in the sense of that term as it is used in section 1044 of the Civil Code, it follows, of course, that, under the provision of said section, it is subject to all the rights and burdens of property of any other kind, and that it may be transferred by assignment or by any other authorized mode of transferring real property; or, under section 388 of the same Code, or, as stated even in the absence of any such a provision, it may be levied upon and sold under execution, for the satisfaction of any judgment against the owner or owners thereof, "in the same manner, and with the same effect, as any other property."

[5] The conclusion to which the foregoing views irresistibly lead is that, the time to which the franchise here shall run not being expressly limited by the grant itself, the effect of said franchise was to vest in John Lawley and his associates an estate in fee in the franchise and the toll road; in other words, an estate in fee in the real property so granted to them by the state. Sections 1072, 1105, Civ. Code.

[6] This being true, and since there is no provision in the grant itself or of any statute to which my attention has been directed expressly requiring that the consent of the state shall first be obtained before the right to sell or transfer the franchise may be exercised, manifestly said franchise may be transferred without the consent of the granting power. I do not, however, intend to be understood as holding that the state could not have made the procurement of its consent a prerequisite or a condition precedent to the exercise of the right by the grantee to transfer the franchise; but the state has not done so in this case by express language or by language reasonably capable of the construction that such was its intention.

[7] The state always retains or reserves the power to regulate and control such franchises wherever they may go or to whomsoever's hands or ownership they may be transmitted, and its chief, and, indeed, only, concern with regard to such grants is that they shall not only be used for the purpose which they are created to subserve, but so used as not to injure the public or trespass upon its rights.

[8] Having this power of supervision or control over such grants, the state may forfeit them and all rights acquired thereby where they are not used or where they are misused. There is, therefore, no necessity for imposing restraints upon or in any way fettering the power of alienation as to estates thus created and thus rendering their value as property exceedingly precarious.

[9] While the result at which I have arrived is manifestly decisive of this case, still I can conceive no impropriety in saying that in my opinion the court erred in finding that John Lawley "never associated with himself in the construction and maintenance of said toll road any person or persons whatsoever." This finding obviously involves a conclusion of law as well as a finding of fact, since necessarily it is founded on a construction of the legal effect of the language of the grant.

[10] The act, as we have seen, provides that "John Lawley, and such persons as he may associate with him, are hereby authorized to construct and maintain a turnpike road," etc.

The respondent contends, as we have seen, that the term "associate," as it appears in the act, contemplates only such persons as John Lawley might have associated with himself in the construction as well as the maintenance of the road. In other words, it is insisted that unless John Lawley associated with himself some person or persons in the construction of the turnpike, but constructed it himself without associates in that work, then he could not associate others with himself, within the meaning of the grant, in the maintenance of the road or after the completion of its construction.

Of course, the Legislature had some material or important purpose in view when authorizing John Lawley, if he chose to do so, to associate others with himself in the execution of the terms of the grant, and I can conceive of no other object intended thus to be effected than that of clothing Lawley with the right to invoke assistance in the building and operation of the road in the event that he found himself unable financially to carry out the purposes of the franchise himself. The purposes of the franchise were twofold, viz.: (1) To construct the road; (2) To operate it. The contingency to meet which the provision was inserted in the grant authorizing Lawley to associate with himself other persons in the prosecution of the enterprise was just as likely to happen in the matter of the maintenance of the road as it was in the matter of its construction, and, the state being equally as interested in its maintenance as in its construction, it would hardly be reasonable to hold that the Legislature intended to say that Lawley could not take associates, within the contemplation of the grant, in the maintenance of the turnpike after its completion by him alone. A contrary view of this proposition would, it seems to me, necessarily involve an imputation to the Legislature of a design to lay a trap by which the forfeiture of the franchise for nonuser might happen long before the grantee named in the franchise had been given an opportunity to reimburse himself for the financial outlay requisite to build the road.

Apart, therefore, from the consideration that the franchise and its essential concomitants are transferable the same as any other character of property and that Lawley, the named grantee, could consequently have taken in associates either in the construction or maintenance of the road or in both or have sold and transferred it altogether, even in the absence of a provision in the grant authorizing him to do so, it is clear to my mind that the Legislature intended to clothe Lawley with the right to take in associates in the prosecution of the enterprise at any time—after as well as before the completion of the turnpike. It follows, of course, that the appellants, although associated with John Lawley in the maintenance of the road after its construction, are, nevertheless, within the purview of the act granting the franchise in question, "such persons as he may associate with him," etc.

I am not prepared to say that the amendment by the Legislature of 1901 (Stats. 1901, p. 5) of section 516 of the Civil Code would involve, if applicable to the franchise in question, legislation whose effect as so applied would impair the obligations of a contract. The Legislature has the undoubted right to subject the exercise of rights under all such franchises to reasonable regulation in order that the interests of the public may be fully safeguarded and protected, and such franchises are granted subject not alone to existing regulations, but to such additional regulations as the granting power may deem proper and reasonable to impose subsequently to the granting of such privileges. I see nothing in the additional requirements prescribed by the amendment of section 516 of the Civil Code which is unreasonable or which could not be complied with without impairing in the slightest measure any rights which might have been acquired under the franchise involved here.

[11] But I am of the opinion that the requirements of the amendment were not intended to apply to perpetual franchises or those as to which no limitation is prescribed as to their term of duration. By said amendment, the owner of a toll road is required, in addition to affixing and keeping up, "at or over each gate, or in some conspicuous place, so as to be conveniently read, a printed list of the rates of toll levied and demanded," as said section formerly read, to show in and by such printed list, "the date when the franchise or privilege under which the right to collect tolls is claimed was granted and the term of duration of said franchise," and "the date upon which rates of toll were last fixed by the board of supervisors." Said section further provides that "failure to comply with the provisions of this act shall work an immediate forfeiture of the franchise." The court found, as we have seen, that the defendants "did affix and at all times kept up at or near the said toll gate on said toll road a list showing the rates of toll last theretofore duly fixed and determined by the said board of supervisors," etc., but that they failed to show in said printed list the date when the franchise was granted or the term of duration of said franchise, and concluded, as a matter of law, that the defendants did not comply with the provisions of the section named.

The obvious object of the requirements of section 516 of the Civil Code is to prevent the public from being fraudulently imposed upon or deceived by persons claiming the right without authority to collect tolls, or, having such authority, claiming the right to collect tolls in excess of the rates established by the board of supervisors. The importance in all cases of the provision as to the posting of the rates of toll fixed by the authorities is plainly apparent, but with respect to the posting of a notice showing the date when the franchise was granted and the term of its duration is important only in those cases where the term of duration of the franchise is limited to a specified number of years. In a case like the present, where the franchise is granted to exist perpetually, the public could not be imposed upon or deceived by the mere failure to publish, as required by the statute, the date the franchise was granted or the time during which it is to run. I am therefore of the opinion that the Legislature did not intend that those provisions which have been added since the granting of the franchise in question should apply to such franchises as were granted by the state itself to exist for an indefinite period prior to the enactment of the amendment, but were inspired solely by the policy, since adopted, of limiting the life of all franchises to a definite number of years. In any event, the vital requirements of the section, so far as this franchise is concerned, having been observed by the defendants, it would certainly be a gross injustice to declare the franchise forfeited for the reason suggested, and particularly would this be true in view of the fact that no possible injury can result to the public from the omission to comply with the requirements referred to.

The summary of my conclusion is: That the franchise in question is property in the sense of that term as it is used in section 1044 of the Civil Code, and is therefore subject to all the rights and burdens of any other species of property; that the appellants are not only the surviving associates of John Lawley within the meaning of the grant, but acquired title to the property—the franchise and the right to collect toll thereunder—through various mesne conveyances, assignments, and other instruments in writing; that the franchise was not forfeited by reason of the noncompliance with the requirements of the amendment of section 516 of the Civil Code.

The judgment and order are therefore reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Petition for a Rehearing.

HART, J. The respondents have petitioned this court for the reopening of this cause and a reconsideration of the points originally urged by them in favor of the judgment. After an extended consultation, the justices of this court have reached the conclusion that, upon a rehearing, there would be no likelihood of a recession from the result arrived at in the original opinion filed herein. We may remark, however, that we keenly appreciate the gravity and importance of the ultimate question submitted for decision in this cause, both in its legal aspect and in its effect upon the parties to the action, whatever may be the final decision; but we may further observe it is a source of much comfort to us to know that, if we have conceived erroneous views upon the legal questions, upon the solution of which the ultimate result must depend, there is another court that can correct the errors of our judgment.

It is said in the petition that "for over 40 years these defendants have exacted tolls on this road," that "at the present time appellants are bleeding the public and the public has no redress," and that, "if the time has not come, it will soon come when the profits from this toll road will amount to more in one year than the whole cost of construction and repair." It must readily be admitted that these are considerations which should make it most desirable that the public should own the road, or that it should not remain in private hands, a consummation not at all adverse to our sentiments, if the conditions be as they are depicted in the petition, but learned counsel will not, of course, undertake to maintain that such considerations constitute a legal argument in favor or in support of the confiscation of private property or the destruction of vested rights, or that will justify the establishment of a principle or precedent that must of necessity operate most disastrously to the owners generally of such franchises. If the appellants are "bleeding the public"—a phrase that can imply nothing short of an accusation that they are exacting unauthorized and illegal tolls—the plain, ready, and effectual remedy lies in a proceeding looking to a forfeiture of the franchise for a misuser of the right granted to them by the state. The boards of supervisors of the two counties into which the road extends have the power, and it is their bounden duty not only to regulate the rates of toll, but to establish such rates only as are reasonable and just both to the owners of the franchise and the public. The owner of the franchise is entitled to only a reasonable return on his investment, and, if the appellants in this case are now charging such rates as will make the profits of the venture in one year equal to the sum total of the original cost of the construction of the road and the cost of maintaining it, the fault lies with the rate-fixing body in such cases and with no one else.

But counsel declare that our construction of section 1044 of the Civil Code is entirely too broad, "because it does not include or provide for the transfer of a franchise such as this"; that "the term 'property' as used in this section refers to private property, and not to grants of public functions." We are unable to follow the argument that franchises such as the one involved in this controversy do not constitute private property. What are they if not private property? They are as much private property as franchises authorizing the construction and maintenance of railroads. There can be no distinction in principle between the two classes of franchises. It is true that they are charged with a public use and subject to the control, for the purposes of necessary and proper regulation, of the granting power and may be forfeited for misuser or nonuser, but, subject to these necessary restraints, they are as much private property in the hands of the grantees as is any other species of property.

[12] As stated in our former opinion, the state undoubtedly has the right to annex as a condition to the transfer of such franchises the procurement of its consent, but it did not do so in the case of the present franchise, and, in the absence of a provision expressly requiring that its consent shall first be obtained before said franchise may be transferred, there was, in our opinion, no necessity for such course to be pursued.

But, having fully presented in the original opinion filed herein our views on the questions discussed in the petition, there is no necessity for further consideration of them now.

As stated, feeling that further consideration of the cause or the points passed upon by us would not have the effect of changing or modifying our views, it will certainly save time to the parties and hasten a final decision, if the judgment of this court does not stand, by denying the petition and thus affording the earliest opportunity of getting the cause before the Supreme Court, if counsel choose to adopt that course.

The petition is denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

CALIFORNIA REPORTER

120 PACIFIC REPORTER

(161 Cal. 632)

Ex parte LA DUE. (Cr. 1,658.)

(Supreme Court of California. Dec. 20, 1911.)

1. Arrest (§ 19*) — Civil Action — Order— Jurisdiction.

An order of arrest in a civil action may be issued by a justice of the peace when the defendant has been guilty of fraud in contracting the debt or incurring the obligation for which the action is brought, as provided by Code Civ. Proc. § 861, subd. 3, and the party applying for the order proves to the satisfaction of the justice, on his own affidavit or that of another, the facts necessary to authorize the order, as prescribed by section 862.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Arrest, Cent. Dig. § 48; Dec. Dig. § 19.*]

2. ARREST (§ 35*)—CIVIL ACTION—PROCEEDINGS.

That an order of arrest may be issued in a civil action, there must be a complaint on file, showing that plaintiff has a cause of action against the defendant on a debt or obligation, in the contracting or incurring of which the fraud has been committed.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 84–87; Dec. Dig. § 35.*]

3. ARREST (§ 35*) — DEBT FRAUDULENTLY CONTRACTED—COMPLAINT—AFFIDAVIT.

A complaint alleged that A. paid defendant $175 in money, which was plaintiff's property; that defendant received it in a fiduciary capacity, and did not deliver it to plaintiff, but, without plaintiff's consent, converted it to his own use, and, on demand, refused and failed to deliver the same, or any part thereof, to plaintiff. An affidavit for an order of arrest showed that defendant received the money as trustee for plaintiff, and, without plaintiff's consent, converted the same, and refused to deliver it. *Held*, that such allegations were sufficient to show that the debt was fraudulently contracted, and to authorize an order of arrest as provided by Code Civ. Proc. §§ 861–865.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 84–87; Dec. Dig. § 35.*]

4. HABEAS CORPUS (§ 1*)—SCOPE OF WRIT—JURISDICTION.

Where a complaint and affidavit for an order of arrest in a civil action was sufficient to confer jurisdiction on the justice to make the order, defendant could not secure his release on habeas corpus; that writ being unavailable to serve the office of a demurrer or appeal.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 1; Dec. Dig. § 1.*]

5. HABEAS CORPUS (§ 92*) — CIVIL ACTION—COMPLAINT AND AFFIDAVIT — CONCLUSIVENESS.

Where a complaint to recover a debt and an affidavit for an order of arrest alleged positively that the debt was fraudulently contracted, importing that affiants had personal knowledge of the facts stated, such positive statement, under oath, was evidence which the justice might consider and accept as proof of the facts, on application for the order of arrest; and hence another court, on habeas corpus, could not revise the justice's determination, on the theory that the facts were such that the affidavits must have been made on information and belief; it not being certain that the affiants could not have had positive knowledge thereof.

[Ed. Note.—For other cases, see Habeas Corpus, Cent.Dig. §§ 81, 83, 87–96; Dec.Dig. § 92.*]

6. ARREST (§ 35*) — CIVIL ACTION — DEBT FRAUDULENTLY CONTRACTED—COMPLAINT—AFFIDAVIT.

Where a complaint and affidavit for warrant of arrest in a civil action alleged that defendant had received plaintiff's money as plaintiff's trustee, and, on demand, had failed and refused to deliver the same, it sufficiently alleged that the sum was due on demand, so as to support an order of arrest.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 84–87; Dec. Dig. § 35.*]

7. HABEAS CORPUS (§ 92*)—HEARING—CONFLICTING EVIDENCE.

On habeas corpus to secure petitioner's release from arrest in a civil action, the court cannot consider conflicting evidence as to the merits of the case.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 81, 83, 87–96; Dec. Dig. § 92.*]

In Bank. Application by Stanley S. La Due for writ of habeas corpus. Writ denied, and petitioner remanded.

See, also, 117 Pac. 586.

T. E. De la Matyr and Hugh J. Crawford, for petitioner. F. E. Davis and Paul W. Schenck, for respondent.

SHAW, J. The petitioner, being in the custody of the sheriff of Los Angeles county upon two orders of arrest made by the justice's court of said county in civil actions pending in said court, obtained from this court a writ of habeas corpus to inquire into the validity of said orders. He claims that the justice's court was without jurisdiction to make said orders.

[1, 2] An order of arrest in a civil action may be issued by a justice of the peace in the manner and upon the conditions prescribed in sections 861 to 865 of the Code of Civil Procedure. It may issue "when the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action was brought." Section 861, subd. 3. The party applying for the order must prove to the satisfaction of the justice, upon his own affidavit or that of another person, the facts necessary to authorize the order. Section 862. There must, of course, be on file a complaint showing that plaintiff has a cause of action against the defendant upon the debt or obligation, in the contracting or incurring of which the fraud was committed. The two actions here involved being in all respects alike, a statement of one will be sufficient.

In the first case, the complaint alleged that on November 10, 1910, one Allen paid into the hands of the defendant $175, in money, which was the property of the plaintiff, and that defendant received it in a fiduciary capacity; that defendant did not deliver it to plaintiff, but, without plaintiff's consent wrongfully converted it to his own use, and, upon demand, fails and refuses to deliver the same, or any part thereof, to the plaintiff. In support of the application for the order of arrest, the plaintiff filed his own affidavit, stating that on November 10, 1910, Allen paid into defendant's hands $175, the property of plaintiff, to be turned over to plaintiff; that defendant represented plaintiff in a fiduciary capacity in receiving said money; that defendant, without cause or legal right, converted the same to his own use, without plaintiff's consent, and that plaintiff had demanded the same of defendant, who thereupon refused to deliver the same.

[3, 4] The complaint may not be as full and specific as might be necessary to make a

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

good pleading in the superior court, if attacked by a demurrer for uncertainty. But it is sufficient as a statement of a cause of action to recover money, under the liberal rules applicable to pleadings in a justice's court. The affidavit, which is the foundation of the order, is more specific and certain. It shows that defendant received the money as trustee of plaintiff; that his specific duty as trustee was to deliver it to plaintiff; that, instead of doing so, he converted it to his own use, and, upon demand, had refused to make delivery to plaintiff. Upon these facts, he was personally liable to plaintiff for the sum so converted, and his conduct in thus violating his trust was fraudulent. This was sufficient to make a case, within the terms of the statute, and, as the justice thereupon made the order of arrest, we must presume that the facts were proved to his satisfaction. Nothing more is required to confer jurisdiction to make such an order. Habeas corpus proceedings cannot be made to serve the office of a demurrer or appeal. If jurisdiction is shown, in cases like the present, the inquiry into the cause of the custody ceases, and the petitioner must be remanded to abide the orders of the court in which the jurisdiction reposes. Ex parte Williams, 121 Cal. 330, 53 Pac. 706; Ex parte Ah Men, 77 Cal. 201, 19 Pac. 380, 11 Am. St. Rep. 263.

[5] There is nothing in the record which supports the petitioner's claim that the facts stated in the affidavit are made on information and belief, and therefore, as he claims, not sufficient as a basis for the order. The statements are in positive language, which imports the affiants' personal knowledge of the facts stated. Petitioner argues that these facts are of such a nature that the plaintiff could not have had personal knowledge thereof; and hence that this court must declare them to be made on information and belief, notwithstanding the positive language used in the affidavit. Whether or not any court would be justified in thus disregarding positive averments as to facts of this character is a question we need not consider. At all events, it is beyond the power of this court in this case to do such a thing. It would be a usurpation by this court of the powers and functions of the court to which the evidence was addressed. It cannot be said that the facts stated could not have been within the personal knowledge of the plaintiff. It is clearly possible that he may have been present at the time the money was delivered, so that he could hear and see what took place. The positive statement, under oath, was evidence which the justice had power to consider, weigh, and accept as proof of the facts stated. Code Civ. Proc. §§ 2002, 1844, 1845. Another court cannot, in habeas corpus, revise the determination of the justice's court as to the credibility and weight of such evidence. The justice was acting within his jurisdiction in accepting it as sufficient, and his order made thereon is not void.

[6, 7] It is further insisted that the complaint and affidavit does not show that the money sued for was then due. It is not so alleged in terms, but the facts stated show that the money was due on demand. The demand and the refusal are also set forth. From this the legal conclusion follows that it was then due. Legal conclusions need not be, and should not be, averred, either in pleadings or affidavits. There were opposing affidavits, contradicting the essential facts above stated. No authority is necessary for the proposition that we cannot consider conflicting evidence upon habeas corpus proceedings instituted to test the validity of an order made upon such evidence, produced in another court having jurisdiction of the cause. Whatever may be the facts upon the merits of the case, they are beyond the reach of any inquiry which we can make in this proceeding.

The petitioner is remanded to the custody of the sheriff of Los Angeles county.

We concur: SLOSS, J.; HENSHAW, J.; ANGELLOTTI, J.

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161 Cal. 621

SEAL OF GOLD MINING CO. v. SLATER et al. (L. A. 2,730.)

(Supreme Court of California. Dec. 20, 1911.)

1. Corporations (§ 298*)—Board of Directors—Meetings—Legality—"Office."

Where a majority of the board of directors of a corporation met pursuant to a regular call for a special meeting of the board, and were unable to obtain access to the office of the corporation, and convened as a board in the hallway of the building just outside of the office, and then adjourned the meeting to a designated date, the meeting of the board was valid as against the objection that the board did not meet at the office, within Civ. Code, § 319, requiring the holding of meetings of boards of directors at the corporation's office.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1292–1319; Dec. Dig. § 298.*

For other definitions, see Words and Phrases, vol. 6, pp. 4921–4931; vol. 8, p. 7736.]

2. Corporations (§ 292*)—Officers—Resignation—Participation in Meeting.

A director of a corporation who in a writing addressed to the board of directors tenders his resignation to take effect on acceptance may participate in meetings of the board until his resignation is accepted.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1255–1257; Dec. Dig. § 292.*]

3. Corporations (§ 298*)—Meetings of Officers—Fraud.

Where a meeting of the board of directors of a corporation had been regularly called and all the directors had been duly notified, the mere fact that a director told another director that he would not attend the meeting, and that in consequence thereof the latter director believing that a quorum would not be present remained away, did not amount to fraud for a majority of the board, including the director who had stated that he would be absent, to meet pursuant to the call and transact proper business.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1292–1319; Dec. Dig. § 298.*]

4. CORPORATIONS (§ 298*)—BOARD OF DIRECTORS—MEETINGS—NOTICE.

Under the by-laws of a corporation authorizing a quorum of the board of directors to adjourn a meeting from time to time, and providing that all the acts regularly done at meetings regularly adjourned from meetings called shall be valid, as if done at meetings regularly called and held, a director receiving notice of a meeting is not entitled to notice of an adjournment of the meeting, but he is bound to know that a quorum may adjourn, and that business may be transacted at the adjourned meeting.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1292–1319; Dec. Dig. § 298.*]

5. CORPORATIONS (§ 298*)—BOARD OF DIRECTORS — MEETINGS — TRANSACTION OF BUSINESS.

Where a majority of the board of directors of a corporation met pursuant to a regular call and notice for a meeting of the board and adjourned to a subsequent time, the board at the subsequent time could transact any business proper for the board to transact at a regularly called meeting.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1292–1319; Dec. Dig. § 298.*]

6. CORPORATIONS (§ 298*)—BOARD OF DIRECTORS — MEETINGS — SPECIAL MEETINGS—NOTICE.

Under Civ. Code, § 320, providing for the calling of meetings by special notice, a notice of a special meeting of the board of directors of a corporation need not specify the purpose of the meeting, but a notice informing the directors that a special meeting is called, specifying the time and place, is sufficient for the transaction of any proper business.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1292–1319; Dec. Dig. § 298.*]

7. CORPORATIONS (§ 295*)—OFFICERS—RESIGNATION—FILLING VACANCY.

Under Civ. Code, § 305, authorizing the board of directors of a corporation to fill a vacancy in the office of a director, etc., the board of directors of a corporation may accept the resignation of a director and elect his successor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1206; Dec. Dig. § 295.*]

8. CORPORATIONS (§ 297*)—BOARD OF DIRECTORS—POWERS—LOCATION AND REMOVAL OF OFFICE OF CORPORATION—"OFFICE."

Under Civ. Code, § 305, authorizing the board of directors of a corporation to exercise corporate powers and control the business and property of the corporation, the board of directors may remove the office of the corporation from one location to another in the same city, notwithstanding section 321a, declaring that the principal place of business of a corporation can be changed only with the consent of the holders of two-thirds of the stock, though the word "office" is deemed equivalent to the words "principal place of business."

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1274–1291; Dec. Dig. § 297.*]

9. CORPORATIONS (§ 398*)—BOARD OF DIRECTORS—QUALIFICATIONS—TRANSFER OF CORPORATE STOCK—EFFECT.

The acts of a director of a corporation who continues to act as such, notwithstanding the transfer of his stock, are valid as to third persons dealing with the corporation, and his title to office cannot be impeached collaterally.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1592–1594; Dec. Dig. § 398.*]

10. CORPORATIONS (§ 298*) — MEETINGS OF BOARD OF DIRECTORS—NOTICE.

Where the time of meeting of a board of directors of a corporation is prescribed by the by-laws of the corporation, it is not necessary to notify directors of the time of meeting; but directors receiving due notice of the changed location in the same city of the office of the corporation have due notice of the time and place of meetings of the board, and acts taken by the board at such a meeting are valid if within the power of the board.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1292–1319; Dec. Dig. § 298.*]

11. WORDS AND PHRASES — "CONVEYED" — "CONVEYANCE."

The term "conveyed" or "conveyance" in its strict legal sense imports a transfer of legal title to land, but it is also habitually used to define any transfer of title legal or equitable, and the meaning of the term in any particular case must be ascertained from the context.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1570–1584; vol. 8, pp. 7618, 7619.]

12. CORPORATIONS (§ 409*)—BY-LAWS—CONSTRUCTION — "CONVEYANCE" — LEASE OF PROPERTY.

The word "conveyance" in the by-laws of a corporation, declaring that no mortgage or conveyance shall be made without the consent of the holders of at least two-thirds of the stock of the corporation, is used in its more restricted sense as importing an act whereby the legal and equitable title to real property of the corporation is transferred, and a lease of a part of the property of the corporation for a term of five years is not a conveyance, and the board of directors may execute such a lease under their power to manage and control the affairs and property of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1620–1622; Dec. Dig. § 409.*]

Department 1. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by the Seal of Gold Mining Company against H. B. Slater and others. From a judgment for defendants, plaintiff appeals. Affirmed.

M. E. C. Munday, Chas. S. McKelvey, Curtis & McNab, Ward Chapman, and McNutt, McNutt & Hannon, for appellant. Purington & Adair, for respondents.

SLOSS, J. The plaintiff, claiming to be the owner and entitled to the possession of certain mining claims in San Bernardino county, brought this action, alleging in its complaint that the defendants had entered into the possession of said premises, ousting plaintiff therefrom, had destroyed buildings on said properties, and extracted gold-bearing ores therefrom. It was alleged that the defendants were still in possession, and would, unless restrained, continue to extract ore, and would destroy the value of the property. The prayer of the complaint was for damages and for a temporary injunction restraining waste. The defendant Slater answered, averring that neither of his codefendants claimed any interest in the property. For himself he admitted plaintiff's ownership of the property, but asserted that he was in possession and entitled to possession by virtue of a lease of the mining claims, made by the plaintiff corporation to him. The destruction of buildings was denied, and the taking of ore was justified under the lease. The findings of the court were in support of the allegations and denials of the answer, and judgment in favor of defendants followed. The plaintiff appeals from the judgment and from an order denying its motion for a new trial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The one question in the case is whether the lease, which was the sole foundation for Slater's claim of a right to enter and work the property, was valid and binding upon the plaintiff. The Seal of Gold Mining Company was a California corporation. It had a board of seven directors. Prior to September 18, 1908, H. A. Landwehr was president of the corporation and one of its directors, and the other directors were George H. Moore, Edgar Sharp, C. F. Huse, Alex Strachan, A. N. Younglove, and P. T. Evans. The office of the corporation was room 306 of the Douglas building, in the city of Los Angeles. A special meeting of the board of directors was regularly called for the 18th day of September, 1908. At the time set four of the above-named persons, to wit, Sharp, Strachan, Younglove, and Evans, came to the Douglas building, but were unable to obtain access to room 306, the office of the corporation; the door to said room, which was also the office of Landwehr, being locked. They convened as a board in the hall of the building, "just outside of the office of the company," and adjourned the meeting to the 21st day of September, 1908, at 11 o'clock a. m. The same four met at the office of the company, at the time to which the meeting of the 18th had been adjourned, and after accepting the resignation of George H. Moore as director elected W. L. Peters to succeed him. Peters, who was present, at once took his seat as director. A resolution was then adopted removing Landwehr from the office of president and electing Strachan in his place. A further resolution, moving the office of the company to room 459 of the Pacific Electric building, was adopted.

The by-laws of the corporation provided for a regular meeting of the board of directors, without notice, on the 10th of each month, at noon. On October 10th, at noon, Younglove, Evans, Strachan, and Peters met as a board of directors at room 459 of the Pacific Electric building, and adopted a resolution authorizing the president and secretary to execute and deliver to Slater the lease under which he claims, and the instrument was accordingly executed. The various objections to this transaction urged by appellant are based in part on the facts stated above, and in part on further facts that will be set forth in discussing the particular points upon which they bear. While the lease in question was authorized at the regular meeting of October 10th, the validity of the acts done on that occasion depends upon the regularity of the two prior meetings. The meeting of October 10th was participated in by a director elected at, and was held at a place fixed by, the meeting of September 21st, which was itself an adjournment of the meeting of September 18th.

[1] 1. The validity of the meeting of September 18th is assailed on the ground that the directors did not meet at the office of the corporation. Section 319 of the Civil Code provides that "the meetings of the stockholders and board of directors must be held at its office or principal place of business." We need not inquire what is meant by the phrase "principal place of business" in this section. Apparently it is not used in a sense synonymous with that of "office." Its precise significance is unimportant here, for the reason that the notice of the meeting in question specified the office of the company as the place of meeting. Doubtless, therefore, the board was required to convene at such office. We think, however, that the facts above set forth show a substantial compliance with the requirement that the meeting be held at the office of the corporation. A majority of the directors, attempting to assemble pursuant to a regular notice, found the door of the office locked. They convened in the hall, outside of the door. No other director could have been thereby deprived of the opportunity to attend had he desired to do so. The place was in immediate proximity to the office, and was the only place available under the circumstances. The provision relied upon is that the meeting must be held "at," not "in," the office. It cannot be under any reasonable construction of the statute that any person who happens to be in possession of the office of the corporation has the power by excluding the directors and members to absolutely prevent the holding of meetings.

[2] 2. It is claimed that Sharp, who participated in the meeting of September 18th, and whose presence was necessary to constitute a quorum, had resigned, and so ceased to be a director. He had, in a writing addressed to the board, tendered his resignation, but the resignation was, by the terms of the writing, "to take effect upon acceptance"; and there was evidence sufficient to warrant the trial court in believing that it was not accepted until the 21st day of September.

[3] 3. We see no force in the contention that it was a fraud upon the corporation to

hold the meeting of September 18th. The facts relied upon in this regard are that Sharp, after informing Landwehr that he would not go to the meeting, did nevertheless, at the request of other directors, attend and participate. But the meeting had been regularly called, and all of the directors had had notice. The mere circumstance that one of them was told that another would not attend, and believed that a quorum would not be present, is not enough to make it a fraud for a majority of the board, including the director who had stated that he would be absent, to meet pursuant to proper call and notice.

[4] 4. The meeting of September 18, 1908, transacted no business other than the taking of an adjournment to September 21st. Under the by-laws, a quorum had power to adjourn a meeting from time to time, not exceeding a period beyond the next regular meeting. The by-laws further provided that "all acts and proceedings regularly had and done at meetings regularly adjourned from meetings called or held, shall be valid and binding as if had and done at meetings otherwise regularly called and held." No notice of the adjournment was given to the directors who had not been present on September 18th. But, under the provision of the by-laws just quoted, no such notice was required. A director receiving notice of a meeting was bound to know that a quorum might adjourn, and that business might be transacted at the adjourned meeting. And this is in accordance with the general rule, which is that no notice of adjournment of a meeting regularly called need be given. 3 Clark & Marsh. Corp. §§ 649, 680; Smith v. Law, 21 N. Y. 296; Western I. Co. v. D. M. Nat. Bank, 103 Iowa, 455, 72 N. W. 657. Thompson v. Williams, 76 Cal. 153, 18 Pac. 153, 9 Am. St. Rep. 187, has been cited (see 10 Cyc. 786; 3 Thomp. Corp. § 3937) as authority for the contrary doctrine, but that case went off on the ground that the hour to which the adjournment was taken was not fixed at the original meeting, and that a new notice was therefore required.

[5] The board at the meeting of September 21st had power, therefore, to transact any business which they might have transacted at the meeting of September 18th. There is nothing to the contrary decided in Bank of National City v. Johnston, 133 Cal. 185, 65 Pac. 383, cited by appellant. In that case a resolution adopted at an adjourned meeting was held invalid for the reason that it was one that the directors could not lawfully have passed at the original meeting.

5. Of the things done at the meeting of September 21st, the only ones having any bearing on the present controversy are the acceptance of the resignation of Moore as director, the election of Peters in his place, and the removal of the office of the corporation to room 459 of the Pacific Electric building. Could the resolutions seeking the accomplishment of these purposes have been adopted at the first meeting, that of September 18th? It is argued that they could not, because they were not specified in the notice which was given to the directors prior to such meeting.

[6] But it appears to be settled in this state that a notice of a special meeting of the board of directors need not specify the purpose of the meeting. Granger v. Orig. Emp. M. & M. Co., 59 Cal. 678; Bell v. Standard Q. Co., 146 Cal. 699, 705, 81 Pac. 17. All that is required by the statute (Civ. Code, § 320) is a "written notice sufficient to inform the directors that a special meeting of the directors is called, and of the exact time and place where it is to be held." See cases last cited. The notice here given contained all these requirements, and it was, therefore effective to confer upon the board jurisdiction to transact any business properly within the scope of its powers at the time of the meeting.

[7] It cannot be questioned that the board had power to accept the resignation of a director, and to elect his successor. Civ. Code, § 305.

[8] And the location and removal of the office of the corporation was equally a matter committed to the discretion of the directors. Under section 321a of the Civil Code, the principal place of business of a corporation can be changed only with the consent of the holders of two-thirds of the stock, and upon publication of a notice of the intended change. But, even if the "office" be treated as equivalent to the "principal place of business," these requirements of consent, notice, and publication do not, by the express terms of the section, apply to a removal from one location to another in the same city.

[9] 6. On the morning of September 18th, before the meeting of that day, Sharp indorsed in blank and delivered to Landwehr the certificate representing all the stock owned by him. On the 19th the stock was transferred on the books of the corporation to a person designated by Landwehr. It is claimed that, inasmuch as the directors must be "elected from among the holders of stock" (Civ. Code, § 305), Sharp, upon the transfer of his shares on September 19th, at once ceased to be a director, and so could not participate in the meeting of September 21st. His participation was necessary to constitute a quorum at that meeting, and the contention is that the election of Peters as successor to Moore, and the subsequent removal of the office, were void. There seems to be abundant authority in other jurisdictions to the effect that, where the charter or a statute requires a director to be a stockholder, a director who parts with all his shares ipso facto divests himself of his title to his office. 3 Clark & Marsh. Priv. Corp. § 661; 3 Cook, Corp. § 623, and cas. cit. But at least in this state it is thoroughly settled that if the director continues to act as such, notwith-

standing the transfer of his stock, his acts are valid as to third persons dealing with the corporation, and his title to office cannot be impeached collaterally. San Jose Sav. Bank v. Sierra L. Co., 63 Cal. 181; Robinson v. Blood, 151 Cal. 504, 91 Pac. 258; Sherwood v. Wallin, 154 Cal. 735, 742, 99 Pac. 191. Speaking of a director whose position was similar to that of Sharp here, the court said, in San Jose Sav. Bank v. Sierra L. Co., supra: "Until he was ousted on a direct proceeding he was a director de facto, and his acts as director would be valid as to third persons. This, in our judgment, is settled beyond controversy. To hold otherwise would be to render insecure all the operations of corporations."

[10] 7. If the foregoing views be sound, the objections to the meeting of October 10th fall to the ground. The persons participating were three of the old directors, together with Peters, whose election, as we have seen, was regular and proper. There was evidence that notice of the meeting was given. But, if it had not been, there was no necessity for notifying the absent directors of the time of meeting, as the time was prescribed by the by-laws. Notice of the change of the company's office to the Pacific Electric building had been given to all of the directors shortly after such change had been ordered, so that each director in fact had notice, through the by-laws, that a meeting would be held on October 10th, and had been advised of the place where the meeting would be held.

[11] 8. The final argument against the validity of the lease is based on the following provision of plaintiff's by-laws: "No mortgage or conveyance shall be made without the consent of the holders of at least two-thirds of the outstanding capital stock of the corporation." There was no such consent to the making of the lease here in question.

The instrument in question was in form a lease, whereby the plaintiff let to Slater certain mining claims for the term of five years, in consideration of Slater's agreement to work the claims and to pay to plaintiff a certain percentage of the net proceeds. (It did not cover the whole of plaintiff's property, and there is no question, therefore, of the application of section 361a of the Civil Code.) Such a lease is not, of course, a mortgage. Is it a "conveyance" within the meaning of the by-law? "The term 'conveyed,' or 'conveyance' is used in several senses. In the strict legal sense the latter term imports a transfer of legal title to land; but it is also habitually used by lawyers to denote any transfer of title, legal or equitable; and the last is also the popular sense of the term." Adams v. Hopkins, 144 Cal. 19, 37, 77 Pac. 712. Not being a word exclusively technical, it is not necessarily to be given a technical sense, unless shown to have been used in that sense. Id.; Civ. Code, § 1645. The meaning is to be ascertained from the context. The accompanying language may, to be sure, be such as to show that leases are included in the term "conveyances." For example, the sections of the Civil Code (1213, 1214, 1215) dealing with the recording of "conveyances" of real property define the term in such manner as clearly to embrace within it leases for a term exceeding one year. See Odd Fellows' Sav. Bank v. Banton, 46 Cal. 603, 7; Jones v. Marks, 47 Cal. 243. But the definition contained in section 1215 is limited to the term conveyance "as used" in the sections just preceding. Stewart v. Powers, 98 Cal. 514, 518, 33 Pac. 486. It does not purport to fix the meaning of the word when employed in different statutes or in contracts or other instruments executed by private parties. Thus is has been held that a lease is not a conveyance within the meaning of a statute authorizing an appeal from a probate order against or in favor of directing the conveyance of real property (In re Tuohy's Estate, 23 Mont. 305, 58 Pac. 722) or of a statute providing that a married woman cannot incumber or convey her lands except by deed in which her husband shall join (Heal v. Niagara Oil Co., 150 Ind. 483, 50 N. E. 482) or of one providing that no covenant shall be implied in any conveyance of real estate (City of New York v. Mabie, 13 N. Y. 151, 64 Am. Dec. 538). While the term "conveyance" has often been defined in such manner as to include leases of terms for years (see Chandler v. Hart, 119 Pac. 516), it is generally held that, in its ordinary significance the term does not include such leases (7 A. & E. Enc. Law [2d Ed.] 487; Des Moines C. A. Soc. v. Tubbessing, 87 Iowa, 138, 54 N. W. 68; Perkins v. Morse, 78 Me. 17, 2 Atl. 130, 57 Am. Rep. 780; Sullivan v. Barry, 46 N. J. Law 1, 5; Edwards v. Perkins, 7 Or. 149).

[12] In construing the by-laws above quoted, we think the word "conveyance" should be read in its more restricted sense, as importing an act whereby the legal or equitable title to real property is transferred. Not only is this in accord with the usual understanding of the term, but it gives to the by-law a more reasonable operation and effect. The purpose of the provision probably was to protect the stockholders against the loss of the corporate property by improvident acts of the directors. Such loss might result either from an executed or executory sale, or from the making of a mortgage with its necessary incident of the possibility of forced sale on foreclosure. But it is not to be supposed that the stockholders in framing their by-laws were seeking to take control of the corporate property from the directors to such an extent as to hamper the board in dealing effectively with the property in ways that would not lead to a parting with the ownership.

In addition to their contention that the lease is not within the terms of the by-law, the respondents make the points that the by-law is not binding upon Slater, who does not appear to have had notice of its restrictions, and that the by-law is void as being in conflict with the law (Civ. Code, §§ 305, 308) vesting the exercise, conduct, and control of the corporate powers, business, and property in the board of directors. A consideration of these points is rendered unnecessary by the construction we have given to the attempted limitation upon the powers of the board.

The judgment and the order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

161 Cal. 552

PEOPLE v. RICHARDSON. (Cr. 1,683.)

(Supreme Court of California. Dec. 13, 1911.)

1. ABORTION (§ 1*)—OFFENSES—ELEMENTS.

The state, on a trial of accused for supplying to a pregnant woman medicine with intent to procure her miscarriage, must show that accused furnished medicine with intent to thereby procure the woman's miscarriage, and that she was pregnant.

[Ed. Note.—For other cases, see Abortion, Cent. Dig. §§ 1–5; Dec. Dig. § 1.*]

2. ABORTION (§ 1*)—OFFENSES—ELEMENTS—INTENT.

The intent to produce a miscarriage within Pen. Code, § 274, may exist on the part of accused without absolute knowledge of the woman's pregnancy; a supposition of the existence of pregnancy and the furnishing of medicine with the intention to thereby procure the woman's miscarriage, if pregnancy exists, being sufficient.

[Ed. Note.—For other cases, see Abortion, Cent. Dig. §§ 1–5; Dec. Dig. § 1.*]

3. ABORTION (§ 11*)—EVIDENCE—INTENT.

On a trial of accused for supplying medicine to a pregnant woman with intent to procure her miscarriage, in violation of Pen. Code, § 274, evidence *held* to support a finding of accused's criminal intent, in view of section 21, declaring that the intent is manifested by the circumstances connected with the offense.

[Ed. Note.—For other cases, see Abortion, Cent. Dig. § 22; Dec. Dig. § 11.*]

4. ABORTION (§ 11*) — EVIDENCE — SUFFICIENCY.

On a trial of accused for supplying medicine to a pregnant woman with intent to produce her miscarriage, evidence *held* to support a finding that she was pregnant at the time accused furnished her with the medicine, justifying a conviction.

[Ed. Note.—For other cases, see Abortion, Cent. Dig. § 22; Dec. Dig. § 11.*]

5. ABORTION (§ 9*)—EVIDENCE—ADMISSIBILITY.

On a trial of accused for supplying medicine to a pregnant woman with intent to procure her miscarriage, the testimony of the woman, after her marriage to a third person, that she was pregnant prior to the marriage, and that accused supplied medicine, was admissible, though the child was born after marriage.

[Ed. Note.—For other cases, see Abortion, Cent. Dig. §§ 17–20; Dec. Dig. § 9.*]

6. ABORTION (§ 9*)—EVIDENCE—ADMISSIBILITY.

Where, on a trial of accused for supplying medicine to a pregnant woman with intent to procure her miscarriage, the woman testified without objection that during a specified period she did not have intercourse with any other man than accused, and that she first became acquainted with a third person, who subsequently married her, after she became pregnant, and that her child was born subsequent to her marriage, it was not error to permit her to testify that accused was the father of the child to show motive and an inducement for the crime.

[Ed. Note.—For other cases, see Abortion, Cent. Dig. §§ 17–20; Dec. Dig. § 9.*]

7. CRIMINAL LAW (§ 404*)—EVIDENCE—EXHIBITION OF CHILD.

The exhibition by the woman of the child about 5½ months old at the time of the trial was admissible for the purpose of comparison with accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 891; Dec. Dig. § 404.*]

8. CRIMINAL LAW (§ 404*)—EVIDENCE—EXHIBITION OF CHILD.

The exhibition of the child was admissible as corroborative of the testimony that it was born fully matured and perfect, to aid in determining whether it was conceived prior to the time that accused furnished the medicine to her.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 891; Dec. Dig. § 404.*]

9. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

Where prosecutrix, on a trial of accused for supplying her with medicine with intent to procure her miscarriage, testified without objection that accused, in soliciting her consent to sexual intercourse, told her that he had done the same thing to other girls in his school and mentioned their names, her subsequent testimony that she knew that such girls attended accused's school was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137–3143; Dec. Dig. § 1169.*]

10. ABORTION (§ 9*) — EVIDENCE — ADMISSIBILITY.

Where prosecutrix, on a trial of accused for supplying medicine to her with intent to procure her miscarriage, testified that accused told her that another girl was pregnant and was taking the same medicine, and that he had given it to her for the same purpose, evidence that accused told prosecutrix, shortly after he had given her the medicine, that he had sexual intercourse with such other girl, was admissible to show an admission on the part of accused as to knowledge of the character of the medicine and its tendency to produce a miscarriage, and the motive and intent with which he had furnished the medicine.

[Ed. Note.—For other cases, see Abortion, Cent. Dig. §§ 17–20; Dec. Dig. § 9.*]

11. ABORTION (§ 9*) — EVIDENCE — ADMISSIBILITY—"CORROBORATE."

The testimony of prosecutrix, on a trial of accused for supplying her with medicine with intent to produce her miscarriage, that accused had intercourse with her, that she had informed him of her fear that she was pregnant, and that he furnished her medicine with the statement that it was for suppressed menses, established the corpus delicti and warranted proof of admissions by accused to corroborate the testimony of prosecutrix within Pen. Code, § 1108, declaring that accused cannot be convicted on the testimony of a woman unless she is corroborated.

[Ed. Note.—For other cases, see Abortion, Cent. Dig. §§ 17–20; Dec. Dig. § 9.*

For other definitions, see Words and Phrases, vol. 2, p. 1627.]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

12. CRIMINAL LAW (§ 778*)—INSTRUCTIONS—PRESUMPTIONS.

Where, on a trial of accused for supplying to a pregnant woman medicine with intent to procure her abortion, the evidence showed that 280 days constituted the average and normal period of gestation, and one of the issues in the case was whether the birth of the woman's child had come about in the ordinary course of nature, an instruction in the language of Code Civ. Proc. § 1963, subd. 28, that there is a presumption that things have happened according to the ordinary course of nature, but such presumption may be controverted by other evidence, was not objectionable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846–1857; Dec. Dig. § 778.*]

13. CRIMINAL LAW (§ 823*)—INSTRUCTIONS—SUFFICIENCY AS A WHOLE.

Where, on a trial of accused for supplying medicine to a pregnant woman with intent to procure her miscarriage, the court repeatedly charged that the specific intent with which the drug was furnished was the gist of the offense, and that unless the jury were satisfied beyond a reasonable doubt that it was furnished with the intent to procure a miscarriage they must acquit, an instruction that a person is presumed to intend to do that which he voluntarily does in fact do, and must be presumed to intend the natural and probable consequences of his own acts, unless there is evidence controverting the presumption, was not misleading as leading the jury to believe that they could find the intent, in the absence of evidence establishing it beyond reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent.Dig. §§ 1992–1995; Dec.Dig. § 823.*]

In Bank. Appeal from Superior Court, Sonoma County; J. Q. White, Judge.

F. C. Richardson was convicted of crime, and he appeals. Affirmed.

W. F. Cowan and T. J. Butts, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the State.

ANGELLOTTI, J. The defendant was convicted of the offense defined by section 274 of the Penal Code as follows: "Every person who provides, supplies or administers to any pregnant woman, or procures any such woman, to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable," etc. The indictment charged that he on or about May 10, 1909, did willfully, unlawfully, and feloniously provide and supply to a woman, naming her, who was then and there a pregnant woman, and procure her to take, a medicine, drug, or substance, to wit, certain pills (describing them), with intent thereby to procure her miscarriage; said miscarriage not being at all necessary to preserve her life. He appeals from the judgment pronounced upon such conviction and from an order denying his motion for a new trial.

1. It is claimed that the evidence was insufficient to warrant a conviction. There is no good foundation for this claim. It is true that our law provides that "upon a trial for procuring or attempting to procure an abortion, or aiding or assisting therein, * * * the defendant cannot be convicted upon the testimony of the woman upon or with whom the offense was committed, unless she is corroborated by other evidence" (section 1108, Pen. Code); but there was ample corroboration of the woman in this case as to all matters essential.

[1] It was necessary for the prosecution to show, as contended by learned counsel for defendant: (a) That defendant furnished the medicine, drug, or substance to the woman; (b) that he furnished it with the intent then and there to thereby procure her miscarriage; and (c) that the woman was then and there a pregnant woman. A brief statement of some of the testimony will show substantial evidence warranting the conclusion of the jury, notwithstanding the rule requiring corroboration of the testimony of the woman.

The defendant kept a business college in the city of Santa Rosa, having therein about 35 pupils. The woman in question entered such school as a pupil in the year 1907, being then a girl between 16 and 17 years of age. She continued to be a pupil therein, with occasional periods of absence, until May or June, 1909. In 1908 defendant, who was a married man, living with his wife and children, began paying her attentions with a view to having sexual intercourse with her. In August, 1908, he commenced having sexual intercourse with her, and the sexual relations thus commenced were continued constantly until she left his school in May or June, 1909. The woman's testimony in this respect was fully corroborated by the admissions contained in the defendant's statement to the district attorney, made prior to his arrest. The woman testified that in March, 1909, she missed her usual monthly sickness and told the defendant, and also told him that she was in the "family way," and that he said that it could not be so. She also missed her sickness the following month and again told defendant, and he said he would get her some pills. He did subsequently furnish her with some pills and told her to take them. He subsequently asked her if they started the flow, and on being informed that they did not, said he would get her some other pills. He then gave her a box of these pills, telling her that they were for suppressed menses. This was in May, 1909. She took some of these, with the result that a slight flow occurred. Her menses did not return until after the birth of her child in December, 1909. Somewhere about April 1, 1909, she began to suffer from what the doctors call "morning sickness," a complaint, according to the doctors, that almost always indicates pregnancy, and this continued up to a month or so before the child was born. As to the existence of this "morning sickness" as early as April,

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

1909, the woman was corrorborated by the testimony of two other witnesses. On July 2, 1909, she became acquainted with her present husband, and married him on August 19, 1909. On December 19 or 20, 1909, she gave birth to a child, which was at the time of its birth fully developed and which weighed seven or eight pounds. There was absolutely nothing about the child to indicate that it was prematurely born. This child lived and was at the time of the trial five months old. In his statement to the district attorney, defendant admitted that he furnished the woman with the pills. He said he bought a box of them at a drug store in Santa Rosa and gave them to her. He further said the reason he did this was because the woman had told him her menses had stopped, and she asked for them. His statement further showed that he knew that the tendency of these pills was to produce a resumption of the menstrual flow, whenever it was interrupted for any reason, and that prior thereto he had procured the same kind of pills for use in such cases. The pills appear to have been put up by the manufacturer and sold by the retailer in boxes, containing a booklet containing statements indicating their value in the case of suppressed menses. A chemical analysis of a box of such pills showed that each five-grain pill contained about 2.88 grains of certain kinds of organic matter. The medical testimony was to the effect that pills composed to such an extent of such organic matter, if taken in sufficient quantity, would produce an abortion in 75 or 80 per cent. of the cases. There was also testimony to the effect that, as said by the District Court of Appeal in this case: "By the administering of certain drastic drugs, such as were given to the prosecutrix, to a pregnant female, a slight return of menstruation may be superinduced, and still a state of pregnancy remain; that, in other words, while the process of gestation may thus appear to be arrested, it nevertheless, still goes on, if an abortion has not been accomplished or a sufficient quantity of the specific intended to bring about that result has not been administered to cause a miscarriage." The woman further testified that defendant had proposed taking her to San Francisco to have an operation performed. Defendant admitted having talked with her about going to San Francisco with her, but claimed that the proposition was made by her, and that he refused. The woman was corroborated, however, by statements of defendant made to Mr. Wiatt. Mr. Wiatt's testimony was substantially that about the last of May or first of June, 1909, defendant told him that the woman wanted him to take her to San Francisco to get her work, that he did not want her to go, but that "they might," and that "he did not want us to be uneasy if they did go." She further testified that, shortly after giving her the pills, he acknowledged to her substantially that he had given them to her for the purpose of procuring her miscarriage, if she was in fact pregnant, and that he knew of the use of such pills in other cases for the same purpose.

The foregoing statement shows very clearly that there was sufficient evidence to justify the jury in finding every fact essential to the guilt of the defendant of the offense charged. It is not and could not reasonably be claimed that the furnishing by him to the woman of the pills described in the indictment is not amply shown.

[2] It appears equally clear that the evidence warranted the jury in concluding that they were so furnished by defendant with the intent then and there and thereby to procure the miscarriage of the woman, if she was in fact pregnant, as he had every reason to believe she might be. Of course, he could not then know absolutely whether or not she was pregnant, but such knowledge on his part was not essential to the commission of the offense. It was said by the Supreme Court of New Jersey, speaking in the light of a substantially similar statute to ours: "The language of the act is express in declaring that an intent to cause a miscarriage is an essential ingredient of the crime. There are no express words declaring that knowledge of the woman's condition is an essential ingredient of the crime. * * * But an intent to produce a miscarriage may exist without absolute knowledge of pregnancy. For example, if there exists in the mind a fully formed belief that pregnancy exists, there may evidently exist as fully formed an intent to cause a miscarriage. And if there be a mere suspicion that pregnancy exists, there may be an intent to cause a miscarriage if the suspected condition is in existence. * * * The plain and obvious meaning of the act was not to require such proof (proof of absolute knowledge of pregnancy), and the construction given it in this case conforms to the manifest intent of the Legislature." Powe v. State, 48 N. J. Law, 34, 2 Atl. 662. If defendant had only a suspicion that pregnancy existed, and furnished the pills with the intention to thereby procure the woman's miscarriage if such pregnancy existed, we have the intent required by the law which defines this offense.

[3] As to the existence of such an intent on his part, we do not see how any other conclusion than that reached by the jury could be reached in the light of the evidence. We have, in the first place, the statement made by defendant to the woman as to the purpose for which he had given them to her. Ample corroboration of the evidence of the woman as to the purpose so admitted is to be found in the facts and circumstances of the case. We do not understand it to be claimed that proof of such intent could be shown only by statements of the defendant. If such were the law, it would be practically impossible to produce any evidence of guilty intent in the great bulk of cases; for it is

rare indeed that a person proposing to commit a crime makes any statement of his intention that is suspectible of proof. We have in this state the common sense rule that "the intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused." Section 21, Pen. Code. If the circumstances connected with the offense are of such a nature as to disclose the intent, it is enough. We are at a loss to understand how, in view of the illicit relations shown to have existed between defendant and the woman, the strong motive on the part of defendant for concealing the fact of such illicit relations, the possibility, if not the probability, of a disclosure in the event of the birth of a child to the woman, the knowledge by him of symptoms in the woman that might reasonably cause suspicion that she was with child by him, and his consequent purchase of and furnishing to her to be taken by her certain pills which would in 75 or 80 per cent. of the cases produce a miscarriage, and with the character and effect of which he had knowledge, a jury could have well concluded otherwise than that defendant suspected pregnancy on the part of the woman and furnished the pills to her with the intent then and there thereby to produce her miscarriage, if in fact she was pregnant.

[4] Upon the question whether she was then a pregnant woman, there is, of course, a possibility that the conclusion of the jury was erroneous. It is possible that the conception was the result of intercourse between the woman and defendant occurring after the pills were furnished, some time in May or the early part of June. But a mere possibility that this may be so does not preclude a conclusion to the contrary. It is enough if the evidence was of such a nature as to warrant the jury in concluding that there was no reasonable doubt that the woman was pregnant at that time. The jury was warranted by the evidence in concluding that her menses ceased in March and did not reappear until after the birth of her child nine months later, and that she suffered from a complaint existing in 75 to 80 per cent. of cases of pregnant women, from the early part of April until shortly before the birth of her child. She gave birth to a fully developed and perfect child in December, 1909, at the end of what would be the natural and ordinary period of pregnancy if conception occurred in March, 1909. We are satisfied that it must be held that these facts were sufficient to warrant the jury in concluding that the woman was pregnant at the time defendant furnished her with the pills. There is no pretense that a miscarriage was necessary to preserve the life of the woman. We conclude, therefore, that the verdict was fully warranted by the evidence.

[5] It appears to be claimed that no evidence given by the woman tending to show pregnancy commencing in March or April, 1909, and terminating in December, 1909, although received without objection, can be considered, in view of the fact that the child was born after her marriage to another and in lawful wedlock; the theory being that evidence of the husband or wife tending to show the illegitimacy of a child so born is incompetent. Passing all other possible answers to this claim, it does not seem to us that the rule invoked can properly have any application to a case of this character. The question of the legitimacy or illegitimacy of the child is in no way directly involved in this case, and, of course, the legal rights of the child can be in no way affected by any conclusion that may be reached herein. It is not even essential to the offense here charged, as it is in bastardy proceedings, that defendant is the father of the child. The object of such testimony was simply to show that the woman was pregnant at a time prior to her marriage when the defendant furnished her with a substance designed to procure her miscarriage if she was in that condition, and it was material and necessary testimony upon that point. That it may incidentally tend to show that the child was not begotten by the man who subsequently met and married the mother, the legal rights of such child being in no way affected thereby, should not require its exclusion, and we do not think that the authorities require any such conclusion. In Ratcliff v. Wales, 1 Hill (N. Y.) 65, approvingly cited and followed in Chamberlain v. People, 23 N. Y. 85, 80 Am. Dec. 255, it was said that it has been uniformly held, in bastardy cases where the mother is a married woman, that, "from the necessity of the thing, she has been constantly permitted to prove the criminal intercourse by which the child was begotten." None of the testimony given by the woman in this case came within the inhibition as the same is declared in Estate of Mills, 137 Cal. 298, 70 Pac. 91, 92 Am. St. Rep. 175, viz., that neither husband nor wife may "testify to the fact of nonaccess during cohabitation." The rule was further stated in the case just cited as follows: "Illegitimacy may be proved; but it cannot be proved by the evidence of a husband or wife that while living together they did not have sexual intercourse." See, also, Baker v. Baker, 13 Cal. 99. It should further be noted that most of the testimony of the woman in this regard was given without objection, and that the particular objection here made does not appear to have been suggested at all in the trial court.

2. Many errors are alleged in the rulings of the trial court on questions of evidence. We shall mention such objections in this regard as appear to warrant notice.

[6] The woman, having testified that her child was born on December 19, 1909, was asked, "Who is the father of that child?" An objection interposed to this question merely on the ground that the same called for the conclusion of the witness was over-

ruled, and the witness answered that defendant was the father. We do not deem it necessary to consider whether this ruling was technically erroneous. She testified, without objection, that never from the time she first entered defendant's school until she left it on June 20th did she have sexual intercourse with any other man than the defendant, and also that she first became acquainted with her husband on July 2, 1909. Under these circumstances, her answer that defendant was the father of the fully developed, fully matured, and perfect child born December 19, 1909, obviously could not have been prejudicial. Evidence of paternity was admissible, of course, in this case on the question of motive and as tending to show inducement for the crime.

[7, 8] The trial court, over the objection of defendant, permitted the woman to bring the child with her upon the witness stand and state that it was the child to which she referred in her testimony, thus giving the jury an opportunity to see it and compare its appearance with that of the defendant in determining the question of its paternity. The child was then about 5½ months old. There appears to be some conflict in the authorities on the question whether an alleged child may thus be exhibited to a jury for purposes of such comparison. The propriety of this practice appears to have been recognized in Estate of Jessup, 81 Cal. 418, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594, though some doubt was there expressed whether such a comparison would go far toward establishing relationship. As is said in section 166 of Wigmore on Evidence, the propriety of an inference of relationship from similarity of corporal traits rests in the supposed physiological likelihood that traits may be transmitted by procreation, a physiological principle that is a matter of common knowledge. An examination of the authorities leads us to the conclusion that the better rule is that the objection in such cases goes only to the question of the weight to be accorded testimony of this nature, and not to its relevancy or competency. This was the conclusion of the Supreme Court of New Jersey in Gaunt v. State, 50 N. J. Law, 490, 14 Atl. 600, a prosecution for fornication. This would appear to be true regardless of the age of the child. See State v. Woodruff, 67 N. C. 89; State v. Britt, 78 N. C. 439; Crow v. Jordan, 49 Ohio St. 655, 32 N. E. 750; State v. Saidell, 70 N. H. 174, 46 Atl. 1083, 85 Am. St. Rep. 627; Gilmanton v. Ham, 38 N. H. 108; Finnegan v. Dugan, 14 Allen (Mass.) 197; Kelly v. State, 133 Ala. 195, 32 South. 56, 91 Am. St. Rep. 25. While, as said before, there is a conflict in the authorities on this proposition, we are of the opinion that there was no good objection to the course pursued in this case. Regardless, however, of what we have said on this point, we think it cannot be disputed that the exhibition of the child was proper as corroborative of the testimony that it was born fully matured and perfect, a matter material in determining whether it was conceived prior to the time that defendant furnished the pills to the woman.

[9] In view of the fact that the woman had testified without objection that defendant, in soliciting her consent to intercourse, told her that he had done the same thing to other girls in the school and mentioned their names, her subsequent testimony that she knew such girls attended the school, which was objected to, could not have prejudiced him.

[10] Subsequent testimony given by her under objection to the effect that he told her, shortly after he had given her the pills, that he had sexual relations with another girl, was admissible. This testimony was given in connection with other testimony to the effect that he told her, as a part of the same statement, that such other girl was pregnant and taking the same pills that she was, and that he had given them to her for the same purpose, viz., "to start the flow." It was proper evidence as tending to show an admission on his part as to knowledge of the character of the pills and their tendency to produce a miscarriage, and also the motive and intent with which he had furnished them to her. If evidence is material and competent, the fact that it may reflect discreditably upon a defendant is no ground for its exclusion.

[11] There was no error in receiving in evidence the statement made by the defendant to the district attorney in his office prior to his arrest. It is not claimed that this statement was not freely and voluntarily made by the defendant, without inducement or pressure of any kind on the part of the district attorney or any other officer. The point against it appears to be that it was not admissible in evidence "until after the corpus delicti in the case had been proven," and that the testimony previously given by the woman was not sufficient to prove such corpus delicti, in view of the law requiring corroboration of her testimony before a conviction could be had. There is nothing in the point. The law in regard to corroboration (section 1108, Pen. Code) is simply that the defendant "cannot be convicted upon the testimony" of the woman, unless she is corroborated by other evidence. Her evidence was sufficient proof of the corpus delicti to warrant the introduction of evidence of admissions or confessions on the part of defendant for purposes of the necessary corroboration. That the testimony of the woman may thus be sufficiently corroborated by a confession of the defendant to warrant a conviction is shown by what is said in People v. Josselyn, 39 Cal. 400.

We think that a sufficient foundation was laid to warrant the evidence based on a chemical analysis of a box of the same kind of pills which was purchased by the officers at a drug store in Santa Rosa.

The other assignments of error in the matter of rulings on evidence do not require notice here, other than the mere statement that there is nothing therein requiring a reversal.

Certain errors in the matter of instructions to the jury are alleged.

[12] The court instructed the jury as follows: "Under the law of this state, there is a presumption that things have happened according to the ordinary course of nature and the ordinary habits of life. Such presumption may be controverted or disproved by other evidence." This was in accord with subdivision 28 of section 1963 of the Code of Civil Procedure. It is not disputed that this is correct as an abstract proposition of law, but the point against it appears to be that with reference to the facts of this case it makes a presumption "run backwards." We see no ground for such a claim. The authorities cited, to the effect that the presumption that a thing once proved to exist continues as long as is usual with things of that nature, does not operate retrospectively, and that there is no presumption that a fact or state of things shown to exist at a particular time was in existence prior thereto, relate to an entirely different subject-matter and have no application here. In view of the established physiological fact, testified to by the medical witnesses in this case, that 280 days constitute the average normal period of gestation in the case of human beings, the rule of law stated was applicable. One of the questions in this case was whether the birth of this fully developed and perfect child had come about in the ordinary course of nature; that is, at the end of the natural term of gestation.

The instruction advising the jury substantially that even if defendant did not know whether pregnancy on the part of the woman was the reason for the cessation of her menses when he furnished her the drug, if he did furnish it, yet if he furnished it with the intention that in case she was pregnant her miscarriage should be thereby procured, and she was in fact then pregnant, he was guilty of the offense charged, was, as we have heretofore seen, correct. See Powe v. State, 48 N. J. Law, 34, 2 Atl. 662.

[13] The court instructed the jury as follows: "A person must be presumed, and is presumed, to intend to do that which he voluntarily and willfully does in fact do, and must also be presumed to intend all the natural, probable, and usual consequences of his own acts, unless there is evidence direct or indirect to controvert this presumption." It is not disputed that this is a correct exposition of the law in ordinary cases; but it is urged that the latter part of the instruction is not applicable and is misleading where, as in this case, the intent with which an act is done is the gist of the offense. We quite agree with counsel that an intent to procure a miscarriage by the pills is not to be legally presumed from the fact of the furnishing thereof, even though the circumstances of such furnishing may be sufficient to warrant an inference as a fact of such intent, and that there was no legal presumption arising from the mere furnishing to the effect that defendant intended to thereby procure a miscarriage. This particular intent being, as said, the gist of the offense, it was incumbent on the people to establish it as a fact by such evidence as would warrant a conclusion to that effect on the part of the jury. People v. Jones, 117 Pac. 176. But we do not think that the instruction complained of was meant or could have been understood by the jury as requiring or authorizing them to find any such intent in the absence of evidence establishing it to their satisfaction beyond all reasonable doubt. This is clear when we examine the charge as a whole. The jury was repeatedly and emphatically instructed that the specific intent with which the drug was furnished was the gist of the offense, and that, unless they were satisfied beyond a reasonable doubt by the evidence that it was furnished with the intent to procure a miscarriage in the event that the woman was pregnant, they must acquit. For instance, one instruction, after stating that guilt could attach only in the event that it appeared from the evidence beyond all reasonable doubt, that such medicine was provided "with intent to produce a miscarriage," proceeded as follows: "Therefore, even though you believe from the evidence that defendant supplied said medicine to said Oma E. Stephens, still, if you cannot determine from the evidence beyond all reasonable doubt whether such medicine was provided to procure a miscarriage, or to relieve suppressed menstruation, you must find defendant not guilty." This is but an example of several instructions given by the court on the element of the intent, and the clear purport of the whole charge was that, to entitle the prosecution to a verdict, it was incumbent upon it to prove as a fact, to the satisfaction of the jury beyond all reasonable doubt, not only the furnishing of the pills, but also a specific intent on the part of the defendant to produce a miscarriage thereby, if pregnancy existed. It is inconceivable that the jury understood otherwise.

We see nothing in any of the points made as to other instructions and requested instructions that requires notice, further than to say that there was no error on the part of the trial court in regard thereto.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

161 Cal. 685

COBURN v. HYNES. (S. F. 5,806.)

(Supreme Court of California. Dec. 27, 1911.)

INSANE PERSONS (§ 33*) — APPOINTMENT OF GUARDIAN—APPEAL—EFFECT.

A guardian of an incompetent person is properly prevented by writ of supersedeas from assuming the functions of his office pending an appeal from the order appointing him, notwithstanding Code Civ. Proc. § 966, which provides that when an order appointing a guardian is reversed for error, but not for want of jurisdiction, all lawful acts performed by the guardian are valid.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 48-51; Dec. Dig. § 33.*]

In Bank. Petition by Loren Coburn for writ of supersedeas against M. J. Hynes, guardian of Loren Coburn. Writ granted.

A. J. Treat and W. B. Kollmyer, for petitioner. Cullinan & Hickey, for respondent.

PER CURIAM. Petitioner was duly declared by the superior court to be an incompetent person, and M. J. Hynes was appointed and qualified as guardian of his person and estate. Immediately following the order of appointment in the guardianship proceeding Loren Coburn, petitioner herein, gave notice of an appeal and within the time required by law filed in proper form his undertaking on appeal in the sum of $300. He now petitions for a writ of supersedeas, alleging that the said M. J. Hynes threatens to take possession of his property and to act as his guardian in spite of the pending appeal. This is admitted by the return. The sole question presented, therefore, is whether or not the guardian should be prevented by means of such a writ from assuming the functions of his office pending the appeal from the order appointing him.

Respondent M. J. Hynes concedes that such cases as In re Woods, 94 Cal. 566, 94 Pac. 566, and Matter of Moss, 120 Cal. 695, 53 Pac. 357, seem to sustain petitioner's position that the filing of the undertaking on appeal provided by section 941 of the Code of Civil Procedure suspends the guardian's power pending appeal, but he asks us to overrule these cases upon the grounds: (1) That section 966, Code of Civil Procedure, recognizes the right of a guardian to act during an appeal from the order appointing him; (2) that this case comes under the rule declared in Dulin v. Pacific Wood & Coal Co., 98 Cal. 305, 33 Pac. 123, and Matter of the Real Estate Associates, 58 Cal. 356; and (3) that it is contrary to sound public policy to suspend the functions of a guardian until the hearing of the appeal from the order appointing him.

Section 966, Code of Civil Procedure, provides that: "When the judgment or order appointing an executor, or administrator, or guardian, is reversed on appeal, for error, and not for want of jurisdiction of the court, all lawful acts in administration upon the estate performed by such executor, or administrator, or guardian, if he have qualified, are as valid as if such judgment or order had been affirmed." We do not see that this section fixes the right of a guardian to act during the pendency of such an appeal as the section designates. On the contrary, its language would indicate that, statutorily, he has no such right, but that if he exercise his functions of guardianship in a case where the order appointing him is not void for want of jurisdiction, his acts will not be invalid. It is just such a section as would prevent an appellant from standing by without complaint and allowing the guardian to manage his estate, and then taking advantage of a decision in appellant's favor in the higher court by refusing to recognize the guardian's acts performed in good faith during the pendency of the appeal. Dulin v. Pacific Wood & Coal Co., supra, was a case in which one who, by a court of competent jurisdiction, had been declared to be a director of a private corporation, was proceeding to act as such during the appeal from the judgment. The court held that the writ of supersedeas could not be used to restrain his codirectors from recognizing the respondent and acting with him, the court saying: "The writ itself is directed to the court whose action is sought to be restrained, or to some of its officers, and is limited to restraining any action upon the judgment appealed from. It cannot be used to perform the functions of an injunction against the parties to the action, restraining them from any act in the assertion of their rights, other than to prevent them from using the process of the court below to enforce the judgment, nor can the writ be employed for any purpose upon persons not parties to the judgment." A guardian is not like a director of a private corporation. The former is an officer of the court, whose every act must depend for its authority upon the order appointing him. If the operation of that order be stayed he is left without power to act. The opinion in Matter of Real Estate Associates, supra, held that the functions of a receiver were not suspended by an undertaking on appeal given under section 941, Code of Civil Procedure. Even if we concede that receivers are in the same category as guardians, we are confronted with the fact that years after the decision last cited and that in In re Woods, supra, were handed down, the Legislature saw fit to provide in terms that an order appointing a receiver cannot be stayed except by the filing of a special bond (section 943, Code Civ. Proc., as amended in 1897; see Stats. 1897, p. 56), while the rule with reference to guardians was left unchanged.

This brings us to respondent's argument that tying the hands of the guardian during the pendency of the appeal is opposed to sound public policy. The answer to that argument is that the Legislature has never seen fit to declare that public policy demanded a change from the doctrine of the Woods Case. This very subject is considered in Matter of Moss, supra, where Mr. Justice McFarland, speaking for the court, said: "Some difficulties are suggested by a consideration of the proposition that the appeal stays the execution of the order, and that, if the appellant be really incompetent, his property might be dissipated by designing persons during the pendency of the appeal. There is some force in this suggestion, and apprehended embarrassments might be remedied perhaps by some amendment to the Code in this regard; but more grievous consequences might follow an erroneous adjudication of guardianship, if no appeal were allowed." The following cases also support petitioner's request for supersedeas: In re Schedel, 69 Cal. 242, 10 Pac. 334; Born v. Horstmann, 80 Cal. 453, 22 Pac. 169, 338, 5 L. R. A. 577; City of Los Angeles v. Pomeroy, 132 Cal. 340, 64 Pac. 477; Rohrbacher v. Superior Court, 144 Cal. 633, 78 Pac. 22.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Let the writ issue.

(159 Cal. 380)

NORTH ALASKA SALMON CO. v. HOBBS, WALL & CO. (S. F. 4,924.)

(Supreme Court of California. March 3, 1911.)

1. SALES (§ 442*)—"WARRANTY OF FITNESS"—EFFECT.

Where it was necessary that boxes sold under an express warranty of quality should be dry to be fit for the use intended, the express warranty was a warranty of quality and of fitness within Civ. Code, § 3314, defining the measure of damages for breach of "warranty of fitness."

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1284–1301; Dec. Dig. § 442.*]

2. SALES (§ 267*)—EXPRESS WARRANTY—IMPLIED WARRANTY.

The making of an express warranty of quality does not exclude an implied warranty of fitness of the article sold, where the warranty so implied is not inconsistent with the express warranty but in harmony therewith.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 760; Dec. Dig. § 267.*]

On petition for rehearing. Denied.

For former opinion, see 113 Pac. 870.

PER CURIAM. [1] In a petition for rehearing the defendant contends that the measure of damages stated by the court below in its instructions to the jury was incorrect and inapplicable. The rule laid down in the instruction complained of was that declared in section 3314 of the Civil Code with respect to the damages for breach of warranty of fitness of an article for a particular purpose, the rule including a fair compensation for the loss incurred by an effort in good faith to use it for such purpose. The defendant's criticism is that the warranty shown was an express warranty of quality, only—that is, that the boxes should be dry—and that this by operation of law excludes an express or implied warranty of fitness. It is sufficient to say on this point that the facts alleged and proven show that in order to make the boxes fit for the use intended it was necessary that they should be dry, and that, therefore, the express warranty made was a warranty both of quality and of fitness for the purpose intended, in which case the rule stated in section 3314 would be applicable.

[2] Furthermore, the facts alleged and proven would suffice to create an implied warranty of fitness, and we do not think it is true that the making of an express warranty of quality will exclude an implied warranty of fitness, where the warranty so implied is not only not inconsistent with the express warranty, but entirely in harmony therewith. There was no conflict in the evidence regarding these warranties.

The petition for a rehearing is denied.

(161 Cal. 676)

McLAUGHLIN et al. v. KNOBLOCH et al. (S. F. 5,239.)

(Supreme Court of California. Dec. 27, 1911.)

MUNICIPAL CORPORATIONS (§ 358*) — SIDEWALKS—ASSESSMENTS—CONCLUSIVENESS.

In a sidewalk improvement proceeding under Vrooman Act (St. 1885, p. 156) § 11, and section 12 as amended by St. 1889, p. 168, § 8, a certificate by the superintendent of streets that work has been completed under a contract, becomes conclusive on a failure of the property owner to appeal to the common council or board of trustees as authorized by section 11; the municipal authorities having jurisdiction to order the improvement and a valid contract having been made.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 890; Dec. Dig. § 358.*]

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by D. C. McLaughlin and others against F. Knobloch and another, partners as the Fresno Artificial Stone Company. From a judgment for plaintiffs and from an order denying a new trial, defendants appeal. Reversed.

Lewis H. Smith, for appellants. J. P. Bernhard, M. B. Harris, and E. M. Harris, for respondents.

LORIGAN, J. The plaintiffs are owners of certain lots fronting on Blackstone avenue in the city of Fresno.

Their complaint alleged that defendants claimed a lien on said lots based on a certain warrant, assessment, and diagram made and issued by the superintendent of streets of the city of Fresno, on June 19, 1907, authorizing and empowering defendants to demand and receive certain assessments upon each of the lots of the plaintiffs described in the complaint; that said warrant, assessment, and diagram purported to be issued under a contract for certain sidewalk work on said Blackstone avenue in said city of Fresno fronting the lots of plaintiffs, entered into between the superintendent of streets of said city and the defendants in accordance with proceedings of the board of trustees of said city theretofore had and taken under what is known as the Vrooman act (St. 1885, p. 147), which provides for work upon streets and sidewalks, etc., within municipalities; that said lien claimed and every one of said liens claimed against said lots is void for the same reason, to wit, because the work for which said lien is claimed was not done or performed under the contract under which said warrant and assessment was issued, or performed on the sidewalks fronting the lots of plaintiffs or any of them under and by reason of the contract under which said lien is claimed; and that the act of the superintendent of streets in issuing said warrant, assessment and diagram had created a cloud upon the title to the lots of the respective plaintiffs. The purpose of the action was to enjoin defendants from collecting the said assessments or enforcing or foreclosing any lien upon the lots of plaintiffs; to have said assessment declared void and that the entire record of said warrant, assessment and diagram in the office of the superintendent of streets be canceled as far as it affected the lots of plaintiffs.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

A general and special demurrer of the defendants to the complaint being overruled they answered denying the material allegations of the complaint, and set up affirmatively due proceedings taken under the Vrooman act, the award of the contract for the improvements to the defendants on April 29, 1907, alleged the completion of the work thereunder, the levy of an assessment therefor by the superintendent of streets on each lot to cover the cost of the improvement; the issuance by said superintendent of streets to the defendants of his warrant, the certificate of the city engineer, and the assessment and diagram showing each street upon which the lots assessed abutted, and prayed for a decree declaring said assessments valid and existing liens against said separate lots of plaintiffs.

On the trial the plaintiffs rested their case solely upon the testimony of three witnesses to the effect that *after* the 29th of April, 1907, the date of the contract upon which the assessment was based, no work of any kind had been done on said sidewalks on Blackstone avenue.

Defendants then introduced in evidence the proceedings taken by the board of trustees showing that the board had acquired jurisdiction to award the contract to the defendants for the improvement of said sidewalks, and also the contract entered into between the superintendent of streets and the defendants for the construction of said sidewalks, the regularity and legality of which was not questioned by plaintiffs. They also introduced in evidence the warrant and assessment of the superintendent of streets, the certificate of the city surveyor and diagram with affidavit of demand of assessments and their nonpayment, which under the statute (section 12, Vrooman Act, as amended Stats. 1889, p. 168, § 8) is declared shall be prima facie evidence of the regularity and correctness of the assessment and of the prior proceedings and acts of the superintendent of streets and city council upon which said warrant, assessment and diagram are based, and like evidence of the right of plaintiff to recover in the action, and thereupon moved the court to strike out the parol testimony previously introduced on behalf of plaintiffs showing that no work was done on the sidewalks after April 29, 1907, on the ground that such testimony was immaterial and irrelevant. This motion was denied and the ruling excepted to. This was practically all the evidence in the case. The court found as alleged in the complaint "that the work for which said lien is claimed was not done or performed under the contract under which said warrant and assessment were issued or by virtue of said contract; that there has been no work done on the sidewalk fronting the lots described in said complaint or any of them under or by reason of the contract by virtue of which said lien is claimed," and upon this finding based its decree in favor of the plaintiffs as prayed for in the complaint and against the defendants. Defendants moved for a new trial, which was denied, and this appeal is taken from both the order denying said motion and from the judgment. It is insisted here by appellants that the court erred in overruling their demurrer to the complaint and also in refusing to strike out the oral testimony of the witnesses above referred to, and that the evidence did not sustain the finding above quoted. There is no necessity for extended separate discussion of the various points made by appellants as the same legal proposition is involved in them all.

The proceedings for the improvements of the sidewalks on Blackstone avenue in front of the lots of plaintiffs were inaugurated by the board of trustees of the city of Fresno and proceeded with entirely under what is known as the Vrooman act and acts amendatory thereto. Under the provisions of that act it is declared that such work or improvements shall be under the direction and to the satisfaction of the superintendent of streets, and sections 8 and 9 thereof provide that "after the contractor of any street work has fulfilled his contract to the satisfaction of the street superintendent of said city, or city council on appeal, the said superintendent shall make an assessment," which, with the warrant, diagram and certificate of the city engineer, shall be recorded in the office of the superintendent of streets, thereafter delivered to the contractor, and shall constitute a lien on the lots assessed.

Section 11 of the act provides that any property owner, or any one directly interested in the work provided for, or in the assessment, who feels aggrieved by any act or determination of the superintendent of streets in relation thereto, "or having or making any objection to the correctness or legality of the assessment or other act, determination or proceeding of the superintendent of streets" shall appeal to the city council within a given time, and be entitled to a hearing thereon. On such appeal the city council is empowered to "revise and correct any of the acts or determinations of the superintendent of streets relating to said work; * * * may confirm, amend, set aside, alter, modify or correct the assessment, * * * and require the work to be completed according to the directions of the city council. All decisions and determinations of said city council * * * shall be final and conclusive upon all persons entitled to appeal * * * as to all errors, informalities and irregularities which said city council might have remedied and avoided, and no assessment shall be held invalid except upon appeal to the city council * * * for any error, informality or other defect in any of the proceedings prior to the assessment or in the assessment itself," etc.

Under the allegations of the complaint it is not attempted to question or attack any of the proceedings for any want of jurisdiction in the board to order the sidewalk improvements on Blackstone avenue made, or that a valid contract was not entered into between the superintendent of streets and the defendants to do that work or that the warrant, assessment and diagram issued by the superintendent of streets were not all valid and regular upon their face. The claim solely is that, notwithstanding the apparent regularity on their face of the warrant and assessment, their issuance by the superintendent of streets was void because the work in front of the lots of plaintiffs for which they purported to be issued was not in fact performed. The attack is made on the validity of the assessment for matters extraneous to its face.

The position of appellants is that as the sole ground of attack on the warrant and assessment is that the work certified by the superintendent of streets to have been performed under the contract, and upon which the warrant and assessment were issued, was not in fact done that, if this were true, the only remedy of the plaintiffs lay in an appeal to the city council or board of trustees under said section 11 of the Vrooman act, to have the determination of the superintendent of streets that it had been done reviewed and corrected, if erroneous, and the warrant and assessment issued by him set aside; that this is the remedy provided by said section, and is the exclusive remedy open to plaintiffs, and as the complaint failed to show that they had taken such appeal to the board they were not entitled to maintain this action in the superior court to have the assessment declared void on the grounds stated and, hence, the demurrer to the complaint should have been sustained; that independent of this, as it appeared on the trial that no such appeal to the board had been taken, and the defendants having introduced in evidence the warrant and assessment, etc., which, under section 12 of the act, showed a prima facie right in the defendants to recover in the action, the court should have stricken out the oral testimony of the witnesses for plaintiff of nonperformance of the work under the contract as irrelevant and immaterial, and wholly insufficient upon which to base the controlling finding made by the court.

We are satisfied that under the provisions of the Vrooman act and the authorities construing such provisions, particularly with reference to a failure to appeal to the board for the correction of errors committed by the superintendent of streets, that there can be no question as to the correctness of the position of appellants as to all the points urged.

Under the act it is left in the first instance to the superintendent of streets to determine whether or not work has been performed under a contract. The assessment here in question issued by the superintendent declares "all of said work having been performed and materials furnished, complying to the specification, under my direction, to my satisfaction and acceptance." Whether the work was done under the contract was a question of fact to be determined by the superintendent in the first instance. Such determination was not conclusive, but subject to review upon an appeal to the common council or board of trustees under section 11 of the act, and is the only method provided whereby such review can be had, and where a property owner fails to take such an appeal within the time allowed, the determination of the superintendent of streets that the work has been done conformably to the contract becomes conclusive of that fact, and cannot be attacked before any other tribunal. This has been uniformly held by this court. Warren v. Riddell, 106 Cal. 352, 39 Pac. 781; Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283; Lambert v. Bates, 137 Cal. 676, 678, 70 Pac. 777. In the latter case it is said: "The rule is firmly established that, if the owner would contest an assessment upon the ground that the work contracted for has not been fully performed, he must present that question upon appeal to the city council for its determination. * * * If in fact he (the superintendent of streets) accepted the work and made the assessment before the contract was fulfilled, such determination or act was an error of that officer which the council might have remedied. It was within the functions of that body, upon the defendant's appeal, to determine whether in fact the work provided for in the contract had been fully performed or not, and, under the above provision of section 11, its action in overruling said appeal and dismissing the same is final and conclusive upon him."

On the part of respondents it is insisted that they were not required to appeal to the board of trustees for the correction of the assessment; that as no work at all was done under the contract the assessment was void, and there was nothing in the unauthorized act of the superintendent in issuing it which could be corrected or remedied by the board of trustees if the plaintiffs had taken an appeal to the board, and rely upon such cases as Manning v. Den, 90 Cal. 610, 27 Pac. 435; Capron v. Hitchcock, 98 Cal. 427, 33 Pac. 431; Frick v. Morford, 87 Cal. 576, 25 Pac. 764; Warren v. Chandos, 115 Cal. 382, 47 Pac. 132; Chase v. Treasurer of Los Angeles, etc., 122 Cal. 544, 55 Pac. 414.

There is nothing in the point made, nor do the authorities relied on support it. In all those cases it was held either that the municipal authorities had never acquired jurisdiction to order the improvement, or that no valid contract had been entered into by the superintendent of streets, and hence that there was nothing upon which a valid assessment could be based, or the assessment upon its face appeared to be absolutely void. There was lack of jurisdiction in the board to order the improvement, or want of power in the superintendent to order the work or contract for it, which rendered the assessment invalid. Where these things exist, or the assessment on its face shows that it is void, the authorities cited hold that no appeal is necessary, as it is always open to the property owner to show lack of jurisdiction or invalidity of the contract, or rely upon the apparent invalidity on the face of the assessment itself when an attempt is made to enforce or assert any right under it. But here there is no question but that the board had acquired jurisdiction to order the improvement made; that the superintendent had entered into a valid contract, and that the assessment showed that the work had been done under the contract to the satisfaction of the superintendent, and in all respects the assessment, warrant, and diagram were regular on their face. No question of law as to jurisdiction or regularity of proceedings from the passage of the resolution of intention to the final act of the issuance of the assessment was involved. The superintendent had determined, as the law made it his duty to do, that the work contracted for had been performed to his satisfaction, and issued the assessment. The plaintiffs claim that the work had not been so performed. This made purely an issue or question of fact between the superintendent and the plaintiffs on this point; an issue arising outside the assessment itself, and one which, under such circumstances could only be reviewed on an appeal to the board of trustees under section 11, and which determination of the matter is made conclusive.

Nor is there any force in the point that the board under the terms of section 11 was unable to afford the plaintiffs adequate relief on an appeal to them if the respondents had prosecuted it; that as no work was done at all under the contract and the time for performing it had expired there was nothing that the board could do to compel the performance of the work by the contractors. But the claim that there was no work done under the contract at all and that the certificate of the superintendent of streets that all the work contracted for had been done was erroneous, and the assessment based thereon improperly issued, does not affect the proposition that even under such circumstances the remedy of the property owner is solely an appeal to the city council or board of trustees. From the testimony of the witnesses for plaintiffs directed specifically to the fact that no work was done under the contract *after* the date of its execution on April 29, 1907, it is to be inferred that the work referred to in the certificate of the superintendent and the warrant and assessment was done prior to that date and that the proceedings had before the board of trustees eventuating in the contract for the sidewalk improvement and the issuance of the certificate and the warrant and assessment here attacked were taken to remedy some defect or imperfection in the prior proceedings for the work which was actually done. We assume this because the record does not disclose the real situation, although it is apparent therefrom that sidewalks were laid on Blackstone avenue in front of the lots of plaintiffs prior to and about that time. We merely mention this in passing because, as we have stated, it can be of no legal moment whether the attack on the validity of the assessment in this action is based on the fact that the superintendent of streets certified that the work had been completed when it had not been done at all, or whether the certificate was untrue because there had been a partial failure to substantially do the work. In either case the remedy is solely by appeal to the board of trustees because whatever the situation may be respecting the performance of the contract, the board is vested with ample power to relieve the property owner which is the purpose of providing for the appeal. Very full power is given to the board. It is authorized to revise any act or determination of the superintendent of streets relative to the work, and if it finds that the work in whole or in part has not been done pursuant to the contract, it can set aside the assessment issued by the superintendent and can require the work to be completed in accordance with the directions of the board. If, as claimed by respondents, the determination of the superintendent that the work had been done pursuant to the contract was untrue; that no work at all was done under the contract, it must be assumed that if an appeal had been made to the board upon that ground, it would either have ordered annulled the certificate of the superintendent of streets and left defendants without a basis to proceed against the property of plaintiff for the collection of the assessment, or it could have directed the completion of the contract according to its terms. It must be assumed that the board of trustees would have done their duty, and, so doing, respondents, if they had appealed, would have been afforded full and complete relief.

It necessarily follows from these views that the plaintiffs having failed to take their appeal to the board of trustees, had no standing to maintain this action. The trial court could not determine the question whether the work had or had not been done under the contract as that was a matter exclusively for the board of trustees to determine on appeal, and it was error to refuse to strike out the testimony of the witnesses on that point after the defendants had introduced in evidence the warrant, assessment, certificate, and diagram, with the affidavit of demand of payment, and nonpayment, which made a prima facie showing entitling them to a judgment sustaining their liens as they had prayed for in their answer.

The judgment and order appealed from are reversed.

We concur: HENSHAW, J.; MELVIN, J.; ANGELLOTTI, J.; SLOSS, J.

(161 Cal. 649)

BILLESBACH v. LARKEY. (S. F. 5,543.)

(Supreme Court of California. Dec. 22, 1911.)

1. Appeal and Error (§ 856*)—Review—Theory of Rulings Below.

The appellate court is not confined to the reasons given for the decision below, so that judgment for defendant will be affirmed if the appellate court can sustain a demurrer to the complaint upon any of the grounds of demurrer, whether on the particular ground sustained by the trial court or not.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3406–3434; Dec. Dig. § 856.*]

2. Physicians and Surgeons (§ 18*)—Malpractice—Actions—Allegations of Complaint.

The complaint alleged that defendant, a physician, was employed by plaintiffs on December 22, 1907, to cure plaintiff, and that he "carelessly and negligently" gave her a written prescription for a drug known as heroin, a derivative of opium, and that after plaintiff had taken the drug for two months, the druggist refused to refill it without special authority by defendant, whereupon defendant carelessly and negligently instructed the druggist to refill the prescription for plaintiff whenever she wanted it, and did not revoke it for more than a year thereafter, and that defendant, being ignorant of its deleterious effect, continued to have the prescription refilled and take the drug for 14 months, whereby she was seriously injured. *Held*, that the complaint was defective on special demurrer and uncertain in failing to inform defendant of the particular act of negligence charged.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 34–48; Dec. Dig. § 18.*]

3. Appeal and Error (§ 959*)—Discretion of Trial Court.

While ordinarily the trial court should be liberal in allowing amendments of the complaint, the appellate court can only reverse for refusing such amendments where there is a manifest abuse of discretion in rendering final judgment on demurrer without leave to amend.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825–3833; Dec. Dig. § 959.*]

4. Pleading (§ 225*)—Amendment After Demurrer—Complaint.

In view of Code Civ. Proc. § 472, providing that a pleading may be amended once as of course before answer or demurrer or after demurrer and before trial thereon, and that where a demurrer to the complaint is overruled and no answer is filed, the court may, upon just terms, allow an answer to be filed, plaintiff does not have a positive right to amend his complaint after a demurrer thereto has been sustained, an amendment being by grace.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 575–582; Dec. Dig. § 225.*]

5. Pleading (§ 225*)—Amendment After Demurrer—Abuse of Discretion.

The third amended complaint in an action against a physician for damages for malpractice in negligently giving a prescription for a certain drug claimed to have injured plaintiff was defective on special demurrer for not showing whether the negligence was in improperly prescribing the drug for the disease, or in prescribing it to be taken in an improper manner, or in improper quantities, or at improper times. *Held*, that the court's refusal to permit an amendment upon sustaining a special demurrer to the third amended complaint on those grounds was not an abuse of discretion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 575–582; Dec. Dig. § 225.*]

In Bank. Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Florence Billesbach and another against A. S. Larkey. From a judgment for defendant, plaintiffs appeal. Affirmed.

W. J. Donovan and Robert L. McKee, for appellants. Chickering & Gregory and Snook & Church, for respondent.

SHAW, J. This is an appeal by the plaintiffs from a judgment given against them in the court below. A demurrer to the third amended complaint was sustained, and thereupon the judgment was rendered, leave to amend further being refused. The decision depends on the sufficiency of the complaint in the particulars pointed out by the demurrer.

The complaint alleges that the defendant is a physician and was employed by plaintiffs on December 22, 1907, to cure the plaintiff, Florence, of a malady from which she was then suffering. In the course of his professional duties toward her he gave her a written prescription for the taking of a drug known as heroin, a derivative of morphine or opium. It is alleged that he "carelessly and negligently" did this, but there is no fact alleged tending to show wherein the prescription was improperly or carelessly given in the first instance. The only negligent act set forth is that after she had been taking this drug for some two months, getting the prescription refilled at a drug store, as needed, the druggist refused to refill it again without special authority from the defendant, and that thereupon the defendant carelessly, unskillfully and negligently instructed said druggist to refill said prescription for her whenever she wanted it, without bothering the defendant each time, and that he did not revoke said instruction for more than a year thereafter, and that the defendant, being ignorant of the deleterious effect of the drug, continued to get the prescription refilled and to take said drug for 14 months thereafter, whereby she was made sick and weak and was seriously injured in body and mind. The complaint is diffuse, irrelevant matters are stated, and other unconnected acts of negligence alleged, but the foregoing is the only matter that can be considered as actionable.

The defendant in his brief has argued at great length the proposition that the action is barred by the statute of limitations. It is said that it was upon this ground that the court below sustained the demurrer.

[1] There were, however, several other causes of demurrer assigned. If we find the ruling justifiable on any of the other grounds the judgment must be affirmed. We cannot take notice of the supposed reasons of the court below and we are not confined to those reasons in considering the rights of the parties upon the appeal. The defendant also claims that the other grounds of demurrer are well taken.

[2] The tenth cause of demurrer is that the complaint is uncertain in many particulars specifically stated, among which is that it cannot be determined therefrom whether the heroin was negligently and improperly prescribed for the malady, or whether it was properly prescribed for the malady, but was directed by the prescription to be taken in an improper manner, or in improper quantities, or with improper frequency. The complaint is clearly defective in these particulars. It does not give, or attempt to state, the contents or substance of the prescription. It does not allege how often or in what quantities the drug was to be taken, nor how often or in what quantities it was taken. It does not aver that heroin was not adapted to the cure or alleviation of the disease from which plaintiff, Florence, was suffering. According to the complaint, the cause of the alleged injury was the continued taking of heroin, after the instruction of the defendant to the druggist to refill the prescription as often as she asked to have it done. This instruction was given in February, 1908. But the only allegation with respect to the taking is that said Florence thereafter "did continue to order and did order large quantities of heroin up to about the 23d day of April, 1909, which was taken and administered to her, the said Florence Billesbach, in accordance with the notification, instructions and open prescription given by said defendant to said druggist." This means that the heroin was taken by her in accordance with the original prescription. The fact that she ordered large quantities could not harm her if she did not take it. As she took it only in accordance with the prescription, the question of the carelessness or lack of skill of the defendant would depend wholly on whether he ordered it taken too often, or in too large quantities, or directed or knowingly or negligently permitted her to continue its use as prescribed for too long a period. Upon each of these propositions the complaint is silent. There is no allegation that he failed to warn her or inform her of the nature of the drug, or of the danger of continuing its use too long. It is alleged, by way of recital only, that she was ignorant of the drug and its harmful effects, but there is no averment that it was in fact harmful. It is one thing to give medicine in an improper manner, another thing to give it too often, another thing to give it in too large quantities, and still another to direct or permit its use to be too long continued. The proof which would meet one of these charges might be essentially different from that necessary to meet another. The defendant had a right to demand that the plaintiffs inform him which of these acts constituted the negligence charged against him. Admitting that the injury was caused by the conduct of the plaintiff in continuing the use of the heroin from February, 1908, to April, 1909, and that the defendant should have instructed her not to do so, it is nevertheless true that the injury may have arisen from the quantity being too large, or from too frequent repetitions of the dose, and the complaint contains no information as to which is intended to be proven. If it is claimed that the taking of the drug for 14 months in the smallest quantity, and at long intervals is necessarily injurious, the complaint should have alleged the fact. It does not aver that the defendant did not instruct her not to continue its use so long, or inform her that the long-continued use of the drug was likely to be injurious. It is only by giving a liberal construction in favor of the plaintiffs to the language of the pleading that we can say that it alleges that the injury to the plaintiff, Florence, was caused by using the drug for too long a time. The allegations as to the cause are vague and general. While the pleading might be sufficient to withstand a

general demurrer, we cannot regard it as sufficient to inform the defendant of the particular act of negligence charged against him, when the objection is taken by a special demurrer pointing out the uncertainty.

[3] Ordinarily the trial court should be liberal in allowing amendments where the defect in the complaint is one of form only. This, however, is a matter which is almost entirely within the discretion of that court, and this court can reverse the case only when there is a manifest abuse of discretion in giving final judgment on demurrer without leave to amend.

[4] The plaintiff does not have a positive right to amend his pleading after a demurrer has been sustained to it. His leave to amend afterward is always of grace, not of right. Code Civ. Proc. § 472.

[5] In the present case the final pleading of the plaintiffs was the third amended complaint. It was, therefore, their fourth attempt to state a cause of action. It cannot be commended as a model, after all this effort and amendment. The refusal of leave to amend was not an abuse of discretion. The complaint being defective in this particular, and the demurrer having been properly sustained for that reason, it is unnecessary to consider the question of the statute of limitations.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

161 Cal. 654

In re O'GORMAN'S ESTATE. (S. F. 5,727.)

(Supreme Court of Caifornia. Dec. 22, 1911.)

1. WILLS (§ 576*)—CONSTRUCTION—PROPERTY DEVISED—"ESTATE."

Where a testator was entitled under the will of his father to a small interest in the real property owned by the latter, and was by descent entitled to other and larger interests in the same real property, a will bequeathing all his interest in the estate of his father, which was the only property that the testator owned, includes not only that interest taken under the will of the father, but all interest owned by the testator, the word "estate" in its most common usage covering the property composing the assets of the decedent, and it must be presumed that the testator did not intend intestacy as to part of the interest owned by him.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1255, 1256; Dec. Dig. § 576.*

For other definitions, see Words and Phrases, vol. 3, pp. 2475–2488; vol. 8, pp. 7653–7654.]

2. WILLS (§ 449*)—CONSTRUCTION—PRESUMPTIONS.

It is presumed that a testator intended to dispose of all of his property by his will, and a construction which leads to intestacy will be avoided if possible.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 965; Dec. Dig. § 449.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of John J. O'Gorman, deceased. From a decree of final distribution, the heirs at law and next akin of decedent appeal. Affirmed.

J. A. Kennedy and John J. McDonald, for appellants. P. V. Ross and Emil Pohli, for respondent.

ANGELLOTTI, J. This is an appeal by three heirs at law and next of kin of John J. O'Gorman, deceased, they being his second cousins, from a decree of final distribution of his estate.

[1] Said deceased died testate on October 3, 1906, his will, evidently drawn by a layman, having been executed the day before his death. The question presented by this appeal is one of construction of such will, which was as follows:

"San Francisco, Oct. 2, 1906.

"I hereby make this my last Will and Testament and declare all previous wills or assignments of interest null and void. I hereby bequeath and bequest all my interest in and to my interest in the Estate of Thomas O'Gorman deceased. To be distributed as follows unto Edward O'Sullivan Two hundred and Fifty ($250) Dollars; To Mrs. Dora Singer widow, the sum of $250.00. To Mrs. Kate Cummings the sum of $250.00. To Mrs. Mary Wirtz a married woman the sum of $250.00. To Mrs. A. Klinner a married woman the sum of $250.00. To Mrs. Catherine La Grave, widow the sum of $250.00. To James O'Connor the sum of $250.00 due to him for money advanced to me, Unto Bernard P. La Grave, the rest and residue of my interest in the Estate of Thomas O'Gorman, deceased, for money previous advanced to me by said Bernard P. La Grave, in the sum of $500.

"I hereby appoint Bernard P. La Grave, executor of my said last Will and Testament.

"Witness my hand this 2d day of Oct. 1906.

his
"John J. X O'Gorman.
mark

"Witness to mark:
"J. J. Ford, Jr.
"J. P. Gardner, M. D.

"John J. O'Gorman being unable to write made his mark, and I wrote his name near and signed as a witness. J. J. Ford, Jr."

At the time of making this will and at the time of his death, the only property owned by deceased was such interest as he owned in two lots of land known as lots 7 and 15 of block 96, Central Park Homestead Association, San Francisco, which at the time of the death of his father, Thomas O'Gorman, in the year 1873, were community property of such father and his wife, Anne O'Gorman, who survived her husband. Said Thomas O'Gorman had died testate, devising these

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•For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes lots, which constituted his whole estate, in undivided shares to his said wife, his daughter Kate O'Gorman, and deceased, John J. O'Gorman, the latter's share being one-sixth. The administration of the estate of said Thomas O'Gorman, the father, had not been completed at the time of the death of this deceased.

At the time of the making of the will of this deceased, the following events had occurred: The mother, Anne O'Gorman, had died intestate, leaving no estate except such interest as she had in these lots, and no probate proceedings had been instituted in the matter of her estate. The daughter Kate had married one James R. Burke, had conveyed all her interest in the estate of her father to her husband, and had died. Said Burke had subsequently died testate, giving all his estate, which consisted entirely of such interest in said lots as he had acquired from his wife, to deceased, John J. O'Gorman. Administration of his estate had not been completed. Another daughter, Anne O'Gorman, who was not devised any interest in these lots by the father, Thomas O'Gorman, and who survived her mother, subsequently died, leaving no estate except such interest in said lots as she succeeded to as heir of her mother (which was subsequent to the death of John J. O'Gorman, distributed in the matter of the estate of her mother, to her successor in interest, Mary C. O'Kelly, and which is in no way involved here). At the time of the making of the will, deceased, John J. O'Gorman, knew all of the facts above stated. It thus appears that at the time of the making of the will deceased was the owner not only of such interest in the lots as he acquired by the will of his father, Thomas O'Gorman, but also of such interest therein as he took under the will of James R. Burke, and such interest as he succeeded to as heir of his mother, and was the owner of no other property.

The claim of appellants is that the will must be construed as disposing only of such interest in said lots as he took under the will of his father, viz.: a one-sixth interest therein, and that as to the residue of his interest in said property, the parts to which he had succeeded as devisee of Burke and as heir of his mother, he must be held to have died intestate, and that, consequently, such residue should be distributed to them as the heirs at law of deceased.

The court below concluded that the will of deceased disposed of all his interest in the lots, both that acquired under his father's will and the interests acquired by him as devisee of Burke and heir of his mother. The lots having been sold subsequent to the death of deceased by order of the probate court in the administration of the estate of the father, for $5,175, the residue of the estate of the father, amounting to $4,129.06, was distributed as follows: To the estate of this deceased, $344.09; to the estate of Anne O'Gorman, the mother, $2,408.61, and to the estate of Burke, $1,376.26. The distributable estate of the mother, consisting entirely of her portion of the proceeds of the sale of such lots, was distributed in the matter of her estate, $1,059.66 to the estate of this deceased, and $1,059.66 to Mary C. O'Kelly, successor in interest of the daughter, Anne. The distributable estate of Burke, consisting entirely of his portion of the proceeds of the sale of such lots, and amounting to $1,168.06, was distributed in the matter of his estate to the estate of this deceased. These accessions made the value of the estate of deceased, consisting entirely of proceeds of the sale of such lots $2,571.81, and the residue for distribution, after payment of expenses of administration, etc., $1,876.42. This amount was distributed by the lower court to the seven legatees under the will of deceased, in equal shares, in payment of their respective legacies and on account of the interest due thereon.

We entertain no doubt as to the correctness of the conclusion of the learned judge of the lower court to the effect that the will must be construed as disposing of all the interest of deceased in such lots. Appellants rely upon certain well-known rules of construction, such as, that the intention of the testator is to be ascertained from the will itself, that parol evidence is not admissible to modify, change, or vary the expressed intent (Estate of Young, 123 Cal. 337, 55 Pac. 1011), and that the words of a will are to be taken in their ordinary grammatical sense, unless a clear intention to use them in another sense can be collected, and which other can be ascertained. Section 1324, Civ. Code. But these rules do not preclude the conclusion reached by the lower court.

The word "estate" is used in various senses, one of its most common uses being to denote and describe in the most general manner the *property* composing the assets of a decedent. The words "all my interest in the estate of Thomas O'Gorman, deceased," may very well mean "all the interest that I have in the particular property that is being administered on as the estate of Thomas O'Gorman, deceased, however acquired." There is nothing in the words used to necessarily limit the interest intended to be disposed of to any particular portion of the whole interest of the testator in such property. The words are "*all* my interest." Taking into view the circumstances under which the will was made, it seems certain that this was the sense in which the words were used in the will before us; in other words that the testator intended by the language used to dispose of all his then interest in the property left by Thomas O'Gorman. The administration of the property left by Thomas O'Gorman was still pending, and no distribution thereof had been had. The testator was the owner of certain undivided interests in said property, comprising nearly the whole thereof, acquired in part directly under the terms of the will of said Thomas and in part from others who succeeded at the death of Thomas to such interests. These undivided interests in this particular property constituted the whole of the property of the testator. What more natural under such circumstances than that he should describe *all* his property by the use of the language contained in this will? And what other meaning can reasonably be given to such language in view of the circumstances set forth?

[2] It is well settled that the presumption is that a testator intended to dispose of all his property by his will (O'Connor v. Murphy, 147 Cal. 153, 81 Pac. 406), and "that a construction of a will favorable to testacy will always obtain when the language used reasonably admits of such construction" (Estate of Dunphy, 147 Cal. 99, 81 Pac. 315. See, also, Estate of Heywood, 148 Cal. 188, 82 Pac. 755; Estate of Heberle, 153 Cal. 277, 95 Pac. 41). "Constructions which lead to intestacy, total or partial, are not favored; and therefore, such an interpretation should, if reasonably possible, be placed upon the provisions of the will as will prevent that result." Le Breton v. Cook, 107 Cal. 416, 40 Pac. 552. This presumption appears peculiarly applicable here. It is inconceivable that this testator making this instrument which he called his last will, intended that the same should be operative only as to about one-sixth of the property of which he knew himself to be the owner, and intended that he should die intestate as to the remaining five-sixths of his property, especially when he had no nearer relative or next of kin than second cousins. No such construction is required by the language of this will. We think it clear, in the light of all the circumstances existing and known to the testator at the time of the making of the will, that the language used shows an intent on his part to dispose by his will of all his then interest in the real property left by Thomas O'Gorman, deceased.

The decree of final distribution is affirmed.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.

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17 Cal. App. 397

CARR v. STERN et al. (Civ. 845.)

(District Court of Appeal, Third District, California. Nov. 8, 1911.)

1. Appeal and Error (§§ 396, 373*)—Notice of Appeal—Undertaking—Necessity.

The service of notice of appeal on respondent's attorneys and the filing by appellant of an undertaking for costs on appeal are essential to the perfection of an appeal under Code Civ. Proc. §§ 940, 941, authorizing appeals and providing for service of notice of appeal and the filing of an undertaking.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2099, 2001; Dec. Dig. §§ 396, 373.*]

2. Appeal and Error (§ 417*)—Manner of Perfecting Appeal—Statutory Provisions.

Under Code Civ. Proc. §§ 953a, 953b, 953c, authorizing an appeal by filing a notice of intention and request that a transcript be made up and the reporter to transcribe a report of the proceedings, etc., an appeal from an order denying a change of venue is perfected without requiring the reporter to transcribe the proceedings, where the record consists of the pleadings and affidavits committed in the first instance to longhand writing and without embracing in the notice a request that a transcript of the testimony be made up and prepared, where such record was made up and approved by the judge and appears in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2140–2143; Dec. Dig. § 417.*]

3. Appeal and Error (§ 937*)—Record—Presumptions.

The court on appeal may, in the absence of a showing to the contrary, assume, from the fact that the judge's approval of the transcript is made to appear in the record, that the clerk gave the attorneys notice of the filing of the transcript, and that within a time specified the same would be presented to the judge for approval.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3788–3794; Dec. Dig. § 937.*]

4. Appeal and Error (§ 373*)—Manner of Taking Appeal—Undertaking.

An appeal taken under Code Civ. Proc. §§ 953a, 953b, 953c, is perfected without the filing by appellant of an undertaking on appeal for costs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2001–2004; Dec. Dig. § 373.*]

5. Appeal and Error (§ 2*)—Statutes Authorizing Appeals—Construction.

Statutes in aid of appeals are liberally construed and applied.

[Ed. Note.—For other cases, see Appeal and Error Cent. Dig. §§ 3–7; Dec. Dig. § 2.*]

6. Venue (§ 68*)—Change of Venue—Convenience of Witnesses—Opposing Affidavits.

A statement, in an affidavit by a party in opposition to a motion for a change of place of trial for the convenience of witnesses, that witnesses named are necessary and material for the party, is a mere conclusion of law and cannot be considered in opposition to the affidavits for the change.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 121; Dec. Dig. § 68.*]

7. Venue (§ 68*)—Change of Venue—Convenience of Witnesses—Opposing Affidavits.

An allegation, in an affidavit of a party in opposition to a motion for a change of place of trial for the convenience of witnesses, that the party expects to disprove the statements contained in the affidavit of the adverse party alleging the infliction by the party of injuries to the adverse party through negligence, and to prove that the accident was caused by the negligence of the adverse party, is a mere conclusion of the party and cannot be considered on the merits of the application.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 121; Dec. Dig. § 68.*]

8. EVIDENCE (§ 477*)—OPINION EVIDENCE—NONEXPERT WITNESSES—PERSONAL INJURIES.

The opinion of a nonexpert witness on the physical condition of a person who has sustained injury is not admissible, unless the injury is such that its nature, extent, and effect will be obvious to the common mind, and the apparent condition of an injured person may not be the real condition, and testimony thereof by a nonexpert on the essential effect of appearances has very little, if any, tendency to disclose that the person injured was not injured as he claims to have been.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2237-2241; Dec. Dig. § 477.*]

9. MUNICIPAL CORPORATIONS (§ 706*)—NEGLIGENT USE OF STREET—EVIDENCE.

In an action for injuries to a traveler on a street struck by an automobile negligently operated by defendant's chauffeur, evidence of the skill of the chauffeur and of the care with which he ordinarily drove automobiles is inadmissible; the issue being whether at the time of the accident he was negligent, and whether such negligence proximately caused the accident.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.*]

10. VENUE (§ 70*)—CHANGE OF PLACE OF TRIAL—CONVENIENCE OF WITNESSES—EVIDENCE.

Evidence *held* to show that a change of place of trial of an action was demanded for convenience of material witnesses.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 122-126; Dec. Dig. § 70.*]

11. VENUE (§ 52*)—CHANGE OF PLACE OF TRIAL—PROMOTION OF JUSTICE.

Where the material witnesses for plaintiff cannot under Code Civ. Proc. § 1899, be compelled to attend as witnesses at the trial of an action if tried in the county where pending, but can be compelled to attend if the place of trial is changed to another county, and such witnesses are the only material witnesses as disclosed on the hearing of an application for a change of place of trial, the ends of justice will be promoted by a change, and it is error to refuse to change the place of trial.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 76, 77; Dec. Dig. § 52.*]

12. VENUE (§ 72*)—CHANGE OF PLACE OF TRIAL—PRIMA FACIE RIGHTS.

A defendant, in an action for negligently injuring plaintiff, has a prima facie right to have the action tried in the county in which he resides, and the burden of showing that the convenience of witnesses will be subserved and the ends of justice promoted by a change of the place of trial is on plaintiff asking for a change.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 127; Dec. Dig. § 72.*]

13. APPEAL AND ERROR (§ 965*)—CHANGE OF PLACE OF TRIAL—DISCRETION OF COURT.

Though the refusal or granting of a change of place of trial on the ground of convenience of witnesses and the promotion of justice rests in the discretion of the trial court, where no reason appears against a change, the order refusing a change will be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3836; Dec. Dig. § 965.*]

Appeal from Superior Court, City and County of San Francisco; J. J. Van Nostrand, Judge.

Action by Theron F. Carr against Abraham Stern and others. From an order denying an application of plaintiff for a change of the place of trial, he appeals. Reversed.

S. W. Charles, Fredrick Schneider, and Willard, Swart, Ferrell & McGovern, for appellant. Henry Ach, for respondents.

HART, J. This is an appeal from an order denying plaintiff's application for a change of the place of trial of this action. The action was brought to recover the sum of $25,060 for personal injuries alleged by the complaint to have been inflicted upon plaintiff through the carelessness and negligence of defendants. According to the averments of the complaint, on the morning of the 9th day of July, 1909, the plaintiff, while riding a bicycle on and over a certain highway in the city of Palo Alto, in Santa Clara county, the automobile of defendants, driven by their chauffeur behind and to the rear of plaintiff, ran down the latter, "thereby mashing the sciatic nerve in plaintiff's left leg and mashing the muscles and flesh of plaintiff's left hip, and rupturing him, the said plaintiff, and inflicting upon him injuries both external and internal." The complaint was filed originally in the superior court in and for the county of San Mateo; but, as disclosed during the course of the oral argument, was, on motion of defendants, removed to the city and county of San Francisco on the ground and a showing that they were residents of said city and county at the time of the commencement of the action. Section 395, Code Civ. Proc.; Schilling v. Buhne, 139 Cal. 611, 613, 73 Pac. 431. The motion, the denial of which is the cause of the present appeal, was based upon the ground of the convenience of witnesses and the promotion of the ends of justice. Section 397, subd. 3, Code Civ. Proc. A preliminary objection is, however, made by counsel for the respondents to a review of the record before us for the alleged reason that the appeal is futile under either the old or the new method of taking appeals in civil cases.

It does not appear that the notice of appeal was served on the defendants or their attorneys, or that an undertaking on appeal "to the effect that the appellant will pay all damages and costs which may be awarded against him on appeal" was filed. Sections 940 and 941, Code Civ. Proc. Hence it is contended that the appeal, if sought to be taken under the older system, is abortive.

On the other hand, it is insisted that, if appellant intended to take his appeal under the new or alternative method, he has not succeeded, because of an omission to comply with the provisions of sections 953a, 953b,

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and 953c of the Code of Civil Procedure in the preparation of the record to be used on appeal.

The first-mentioned of the foregoing sections provides that, where a vanquished party intends to take an appeal from any judgment or order, he must file a notice with the clerk of the court of such intention and therein request that a transcript of the testimony, instructions, rulings of the court, etc., be made up and prepared, and that thereupon the court shall require the stenographic reporter to transcribe fully and completely a phonographic report of all the proceedings had at the trial.

Section 953b provides for the execution and filing of an undertaking at the time said notice is filed, in an amount to be fixed by the clerk, by which the party giving such notice shall undertake and agree to pay the clerk the cost of preparing the transcript.

The last-mentioned section makes it the duty of the clerk to transmit said record, within 10 days after the preparation of the same in the manner prescribed by the two preceding sections, to the clerk of the court to which the appeal is taken.

[1] As a matter of fact, neither method of taking appeals in civil actions was strictly pursued by the appellant. As seen, the notice of appeal was not served on the defendants or their attorneys, nor did the appellant file an undertaking as indemnity for the costs on appeal. These prerequisites were indispensably essential to the perfection of an appeal before the adoption of the new or alternative method.

Nor does the notice contain a request that a transcript of the proceedings be made up and prepared by the clerk; neither was there filed an undertaking by which the appellant undertook and agreed to pay to the clerk the cost of preparing said transcript.

[2] But, with all these omissions in the preparation of the record, we perceive no substantial legal reason why we should not review it and so determine the merits of the controversy which it presents on the present appeal.

We think it is clear, and we shall assume, that the appellant sought to take this appeal under the alternative method, and, so viewing the appeal, it is to be observed that there was practically no necessity for the reporter to transcribe the proceedings, for the record on the motion which is the foundation for this appeal consists wholly of the pleadings and affidavits which were already, or in the first instance, committed to longhand writing, and it was therefore not necessary that they should be "transcribed." As to the omission to embrace in the notice a request that a transcript of the testimony offered or taken and evidence offered or received be made up and prepared, the reply is that such record was made up, was approved by the judge, and as so prepared and approved is now before us.

[3] We may assume, in the absence of a showing to the contrary, from the fact that the judge's approval of the transcript is made to appear in the record, that the clerk gave "the attorneys appearing in said cause notice that said transcript has been filed, and that within five days after the receipt of said notice the same will be presented to the judge for approval."

[4] As to the matter of the requirement of a bond for costs on appeal, we have only to refer to the case of Estate of McPhee, 154 Cal. 385, 392, 97 Pac. 878, 881, to show that that requirement of the statute, since the adoption of the new method of taking appeals, is regarded as a nonessential. The court in that case says: "Nor is there any merit in the point that the appeal should be dismissed for failure of appellant to file an undertaking on appeal for costs. The act under which this appeal is taken does not require the filing of any such bond. It was a matter solely for the Legislature to determine whether it would require such a bond to be given, and it has dispensed with it." To the same effect is Mitchell v. California, etc., S. S. Co., 154 Cal. 731, 733, 99 Pac. 202.

It is not provided by section 953b, as it is by section 940 of the Code with reference to the undertaking on appeal required by the last-mentioned section, that the appeal is ineffectual unless the undertaking referred to by said section 953b is filed. Indeed, by the terms of section 941c of said Code, the appeal is fully perfected upon following the provisions of section 941b, which requires no notice to the adverse party and no undertaking of any character. As is said in Mitchell v. California, etc., S. S. Co., supra: "When, upon examining the transcript, it is found that it shows a notice of appeal properly filed, which is sufficient ipso facto under the new and alternative method to perfect the appeal, the court will look no further, but will treat a failure to serve the notice or give a cost bond, or an error in attempting to do so, which might have been fatal to the appeal under the old method, as a matter of no legal consequence."

[5] In the same case it is said that "all statutes making provisions in aid of appeals are to be liberally construed and applied." The record here is duly authenticated by the trial judge and certified by the clerk of the court below, and contains all the evidence and proceedings upon which the order appealed from was made. As before stated, we know of no sound reason why we should not review the merits of the controversy.

As to the merits, we think that it is very evident that the trial court abused its discretion in disallowing the motion for the change of the place of trial to San Mateo county.

The plaintiff, by his affidavit, deposes that he has 16 witnesses, who reside in San Mateo county, and by whom he can prove certain stated facts material to the issues made by the complaint; that the residences of all said witnesses, with the exception of that of Charles M. and Ida M. Carr, are located in the city of Palo Alto, a distance of 6 miles from Redwood City, the county seat of San Mateo county, and are situated a distance of more than 32 miles from the city and county of San Francisco and a distance of 16 miles from San Jose, the seat of the county of Santa Clara; that Charles M. and Ida M. Carr reside within a distance of 6 miles from said Redwood City and more than 30 miles from the city and county of San Francisco. It will not be necessary to detail here the testimony which plaintiff alleges that the witnesses named in his affidavit will give at the trial. It will be sufficient to say generally that some of them, so the affidavit affirms, will testify to the circumstances by which the accident resulting in the injury to plaintiff happened; others will testify to the physical condition of the plaintiff following the accident and as the result thereof; certain witnesses will give testimony with respect to the condition and width of the highway on which the accident occurred; and the physicians will testify as to the nature of the injuries received by the plaintiff and the effect of such injuries upon him.

Plaintiff further deposes that all the male witnesses whom he has named and whose testimony will be material to his case are professional and business men whose professional and business duties require their personal attention, and that it would cause each and all of plaintiff's witnesses great inconvenience to attend said trial in the city of San Francisco, "owing to the distance to be traveled as above set forth, and owing to the crowded condition of the trial calendar" of the department of the superior court of said city and county to which this cause has been assigned, as well as of the crowded condition of the calendars of other departments of said court in which jury cases are tried; that thus the attendance of said witnesses in San Francisco for several days would be necessitated; that "were said trial held in said Redwood City, San Mateo county, none of said witnesses would suffer inconvenience, as all of said witnesses reside within a radius of six miles from said Redwood City, and the trial calendar of said superior court of Redwood City is not crowded, and said case can easily be set for trial for some definite day and time not far distant."

The counter affidavit filed by the defendants sets forth that they have some 29 witnesses, all residing in the city of San Francisco, by certain of whom they expect "to disprove the statements of the plaintiff as contained in his affidavit," etc., and "that the accident was caused by the negligence of said plaintiff, and without any negligence on the part of said chauffeur of defendants"; that they expect to and will prove by Elise Stern "that she called at the house of the plaintiff and can testify as to his apparent condition previous to the time the doctor arrived, and that plaintiff was not injured as badly as he claims to have been"; that they expect to and will prove by Abraham Stern "that he is the owner of the automobile driven by William Swain, which is alleged to have run over the said plaintiff; that said Swain had been in his employ some seven months previous to that time and was a careful, experienced, and efficient driver," and that others by whom Swain had been previously employed had told him previous to his employment of said Swain that the latter was "a capable, efficient, and careful chauffeur"; that all the other witnesses named in their affidavit are personally acquainted with Swain, have driven with him, and have been driven by him in automobiles at different times, and "know from their own personal observations as well as from the general reputation of said William Swain" that he is a careful, capable, and efficient driver, and was more than ordinarily careful in driving an automobile.

The foregoing represents a synoptical statement of the evidence produced by both sides on the motion.

It is plainly apparent, from a mere reading of the affidavit of the defendants, that there is therein practically no showing whatsoever in opposition to the showing made by plaintiff in support of his motion.

In the first place, it is to be said that the defendants, in their affidavit, do not in any manner deny the materiality of the plaintiff's witnesses, nor that their convenience requires a change of the place of trial, nor that the ends of justice would be promoted, nor is it alleged that it would cause delay in the trial, nor is the good faith of the plaintiff impugned therein. Thompson v. Brandt, 98 Cal. 156, 32 Pac. 890. Nor is there any denial in the statement in plaintiff's affidavit that the calendar of the department of the superior court of the city and county of San Francisco in which this action is pending, as well as the calendars of other departments of said court that try jury cases, are so crowded and congested as to render it uncertain when this cause may be called for trial, and that by reason thereof and under the rules of that court plaintiff's witnesses might be compelled to remain in San Francisco for several days before the cause, although set for a day certain, can be reached, so as to be in immediate readiness to answer when called to testify.

In the second place, there is not contained in the affidavit of the defendants a single fact which would have any material bearing upon the questions of fact tendered by the pleadings.

[6, 7] The statement that the witnesses are "necessary and material for the defendants" involves, manifestly, a conclusion of law, while the allegation that the defendants ex-

pect to disprove the statements contained in plaintiff's affidavit and prove that the accident was caused by the negligence of plaintiff himself, and not by or through the negligence of the chauffeur of defendants, is a mere conclusion of the affiant.

[8] The statement that Elise Stern will testify that she called at the home of plaintiff after the accident and saw the latter, and "can testify as to his *apparent* condition previous to the time the doctor arrived, and that plaintiff was not injured as badly as he claims to have been," is the only averment that the counter affidavit contains which even approximates the statement of a material fact, and, as that statement would involve the expression of the opinion of a witness who is not shown to be an expert on the subject to which it would relate, it is most probable that the court would refuse to receive it as evidence of the plaintiff's condition or the character or extent of the injuries he sustained. We do not say that a lay witness is not competent to give testimony descriptive of the physical condition of a person who has been injured and thus disabled; but testimony relating to such matters coming from such a source must be of some material fact or facts from which the jury or the court may infer what the condition of the person was. In other words, the opinion of a nonexpert upon such subjects would hardly be admissible unless the injury is such as that its nature, extent, and effect would be obvious to the common mind —such injuries, for instance, as the loss of a limb or some other member of the body. The *apparent* condition of an injured or a disabled person might not be the *real* condition, and testimony thereof by one not an expert on the essential effect of appearances would have very little, if any, tendency to disclose that the injured party "was not injured as badly as he claims to have been."

[9] The testimony which defendants allege that they can produce of the skill and efficiency of Swain, who was the driver of the car when the accident occurred, as a chauffeur, and of the care with which he ordinarily drives and has driven automobiles is obviously immaterial. The question at issue is, not whether the chauffeur as such was capable, careful, and proficient in the driving of automobiles, and ordinarily careful when engaged in that work, but whether, on the occasion of the accident, he was negligent, and that such negligence was the proximate cause of the accident and the consequent injuries to plaintiff. "Whether the act of the defendant is actionable negligence," says Deering on Negligence, § 407, "is to be determined by the character of the act, or omission, and not by the defendant's character for care and caution. Evidence that the defendant is a careful, cautious, and prudent man is inadmissible to negative his want of ordinary care. Upon the question of the negligence of the engineer at the time of the collision of two trains, evidence of the general incapacity of the engineer, or of his being subject to fits, is immaterial. The reputation of the driver of a horse and carriage is inadmissible in an action by the owner of another horse killed by a collision therewith."

The same rule is laid down in 2 Thompson on Negligence, p. 804, where it is said: "Evidence that the plaintiff was commonly a careful and skillful driver is not admissible to show that when the accident occurred he was in the exercise of due care. The principle is that the question whether a person was at a given time in the exercise of due care is to be resolved upon evidence of what took place at the time, and not upon evidence of the general character he may sustain."

The principle as thus enunciated is approved and applied in the cases of Towle v. Pac. Imp. Co., 98 Cal. 342, 344, 33 Pac. 207, and Cunningham v. L. A. Ry. Co., 115 Cal. 561, 47 Pac. 452. In the last-named case, where the plaintiff was injured by collision with one of defendant's cars, the court, among other things, said: "The question was: Did the servant exercise ordinary care to avoid the injury? If he did, the plaintiff could not recover, no matter how wanting the servant may have been in general competency; while, if he did not exercise such care, plaintiff was entitled to recover, even if the servant possessed the utmost degree of efficiency and skill in the performance of his duty. The sole question, therefore, was: What was the conduct of the servant at the time? And this was to be unembarrassed by any consideration of his general qualifications."

[10] It will thus be observed that, as stated, the defendants have not only wholly failed to deny or contradict the showing made by plaintiff for a change of the place of trial to the county of San Mateo, but have themselves made absolutely no showing that they have necessary and material witnesses who reside in the city of San Francisco or whose convenience would be subserved by retaining the trial in said city. There is therefore no question of a conflict of evidence presented which would, under the rule as to a substantial conflict in the evidence, render the decision of the trial court conclusive upon a reviewing court. The evidence is, indeed, all one way, and very clearly discloses that the convenience of all the witnesses whose testimony, it is shown, will be material to the issues of fact, and who are, therefore, necessary witnesses, would be subserved by an order changing the place of trial as requested.

[11] That the ends of justice would be promoted by a change of the venue as prayed for by plaintiff is irresistibly inferable from the fact, which is made to appear by his affidavit and which is not denied, that all the witnesses named by plaintiff and whose testimony would be material to the issues of fact reside at a distance of over 30 miles from the

city and county of San Francisco, and could not, therefore, be compelled to attend as witnesses at the trial, if held in said city and county (section 1899, Code Civ. Proc.; Naylor v. Adams, 15 Cal. App. 353, 114 Pac. 997); whereas, they reside within such distance of the county seat of the county to which it is requested that the trial of the action be removed as that they would be subject to the coercive power of the court, and consequently their attendance as witnesses at the trial compulsory. It is true, of course, that, should the trial be had in San Francisco, their depositions could be taken, if their personal attendance could not be secured, still it is manifestly always more satisfactory and desirable, in jury cases in particular, to present the testimony first hand to those who must determine the questions of fact, than to submit the same through depositions, which, in practical effect, is always a sort of hearsay way of adducing the proofs.

[12] In holding that the trial court erred in denying plaintiff's motion upon the record as made, we are not unmindful of the rule that the defendants have a prima facie right to have actions of this character tried in the superior court of the county in which they reside (Schilling v. Buhne, 139 Cal. 611, 613, 73 Pac. 431), and that the burden of showing that the convenience of witnesses will be subserved and the ends of justice promoted in the change is on the plaintiff.

[13] Likewise we are not insensible of the rule that the matter of refusing or granting a motion for a change of venue rests in the discretion of the court to which the application is made; but, as is declared in Thompson v. Brandt, 98 Cal. 155, 156, 32 Pac. 890, where no reason appears on the record against the change, the order refusing to grant such a motion cannot be justified upon the ground that granting such orders is in the discretion of the court.

For the reasons stated herein, the order is reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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17 Cal. App. 464

PEOPLE v. SLIGER. (Cr. 212.)

(District Court of Appeal, Second District, California. Nov. 15, 1911.)

CRIMINAL LAW (§ 603*)—CONTINUANCE—AFFIDAVITS.

On a motion for continuance of a prosecution for absence of witnesses, the affidavit showed the materiality of the facts to which the witnesses would testify, and that on April 26th the case was set for trial on June 12th, and on May 16th a subpœna was issued for the witnesses; that the witnesses resided in the county, but were temporarily absent from their homes, "so affiant is informed and believes." Affiant also averred that he "has exercised every diligence in his power to obtain the presence of said witnesses at this trial at this time." *Held*, that there was no error in denying the application, as there was nothing to show that the witnesses were not within the county and their location at all times known to affiant, nor due diligence to obtain the attendance of the witnesses; the allegation as to the exercise of diligence being a mere conclusion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1348-1361; Dec. Dig. § 603.*]

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

J. Horace Sliger was convicted of an offense under Pen. Code, § 288, and appeals. Affirmed.

Willedd Andrews and Tom L. Johnston, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was convicted upon an information charging him with the offense defined in section 288 of the Penal Code. He appeals from the judgment and an order of the court denying his motion for a new trial.

A general demurrer was interposed to the information and by the court overruled. While the ruling is assigned as error, counsel for appellant state that they "submit it without argument or comment." We are unable to perceive wherein the court erred in the ruling. The information is in the language of the statute and free from the defects pointed out by this court in the case of People v. Grinnell, 9 Cal. App. 239, 98 Pac. 681, where the information purported to charge a like offense.

When the case was called for trial, on June 12, 1911, defendant moved for a continuance on the ground of the absence of material witnesses, and in support of his motion caused to be read and filed his own affidavit. The motion was denied, and this ruling is assigned as error. The affidavit is vague, indefinite, and not such as would justify this court in holding that there was any abuse of discretion on the part of the trial court in denying the application. While it sufficiently shows the materiality of the facts to which it was averred the absent witnesses would testify, it is wholly lacking, in that it fails to show any facts necessary to enable the court to determine that any effort, other than causing a subpœna to be issued and placed in the hands of the sheriff, had been made on the part of the defendant to procure their presence at the trial (People v. Ah Yute, 53 Cal. 613; People v. Wade, 118 Cal. 672, 50 Pac. 841), or that there was reasonable ground for believing the presence of the witnesses or their testimony could be procured at a future day. People v. Winters, 125 Cal. 325, 57 Pac. 1067. It is true the affidavit avers "that affiant has exercised every diligence in his power to obtain the presence of said witnesses at this trial at this time," but that is a mere conclusion. People v. Francis, 38 Cal. 187. Affiant should have stated the reasons upon which he based his belief. On April 26th an order was made setting the case for trial on June 12th, and the only effort, so far as shown by the affidavit, made by the defendant to procure the presence of the witnesses in court at the time when the case was set for trial was that, on May 16th, he caused the clerk of the court to issue a subpœna for the witnesses. It does not appear that the defendant personally caused any inquiry to be made as to the whereabouts of the witnesses, or made any effort whatsoever to locate them, or to enable the officer whose duty it was to serve the subpœna to find the witnesses, who, as shown by the affidavit, "reside in the county of Los Angeles, state of California, but are temporarily absent from their homes, and will be for a few weeks, so affiant is informed and believes." There is absolutely nothing in the affidavit that negatives the fact that the witnesses were in the county of Los Angeles, and that their location was at all times known to affiant. It appears that on the 6th day of June the sheriff returned the subpœna, certifying "that after diligent search and careful inquiry, I have been unable to find [the witnesses] named in within subpœna in the county of Los Angeles." When the subpœna was placed in his hands for service is not made to appear. For aught that is disclosed by the affidavit, he may have received the subpœna on or about the date of its return. From the 6th day of June, when the subpœna was returned, until June 12th, the date of the trial, no effort appears to have been made to ascertain the whereabouts of the witnesses, if it was in fact unknown, or to require their presence in court. While it is made to appear that the witnesses were absent from their homes on the date of the trial, such averment is not inconsistent with the fact that they may have been at their homes at all times prior to such date. There was no error in the ruling of the court denying the application.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Our attention is not directed to any other alleged error.

Judgment and order affirmed.

We concur: ALLEN, P. J.; JAMES, J.

17 Cal. App. 471

BLAIR v. BROWNSTONE OIL & REFINING CO. (Civ. 1,030.)

(District Court of Appeal, Second District, California. Nov. 15, 1911.)

1. Contracts (§ 354*)—Action—Findings—Construction.

In an action on a contract, by which plaintiff agreed to shut off the water, drill and complete for defendant its oil well to a certain depth, the court found that when plaintiff commenced work he knew that the casing in the well was broken, and that one of his employés carelessly handled the tools, whereby they were stuck in the well and could not be removed; that plaintiff demanded that defendant furnish him with a wire cable, which, under the contract, it was defendant's duty to do, and defendant failed to furnish such cable; and that "plaintiff's inability to shut off the water and remove the tools was due to the failure to furnish the cable, and to the careless and negligent manner in which said employé of plaintiff handled the tools in working said oil well." *Held*, that this implied a finding that the cable was a necessary tool which defendant was to furnish under the contract, and which, if supplied, would have enabled plaintiff to perform the contract, so that defendant could not complain of the failure, and the finding would not support a judgment for defendant.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 354.*]

2. Corporations (§ 432*) — Contracts — "Cancellation" — Authority of Secretary.

Evidence that plaintiff, who had entered into a written contract with a corporation, told the secretary that he wanted the contract destroyed, and the secretary had said that it was not there, but that he could get it, and plaintiff told him to do so, and destroy the signatures and send it to him, which the secretary did, did not show a valid "cancellation," within Civ. Code, § 1699; there being nothing to show any authority on the part of the secretary to release plaintiff.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 432.*

For other definitions, see Words and Phrases, vol. 1, pp. 949–951.]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Charles H. Blair against the Brownstone Oil & Refining Company. From a judgment for defendant, plaintiff appeals. Reversed.

William H. Fuller and Chas. E. Putnam, for appellant. Geo. E. Farrand and Leonard B. Slosson, for respondent.

SHAW, J. The complaint alleged that on October 3, 1908, plaintiff and defendant entered into a contract, whereby the former, for a stipulated price per foot of depth, agreed to shut off the water, drill, construct, and complete for defendant its oil well No. 5 from its then depth to a depth of 1,500 feet, By the express terms of this agreement, defendant was to "furnish the derrick and all machinery, tools, cordage, lights, water, fuel, casing, casing-shoes, tubing and rods necessary for the deepening and drilling of the said well No. 5 from its present depth to a depth of 1,500 feet." It was further alleged that, on October 6th, plaintiff, pursuant to the terms of the contract, commenced work on the well, and he and his employés performed 79 days labor in the prosecution of the work; that plaintiff was unable to deepen the well and complete the contract in accordance with the terms thereof; by reason of the fact that defendant failed and refused to furnish plaintiff with the necessary and proper tools for the performance of the work; that, had said defendant furnished the necessary and proper tools in accordance with the agreement, and which it had neglected and refused to furnish plaintiff, the latter could and would have been able to have drilled the well to the depth of 1,500 feet, as required by the contract; that, by reason of defendant's said failure to furnish the necessary tools, plaintiff was prevented from performing the work, to his damage in the sum of $1,912.65. There is set out in the complaint a second cause of action, whereby plaintiff sues for the value of the work, labor, services, and materials furnished defendant, the value of which is alleged to be the sum of $1,912.65. The answer denied the making of the contract, as well as other material allegations of the complaint. It also, as a separate defense, alleged an oral understanding and agreement with plaintiff, whereby said plaintiff and defendant settled and compromised all claims and demands then existing between plaintiff and defendant, by reason of any work theretofore done and performed by plaintiff for defendant. Judgment went for defendant, from which, and an order denying his motion for a new trial, plaintiff appeals.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] The court found the contract was made as alleged, and that on October 6th plaintiff entered upon the performance of the covenants on his part therein contained, and expended the sum of $1,263.65 in the performance of 79 days labor thereon. It also found that at the time when plaintiff commenced the work the casing in the well was broken and parted, which fact was known to plaintiff; that one of plaintiff's employés handled the tools in a careless and unskilled manner, by reason whereof the tools were stuck in the well and could not be removed therefrom; that on January 18, 1909, plaintiff demanded that defendant furnish him with a wire cable to be used in the performance of the work, all other necessary tools having been supplied by defendant, but which cable defendant failed to furnish; and the court finds that "plaintiff's inability to shut off the water from said well and remove the tools therefrom was due to the failure of said defendant corporation to furnish plaintiff with said cable, and to the careless and negligent manner in which said employé of plaintiff used and handled tools in working in said oil well." By implication, at least, the court finds that this cable was a proper and necessary tool to be used in doing the work called for by the contract. Had it been supplied, plaintiff could have performed the contract. Thus construed, it appears that plaintiff was prevented from performing his contract by reason of defendant's default in furnishing proper and necessary tools. Defendant was not in a position to complain of plaintiff's negligence, so long as it was in default in supplying him with the proper tools with which to perform his contract. Any interpretation of the finding, other than that here given, would render the finding wholly inconsistent with reference to the facts found. The finding does not support the judgment.

[2] The court further found that plaintiff and defendant, in September, 1909, compromised and settled between themselves all claims or demands of any nature existing between them, and did then and there each release the other from any and all claims and demands growing out of the work done by plaintiff under the said contract, and by mutual agreement canceled and destroyed said contract, together with another made between said parties upon the same date. Defendant was a corporation, and the contract made was in writing. It appears from the evidence that several months after plaintiff had ceased work upon the well he called upon the secretary of the defendant company, and, according to the testimony of the secretary, said that he did not want the contract in question, nor another contract made for the drilling of a new well, brought up against him upon a claim for damages. The secretary said: "What do you want me to do?" to which plaintiff replied: "I want the contract destroyed." The secretary then said: "The contract is not here, Mr. Blair; I have not got it, but I can get it." "Well," said the plaintiff, "you can destroy the signatures and send it to me." Later the secretary sent one copy of the contract, which was executed in duplicate, to plaintiff with the name of the president of the company cut off. Section 1699 of the Civil Code provides: "The destruction or cancellation of a written contract, or of the signatures of the parties liable thereon, with intent to extinguish the obligation thereof, extinguishes it as to all of the parties consenting to the act." Under the provisions of this section, the evidence quoted would justify the finding complained of, were it not for the fact that the record is silent, in that it fails to show any authority, either express or implied, on the part of the secretary to thus release plaintiff from his obligations under the terms of the contract, if he had in fact, without defendant's fault, failed to comply with the terms thereof. The act of the secretary was wholly without any authority on the part of the board of directors of the corporation. Nor is it made to appear from the record that the corporation had any notice of the secretary's act or proposed rescission of the contract, and no facts are shown from which a ratification thereof would follow. The effect of the attempted rescission and release was to make a new contract between the parties, and, conceding that plaintiff made the proposal, it does not appear that the corporation ever assented thereto.

For the reasons given, the judgment and order are reversed.

We concur: ALLEN, P. J.; JAMES, J.

17 Cal. App. 466

PEOPLE v. MOXLEY. (Cr. 216.)

(District Court of Appeal, Second District, California. Nov. 15, 1911.)

1. False Pretenses (§ 30*)—Indictment—Existence of Mechanic's Lien.

A mechanic's lien attaches as the material is furnished or labor performed, although, if a notice be not recorded within the time specified in the statute, the lien is not enforceable; and therefore an information for obtaining money under false pretenses, which shows that liens to the amount of $6,000 existed against certain property at the date of the representations that the property was free from liens, and that subsequently, and within the statutory time, notices of lien were recorded, sufficiently avers the falsity of the representations.

[Ed. Note.—For other cases, see False Pretenses, Dec. Dig. § 30.*]

2. False Pretenses (§ 4*) — Elements of Crime.

Where money is obtained under false pretenses, the person obtaining it is guilty, although there were influences combined with the false pretenses which resulted in his obtaining the money.

[Ed. Note.—For other cases, see False Pretenses, Dec. Dig. § 4.*]

3. False Pretenses (§ 9*)—Reliance upon Pretenses.

The crime of obtaining money under false pretenses is committed if some of the pretenses are false and relied upon by the person paying the money, although he did not rely upon all the pretenses made by accused.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. 14; Dec. Dig. § 9.*]

4. Criminal Law (§ 312*)—Presumptions—Natural Consequences of Act.

A person is presumed to intend the natural, probable, and usual consequences of his act.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 26–28; Dec. Dig. § 312.*]

Appeal from Superior Court, Riverside County; Curtis D. Wilbur, Judge.

Judson Moxley was convicted of obtaining money by false pretenses, and appeals. Affirmed.

Lafayette Gill and C. L. McFarland, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J., Defendant and appellant was informed against for the crime of obtaining money by false pretenses, and convicted. He appeals from the judgment and from an order denying a new trial.

[1] The principal question presented upon this appeal relates to the sufficiency of the information. There is no question raised as to the sufficiency of this information, other than that involved in a determination of the question as to when the liens of mechanics and materialmen attach. It is the contention of appellant that, notwithstanding materialmen and mechanics had provided material and labor in the construction of houses upon the described premises, which had been unliquidated, still liens do not attach until notice of lien is filed in the recorder's office; and the information in this case clearly showing that such notices of lien were not filed until after the representations were made and the money procured upon a reliance thereon, the statements and representations, therefore, were not shown to be untrue, and that no offense was charged. We are of opinion that appellant's contention cannot be sustained. The lien of a mechanic or materialman is a constitutional right, and attaches to the structure as the material is furnished or labor performed. The statutory procedure enacted for the enforcement of such right has reference only to the remedy. It is true that, if notices of lien be not recorded within the specified time, the lien is not enforceable. The lien, however, created by the Constitution, cannot be made subordinate to or dependent upon any legislative act. It exists with all of its force at all times between the furnishing of the material or the performing of the labor and the expiration of the time within which such notices of lien may be filed. With reference to these liens, the only power the Legislature possesses is to obey the mandate of the Constitution by providing means for the enforcement of the liens existing by virtue of the provisions of the Constitution. The information, then, in this case, showing that under the Constitution liens to the amount of $6,000 existed against this property at the date of the representations, and that subsequently, and within the statutory time, notices of lien were filed and recorded, sufficiently avers the falsity of the representations. As we have before said, conceding the falsity of the representations, no other question is raised as to the sufficiency of the information, either in the matters relating to their making, or in declaring their falsity.

Appellant cites Hughes v. Hoover, 3 Cal. App. 150, 84 Pac. 681, wherein this court, in speaking of a mechanic's lien, says that the constitutional right of lien becomes perfected and enforceable only when a written claim of lien containing certain facts properly verified is filed. A reading of that case will disclose that the word "perfected" was inadvertently used in the sentence above quoted, for, just preceding that, the opinion states that the right of lien is given by the Constitution, and that section 1190, Code of Civil Procedure, which declares that liens cease to exist under certain circumstances, may be ignored, as the same exceeds legislative power; that the only effect to be given such section is to interpret it as a statute of limitations which provides the time within which an action may be brought for the enforcement of a right. It is true that, in

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Mills v. La Verne Land Co., 97 Cal. 254, 32 Pac. 169, 33 Am. St. Rep. 168, our Supreme Court has said that the lien is perfected by filing proper notice; that until such notice is filed it is a mere inchoate right personal to the individual; and that until so perfected it has no tangible existence as property. In Spinney v. Griffith, 98 Cal. 151, 32 Pac. 974, it is said that until notice of lien is filed the naked right is without form, and void. The later case, however, of Hampton v. Christensen, 148 Cal. 737, 84 Pac. 203, we regard as setting at rest the question as to when the lien is perfected, and when the right accrues, and by what authority it exists. The Supreme Court there says, with reference to statutory enactments: "Every provision of the laws which the Legislature may enact must be subordinate to and in consonance with this constitutional provision." And whether we say that the right of lien is personal, or inchoate, or otherwise, it is, nevertheless, a vested, constitutionally guaranteed and existing right, and when, as in this case, the constitutional right is rendered enforceable through the observance of statutory provisions, it is an enforceable right. The allegations with reference to the filing of the notices of lien were only necessary as showing that an injury was caused by the false statements, as this injury could only be worked out through a compliance with the statutory provisions requisite to the enforcement of the right of lien.

[2] There is nothing in the point made by appellant that Mr. Ryon relied upon the representations of attorneys or trust companies; the whole record disclosing that he relied upon the representations of defendant, Moxley. If the false pretenses are among the means by which defendant obtained the money, he has committed the crime, the same as though no other influence combined therewith. People v. Weir, 120 Cal. 279, 52 Pac. 656.

[3] There is no merit in the contention of appellant that the court erred in refusing to give to the jury the instruction marked "Defendant's Instruction No. 6." The language used therein could only be construed as an instruction that the jury were required to find that Ryon relied upon all of the pretenses made by the defendant. This is not necessary. It is sufficient if he relied upon some of the material misrepresentations.

[4] We see no error in the court instructing the jury that "a person is presumed to do that which he voluntarily and willfully does in fact do, and that he must be presumed to intend the natural, probable, and usual consequences of his own act." We think this is a correct statement of the law, either in this or any other character of criminal prosecution.

An examination of the record discloses to us no prejudicial error, and the judgment and order appealed from are therefore affirmed.

We concur: JAMES, J.; SHAW, J.

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17 Cal. App. 460

UNION LUMBER CO. v. SUNSET ROAD OIL CO. (Civ. 926.)

(District Court of Appeal, Second District, California. Nov. 13, 1911.)

1. APPEAL AND ERROR (§ 340*)—APPEAL FROM JUDGMENT—TIME.

Code Civ. Proc. § 939, subd. 1, provides that, where the sufficiency of the evidence to sustain the decision is a matter to which inquiry is pointed, the appeal must be taken within 60 days after the entry of judgment. *Held* that, since an appeal from a judgment may be taken within six months after judgment entered, the effect of a failure to take such an appeal within 60 days is only to prevent a consideration of the sufficiency of the evidence to sustain the decision.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1888; Dec. Dig. § 340.*]

2. APPEAL AND ERROR (§ 937*)—MOTION FOR NEW TRIAL—TIME—ORDER—NOTICE OF FILING.

Code Civ. Proc. § 939, subd. 3, provides that an appeal from an order denying a motion for a new trial must be taken within 60 days after the order is entered in the minutes of the court, or filed with the clerk, but section 941b declares that, in order that the time within which an appeal must be taken shall commence to run, appellant must be given notice of the entry of the judgment or order. *Held* that, where an appeal is taken from an order denying a motion for a new trial, it will be presumed, in the absence of proof by respondent to the contrary, that it has been taken within 60 days from service of notice on the appellant of the entry of the order, and is therefore in time.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 937.*]

3. SALES (§ 359*)—REASONABLE VALUE—EVIDENCE—FINDINGS.

Where, in an action for the reasonable value of lumber sold, there was evidence that plaintiff furnished defendant written invoices and statements of account made up from its books, with information as to the amount of the indebtedness claimed, and that so far as the value of the lumber was concerned no question was raised at any time, the court was justified therefrom in finding the reasonable value of the lumber.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 359.*]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by the Union Lumber Company against the Sunset Road Oil Company. Judgment for plaintiff, and defendant appeals. Affirmed.

E. L. Foster, for appellant. W. W. Kaye (Alfred Siemon, of counsel), for respondent.

JAMES, J. Appeal is taken from a judgment entered against defendant and from an order denying a new trial. It is suggested in the brief of respondent that both appeals

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

should be dismissed; that from the judgment because the notice of appeal was served and filed more than 60 days after the entry of the judgment; and that from the order denying the motion for a new trial because the notice of appeal was filed more than 60 days after such order was entered.

[1] The appeal from the judgment was taken within six months after the judgment was entered, and this appeal, therefore, was in time, except that in a consideration thereof the question as to the sufficiency of the evidence to sustain the decision cannot be inquired into. Subdivision 1 of section 939, Code of Civil Procedure, provides that, where the sufficiency of the evidence to sustain the decision is a matter to which inquiry is pointed, the appeal must be taken within 60 days after the entry of the judgment. However, the appeal from the judgment is effectual for the purpose of securing to appellant a review of any alleged errors of law occurring at the trial.

[2] In subdivision 3 of section 939, Code of Civil Procedure, it is provided that an appeal from an order denying a motion for a new trial, in order to be regular, must be taken within 60 days after the order is made and entered in the minutes of the court, or filed with the clerk. It appears without question that the notice of appeal from the order was in this case served and filed more than 60 days after the order was entered, and, if the provisions of section 939, above referred to, were the only ones to be considered in determining the sufficiency of this appeal, then it should be held that this appeal was taken too late. But our Supreme Court in the case of Foss v. Johnstone, Jr., et al., 158 Cal. 119, 110 Pac. 294, has held that the provisions of section 941b, dealing with the alternative method of appeal, are also applicable to an appeal assumed to be taken under the older method, and that, in order that the time within which an appeal must be taken shall be made to commence to run, appellant must be given notice of the entry of the judgment or order. In that case it is further held that the burden is upon the respondent, in the absence of any evidence of the fact furnished by the record, to show that a notice of entry of the judgment or order has been given, and the time thereof. In this case there is nothing in the record from which we can determine whether any notice was ever given of the order of the court denying the appellant's motion for a new trial. For that reason, the appeal must be treated as having been regularly taken, and in time.

Appellant's counsel in his brief argues only questions touching the sufficiency of the evidence to sustain certain of the findings made by the trial court, and, as an error of law, assigns the ruling of the trial judge denying defendant's motion for judgment of nonsuit, which was made at the conclusion of the introduction of testimony on behalf of plaintiff. In the second cause of action set out in plaintiff's complaint, as to which only appellant urges the objections we have referred to, it is alleged that the defendant on a day certain was indebted to plaintiff in the sum of $1,945.98 as a balance of an account for lumber sold and delivered by the plaintiff to defendant. In its answer defendant alleged that lumber was purchased by it from plaintiff for which it agreed to pay the reasonable value, and then, by express allegation, admitted an indebtedness on that account in the sum of $1,587.40.

[3] The trial court by its findings determined that lumber had been sold and delivered to defendant of the reasonable value of $2,358.58, and that defendant was entitled to a credit in the sum of $496.49, leaving a balance, found to be due at the commencement of the action, of the sum of $1,862.09, for which amount judgment was given.

The contention of appellant that there was no evidence warranting the court in finding that the reasonable value of the lumber sold was the sum of $2,358.58 cannot be sustained. From the evidence set out in the bill of exceptions, it appears that the custom of dealing between plaintiff and defendant was that which is usual and ordinary between a vendor of merchandise and his vendee; that from time to time lumber was ordered by defendant from plaintiff and statements were thereupon rendered by the plaintiff to defendant showing the prices at which the lumber was charged. If not appearing by express statement to that effect, it does appear by every reasonable inference to be drawn from all of the testimony that the understanding between plaintiff and defendant was that the merchandise furnished was to be charged for at the current market price, which, in other words, would be the reasonable value thereof, and that the account against defendant was made up upon that basis. There was ample evidence showing that the defendant by written invoices and statements of account made up from the books of the lumber company was furnished with the information as to what the indebtedness claimed to be owing by it to the plaintiff was at all times, and that, so far as the value of the lumber may be concerned, no question was raised as to its price. We feel well satisfied that the findings as made by the trial judge are amply sustained by the evidence. What has been said upon the question of the objections urged to the sufficiency of the evidence to sustain the findings applies equally in answer to the contention of appellant that the court erred in denying its motion for a judgment of nonsuit. Appellant complains that the motion should have been granted for the same reason that it questions the sufficiency of the findings in the particulars above referred to.

The appeals taken in this case appear to be without merit, and the judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

17 Cal. App. 447

PEOPLE v. KELLY. (Cr. 164.)

(District Court of Appeal, Third District, California. Nov. 13, 1911.)

1. Criminal Law (§ 547*)—Evidence—Preliminary Examination—Official Reporter—Qualification.

Where an official reporter took down the deposition of a witness at a preliminary examination, it would be presumed that he was duly qualified by his official oath to faithfully discharge his duties, and it was not necessary that he be sworn at the preliminary hearing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1237–1246; Dec. Dig. § 547.*]

2. Criminal Law (§ 547*)—Evidence Taken at Preliminary Examination—Interpreter—Qualification—Oath.

Pen. Code, § 869, declares that the reporter's transcript of the proceedings in a case shall be regarded as prima facie correct, and section 686 provides that the accused shall be entitled to be confronted with the witnesses against him, except that where the charge has been preliminarily examined before a committing magistrate, and the testimony taken down in the presence of the accused, with opportunity to cross-examine, the deposition of such witness may be read where it is shown that he is dead, insane, or cannot with due diligence be found within the state. *Held* that, where a witness was examined by means of an interpreter at a preliminary examination, the statute did not require the witness' deposition to show that the interpreter was sworn, though it was the duty of the magistrate to do so; the deposition being taken as prima facie correct.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1237–1246; Dec. Dig. § 547.*]

3. Criminal Law (§ 543*)—Evidence at Preliminary Examination—Absence of Witness—Diligence.

A blacksmith, who had testified at a preliminary examination before leaving the county and going to San Francisco to work, gave his address to the district attorney, who did not think it necessary to detain him, believing he was not a "wandering character." Within a month after the witness left, a sheriff went to San Francisco a few days before the trial with a subpœna to serve on the witness, and went to the address given, found it to be a blacksmith shop, but failed to find the witness. He visited several blacksmith shops in the city in search of the witness, but without avail. He made previous inquiry in the county where the witness had been living before he went to San Francisco, and subpœnas were sent to neighboring counties shortly before the trial and were returned not found, as was also a subpœna given to the sheriff of the city and county of San Francisco. *Held*, that sufficient diligence was shown to authorize the admission of the witness' deposition.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1233, 1236; Dec. Dig. § 543.*]

4. Criminal Law (§ 543*)—Appeal—Matters of Discretion—Review.

Whether a sufficient foundation was laid for the admission of the deposition of a witness taken at a preliminary examination was a matter largely within the discretion of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1233, 1236; Dec. Dig. § 543.*]

5. Criminal Law (§ 1186*)—Appeal—Instruction—Reasonable Doubt—Failure to Define—Prejudice.

Proposed amendment No. 26 to the Constitution (St. 1911, p. 1798) provides that no judgment shall be set aside or new trial granted in any criminal case for misdirection of the jury or for error as to any matter of pleading or procedure, unless the court shall be of the opinion that the error complained of resulted in a miscarriage of justice. The court charged that, if accused in a prosecution for robbery offered an explanation of his possession of the stolen property, it was for the jury to say, under all the evidence, whether such explanation produced in their minds a reasonable doubt, and, if it did produce a reasonable doubt of accused's guilt, then he would be entitled to an acquittal; that a reasonable doubt need not result from the testimony affirmatively produced by accused, but might arise from and be founded on a weakness or defect in the testimony introduced by the prosecution; and that the presumption of innocence remained with accused until the end of the case and until his guilt was proven to a moral certainty and beyond all reasonable doubt. *Held*, that accused was not prejudiced by the refusal of an instruction defining reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215–3219; Dec. Dig. § 1186.*]

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

A. B. Kelly was convicted of robbery, and he appeals. Affirmed.

B. F. Fowler, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

CHIPMAN, P. J. Defendant was convicted of the crime of robbery, and, upon judgment of conviction, was sentenced to 12 years in the Folsom prison. He appeals from the judgment and the order denying his motion for a new trial.

In his brief defendant presents but two objections to any of the proceedings had at the trial.

First. It is claimed that the deposition of the prosecuting witness, Grunitz, taken at the preliminary examination, was improperly read in evidence by the district attorney for the following reasons: (1) Because his testimony "was taken through an interpreter in a foreign language and was not taken in conformity with section 869 of the Penal Code"; (2) Because such diligence in securing the attendance of the witness, as is required by subdivision 3, § 686, of the Penal Code, was not shown.

It appeared that the deposition was taken before the magistrate through the official reporter, reduced to longhand, and filed with the clerk with the reporter's notes, and showed that the witness was duly sworn. It did not appear that either the reporter or the interpreter was sworn. The certificate of the reporter read as follows: "I hereby certify that the within transcript numbered from 1 to 15 both inclusive is a full, true and correct transcript of my shorthand notes, and a full, true and correct statement of all the testimony given and proceedings had upon the preliminary examination in the justice's court of No. 2 township, county of Merced, state of California, in the case entitled the People of the State of California vs. A. B. Kelly, on Friday, December 10, 1910, before J. J. Griffin, Justice of the Peace in and for No. 2 Township. [Signed] J. T. Conley, Shorthand Reporter." The transcript shows as follows: "Richard Grunitz. A witness on behalf of the People, after being duly sworn testified as follows. (Through the German Interpreter L. Wagner.)" Then follows the deposition. The transcript shows that Grunitz was duly sworn.

[1] It must be presumed that the official reporter had duly qualified by taking his official oath to faithfully discharge his duties. It was not necessary that he be sworn at the preliminary hearing.

[2] The question, then, is: Could the deposition be read without proof that the interpreter was sworn? The point was distinctly raised at the time the offer was made and later by motion to strike out. Section 869 of the Penal Code declares that the transcript of the reporter, "when written out in longhand writing, and certified as being a correct statement of such testimony and proceedings in the case, shall be prima facie a correct statement of such testimony and proceedings." Section 686 of the same Code provides that the defendant is entitled to be confronted with the witness against him, "except that where the charge has been preliminarily examined before a committing magistrate and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness; * * * the deposition of such witness may be read, upon its being satisfactorily shown to the court that he is dead or insane or cannot with due diligence be found in the state." In People v. Lewandowski, 143 Cal. 574, 577, 578, 77 Pac. 467, 469, it was held that, under these statutes, the transcript in longhand of the shorthand notes, duly certified and filed, "is placed upon the footing of a deposition." Said the court: "Whether taken through an interpreter or not, it is in each case the original testimony of the witness, in the same sense and to the same extent as is the testimony of the witness present at the trial, given through the medium of an interpreter, his original testimony on the trial, and in the cases provided by law may be read in evidence as such." It thus appears that the deposition is "prima facie a correct statement of such testimony" and "may be read," where, after due diligence, the witness cannot be found in the state. The statute does not require it to be shown at the time the deposition is offered to be read that the intrepreter was sworn at the preliminary hearing. It was, of course, the duty of the magistrate to place him under oath the same as any other witness, but the burden of proving that he was not sworn was on the defendant. Nor does the statute require proof that the reporter was sworn before taking his notes of the testimony as a prerequisite to making the deposition "prima facie correct." Was due diligence shown?

[3] Before the deposition was offered, the district attorney submitted his proof of diligence in endeavoring to secure the personal attendance of the witness. It appeared that the witness had been working in the neighborhood on a ranch, and, it may be inferred from the testimony, as a blacksmith. The case was first tried on February 23 and 24, 1911, and the prosecuting witness testified at that trial. He was then working in the neighborhood. He informed the sheriff not long after, some time in the early part of March, that he was going to San Francisco to work, and gave the number of the place on Folsom street where he could be found. The district attorney knew that he was intending to go there, but he testified that he did not think it necessary to detain him, and believed he would have no trouble in finding him; that he was not a "wandering character." The sheriff went to San Francisco a few days before the trial, which began on April 10, 1911, taking with him a subpœna to serve upon the witness. He went to the number given by the witness, and found a shop, but did not find the witness. He visited several blacksmith shops in the city in search of the witness without avail. He made previous inquiry in Merced county where witness had been living but did not find him. Subpœnas were sent to neighboring counties shortly before the trial and were returned "not found," as was also a subpœna given to the sheriff of the city and county of San Francisco. We cannot see what more could reasonably have been done to find the witness.

[4] Furthermore, the question whether a sufficient foundation has been laid is largely within the discretion of the trial court. People v. Lederer, 119 Pac. 949. It should be observed that witness Grunitz testified at the first trial and defendant introduced and read to the jury his testimony given at that trial. Just why the defendant made use of this testimony after having endeavored to prevent the reading of the testimony taken at the preliminary hearing is not apparent, unless it was to point out certain conflicting statements which in fact were not very material. In substance, the testimony on both occasions was the same.

[5] The only remaining error pointed out

in the brief relates to the refusal of the court to give an instruction on reasonable doubt as formulated by defendant. It follows the stereotyped instruction on that subject, and concludes thus: "But if, upon such consideration, the minds of the jury are not firmly and abidingly satisfied of the defendant's guilt if the conscientious judgment of the jurors wavers and oscillates, then the doubt of the defendant's guilt is reasonable, and you should acquit." This instruction was refused because given elsewhere. The court gave several instructions on the subject of reasonable doubt, although not distinctly defining the terms; i. e., the court told the jury that "the prosecution must prove to you to a moral certainty and beyond all reasonable doubt that the defendant and no one else committed the offense," etc. Again: "It is not sufficient that the circumstances proved coincide, account for, and therefore render probable the theory sought to be established by the prosecution, but that they exclude to a moral certainty every other reasonable hypothesis than the single one of guilt, or the jury must find the defendant not guilty."

Again, in speaking of the recent possession of stolen property, the court told the jury: "If the defendant under such circumstances offers and produces an explanation of the possession of such property, it is for you to say under all the evidence whether or not such explanatory evidence produces in your minds a reasonable doubt, and, if such evidence does produce in your minds a reasonable doubt of his guilt, then he is entitled to an acquittal at your hands." The jury were also told a reasonable doubt of defendant's guilt need not result from the testimony affirmatively produced at the trial by defendant—"it may arise as well from and be founded upon a weakness or defect in the testimony introduced on the part of the prosecution"—also that the presumption of innocence remains with defendant "until the end of the case and until his guilt is proven to a moral certainty and beyond all reasonable doubt." In several other instructions the necessity for establishing facts, indicating guilt, to a moral certainty and beyond a reasonable doubt is emphasized. We are aware that trial courts usually and very properly round out their instructions on this subject by a definition of reasonable doubt. But are these terms themselves so shrouded in doubt that it is prejudicial error to refuse to define their meaning? Are the rights of a defendant prejudiced by leaving the jury to determine what the court means when they are told that they must find the facts "to a moral certainty and beyond a reasonable doubt"? Section 1096 of the Penal Code provides as follows: "A defendant in a criminal case is presumed to be innocent until the contrary is proved, and, in cases of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal. In People v. Cohn, 76 Cal. 386, 18 Pac. 410, where the court was by the defendant asked, but refused, to instruct the jury that "the burden is upon the prosecution of establishing every element of the crime of which the defendant may be convicted, beyond a reasonable doubt," and also "omitted to give any other instruction of a like character, or stating or bearing upon the rule as to reasonable doubt in criminal cases," the Supreme Court reversed the judgment. But we have found no case holding, where the rule stated in the Penal Code is given and is emphasized in many instructions and in various forms of expression, that it would be so prejudicial as to demand a reversal, for the court to refuse to give a specific definition of reasonable doubt. We find ourselves unwilling to so hold. It will be noticed that, in the concluding paragraph of the instruction refused, the jury are told that, "if their conscientious judgment wavers and oscillates, then the doubt of the defendant's guilt is reasonable," and they should acquit. To make this statement free from objection, it should be made to apply to the judgment of the jury in their final conclusion, and not to direct them to acquit whenever they find their minds wavering or oscillating. Jurors often change their minds many times during the course of their deliberations. They may have reasonable doubts during their deliberations. Their judgment may waver and oscillate at such times. It is when they finally decide that the jurors' minds must be "abidingly satisfied of the defendant's guilt." However this may be, the rule by which we are to be guided is now that "no judgment shall be set aside or a new trial granted in any criminal case on the ground of misdirecting the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Proposed Amendment No. 26 of the Constitution, recently adopted (St. 1911, p. 1798). It is not necessary to indicate the full scope and meaning of this amendment, or how far it will work a reformation in the examination of cases brought up for review by appeal. We are clearly of the opinion that we cannot say that the error now being considered, conceding it to have been error, "has resulted in a miscarriage of justice."

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

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EHAT v. SCHEIDT. (Civ. 878.)

(District Court of Appeal, Third District, California. Nov. 10, 1911.)

1. Evidence (§ 471*)—Opinion Evidence—Conclusion and Opinion of Witness.

Evidence by the plaintiff in a civil action for assault, descriptive of the nature of his injuries, was not objectionable as an opinion and conclusion of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149–2185; Dec. Dig. § 471.*]

2. Appeal and Error (§ 1050*)—Harmless Error—Admission of Evidence.

Error, if any, in permitting plaintiff in a civil action for assault to himself describe his injuries, is harmless, where the physicians who attended him gave a detailed and technical description of such injuries.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153–4160; Dec. Dig. § 1050.*]

3. Assault and Battery (§ 32*)—Civil Action—Evidence—Damages.

In a civil action for assault, where it appeared that plaintiff was an ordinary laborer, and was thereafter unable to do the amount of labor he could perform before the injuries, evidence as to the wages he was receiving up to the time he was injured was admissible as bearing upon the question of damages.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 44; Dec. Dig. § 32.*]

4. Assault and Battery (§ 27*)—Civil Action—Admission of Evidence.

In a civil action for damages from an assault, evidence by a witness, who accompanied plaintiff to a doctor after he was injured, as to what the doctor did in preparing to treat plaintiff and to reset his dislocated shoulder, was admissible.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 37–39; Dec. Dig. § 27.*]

5. Appeal and Error (§ 690*)—Questions Presented for Review—Admission of Evidence—Record.

Where there is nothing in the record showing that a witness for defendant did not testify in the English language in the police court, nor showing that the witness offered to rebut him did not understand the Italian language, an objection by defendant that the testimony offered in rebuttal to impeach his witness, who testified through an interpreter, was in the nature of hearsay, will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2897–2908; Dec. Dig. § 690.*]

6. Assault and Battery (§ 30*)—Civil Action—Admission of Evidence—Aggression.

Where the theory of the defendant in a civil action for assault was that he and another met the plaintiff by mere accident, and the plaintiff's theory was that it was the defendant's purpose to meet him and get a settlement of plaintiff's indebtedness from him, the evidence of a witness for the defendant that he did not know the purpose of the defendant in going to the place where plaintiff worked was admissible on the issue of aggression.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 40; Dec. Dig. § 30.*]

7. Appeal and Error (§ 1048*)—Harmless Error—Rulings as to Questions to Witness.

In a civil action for assault, where aggression was in issue, and where a witness for defendant testified that he did not know the purpose of defendant in going to the place where plaintiff worked, the permission of rebuttal evidence tending to impeach the witness by reason of inconsistent statements at a former trial *held* harmless error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140–4145, 4151, 4158–4160; Dec. Dig. § 1048.*]

8. Witnesses (§ 388*) — Impeachment — Foundation.

Where a witness was asked if he did not, in the presence of certain persons at a former trial, make a statement referred to, stated that he remembered the occasion referred to, that he was present, and then gave testimony, there is a sufficient foundation for an impeachment of the witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1233–1242; Dec. Dig. § 388.*]

9. Witnesses (§ 389*)—Impeachment—Inconsistent Statements.

Where a witness, in answer to a question as to whether he made an alleged inconsistent statement in a previous trial, answered, "I don't remember," it is proper to show by way of impeachment that he did, in fact, make the alleged statement at the time mentioned.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1243–1245; Dec. Dig. § 389.*]

10. Witnesses (§ 388*) — Impeachment — Foundation.

Where defendant in a civil action for assault was asked by counsel for plaintiff whether he testified at a trial in the police court that he knocked the plaintiff to the ground, and replied that he had no recollection of so testifying at the occasion mentioned, there was sufficient foundation for the admission of testimony of the police judge and plaintiff's attorney in the police court that defendant did so testify.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1233–1242; Dec. Dig. § 388.*]

11. Appeal and Error (§ 1008*) — Trial by Court — Credibility of Witnesses — Weight of Evidence.

In a trial by the court, it is the exclusive judge of the credibility of the witnesses, the weight, effect, and evidentiary value of the testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955–3969; Dec. Dig. § 1008.*]

12. Assault and Battery (§ 35*)—Civil Action—Sufficiency of Evidence.

Evidence, in a civil action for assault and battery, *held* sufficient to support findings by the court that defendant willfully assaulted plaintiff and struck him and knocked him down and kicked him; that by the striking and beating plaintiff's head was bruised and swollen, his shoulder dislocated, his two ribs badly injured, and caused plaintiff to be sick and confined to bed immediately following the assault.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 51; Dec. Dig. § 35.*]

13. Judgment (§ 256*)—Civil Prosecution—Judgment Supported by Findings.

Findings that defendant willfully assaulted the plaintiff and struck him and knocked him down and kicked him, bruising him, dislocating his shoulder, injuring two ribs, and causing him to be sick and confined to bed for about eight days, *held* to support a judgment for plaintiff in a civil action for damages from the assault.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 446–454; Dec. Dig. § 256.*]

14. ASSAULT AND BATTERY (§ 40*)—CIVIL ACTION—DAMAGES NOT EXCESSIVE.

Where plaintiff, a man 65 years of age, was willfully assaulted by defendant, and struck and knocked down and kicked, and was bruised and had his shoulder joint dislocated and two ribs injured, and in consequence of the assault was confined to bed eight days, incurred medical expense, and suffered an impairment in his earning capacity, a judgment for $500 was not excessive.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 55; Dec. Dig. § 40.*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by C. J. Ehat against J. H. Scheidt. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank Kauke, for appellant. U. Grant Hayden, for respondent.

HART, J. This action was brought by the plaintiff to recover damages for personal injuries which the complaint alleges were inflicted upon him by the defendant. The action was tried by the court; a jury having been waived by the parties, and judgment was awarded plaintiff in the sum of $500. This appeal is by the defendant from the judgment and the order denying him a new trial.

The points urged by the appellant against the validity of the judgment and the order are that certain rulings of the court respecting certain evidence were illegal and harmful to the defendant, and that certain findings are not supported by the evidence.

The facts are these: The plaintiff, a man 65 years of age at the time he received the injuries complained of, was indebted to the defendant in the sum of $16.75. On the 19th day of July, 1909, the plaintiff was working as a laborer in a box yard in the city of Fresno. In the forenoon of that day, the defendant, accompanied by an Italian by the name of Toschi, went to the box yard, where they met plaintiff. The defendant spoke to the plaintiff about the indebtedness referred to, asking him for payment of the same. An acrimonious discussion ensued, which was finally followed by a fight, with the result, according to the story of plaintiff, that the latter was severely beaten and seriously injured by the defendant. The plaintiff, after the trouble ceased, was assisted by a man named Arieta to a physician's office, where his bruises and injuries were given medical attention.

[1] 1. The plaintiff was permitted, over an objection interposed by defendant, to describe the nature of his injuries. The specific reason urged against that testimony was that it could amount to no more than an opinion and a conclusion of the witness. We see no force in the objection. The plaintiff, while not an expert on such matters, was competent to give in a general way an approximately correct description of the bruises and other injuries received by him.

[2] Besides, the doctor who waited on him, dressing and otherwise attending to his various wounds, gave to the court a detailed and technical description of plaintiff's injuries, and the testimony of plaintiff on that subject harmonized, generally, with that of the physician. The testimony objected to could not therefore have in any event prejudiced the rights of the defendant.

[3] Nor did the court err in allowing the plaintiff to state the wage rate he was receiving for his labor up to the time he was injured. The testimony disclosed that plaintiff earned his living as an ordinary laborer; that, on account of the injuries inflicted upon him by defendant, he was confined to his home for eight days, and has, since the trouble, according to his statement, been unable to do the amount of labor he was capable of performing prior to receiving the injuries. The earning capacity of the plaintiff prior to receiving the injuries complained of in the business which he had customarily followed was a proper element to be considered in the assessment of damages. Zibbell v. Southern Pac. Co. et al., 116 Pac. 513.

[4] The court did not err in allowing Arieta, who accompanied the plaintiff to the doctor's office, to state what transpired at said office after the arrival of plaintiff there. The witness merely described, as well as he knew how, what the doctor did in preparing to treat plaintiff and what he did in order to reset plaintiff's dislocated shoulder. The testimony, while practically without any force in any direction, tended, if anything, to corroborate the doctor as to the treatment to which it was necessary to subject the plaintiff for the injuries upon his body.

[5] The objection to the testimony offered in rebuttal by the plaintiff to impeach the witness, Toschi, who testified for the defense, cannot be sustained. It appears that the witness testified with respect to the circumstances of the trouble between the parties before the police court of the city of Fresno; the defendant having been in said court prosecuted upon a charge of battery growing out of said trouble. It appears that his testimony given at the trial of the case at bar varied in some particulars from that given by him at the trial in the police court. On his cross-examination by counsel for plaintiff in the present case, the witness' attention was called to the disparity between his former testimony and that given in this trial, and his reply as to whether he had made the former statements was, "I don't remember," or "I remember not saying that." Hay-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

den, attorney for plaintiff, having been present at the trial in the police court, and also the police judge, took the witness stand in this action for plaintiff in rebuttal, for the purpose of testifying to the statements made by Toschi at the trial in the police court which it was claimed were inconsistent with his testimony in the trial of this case.

One of the objections urged here against the competency of Hayden and the police judge to testify in impeachment of Toschi is that the latter is an Italian, speaks the little English that he is capable of using imperfectly, and gave his testimony at the police court trial through an interpreter, and that Hayden and the police judge were therefore permitted to testify only to what the interpreter said that Toschi stated. In other words, it is contended that Hayden's testimony, as well as that of the police judge, in the present trial was hearsay. But the difficulty about this objection is that there is absolutely nothing in the record showing that Toschi did not testify in the English language in the police court. Nor is there any showing that Hayden and the police judge do not understand the Italian language. It does appear, however, that Toschi could speak to some extent in the English language, though imperfectly, for he declared in the present trial in English that he understood certain language (giving it in English) used by the plaintiff in addressing the defendant. In any event, as indicated, the record is not such as to make the objection here considered available to the appellant.

[6] But it is further objected that the matter to which the impeaching testimony was addressed was in its character collateral, and therefore not subject to impeachment.

The theory of the defense was that the defendant and Toschi went to the box yard for the purpose of looking after some boxes which had been left there by a neighbor of the defendant, and that the latter met the plaintiff on the occasion of the affray by mere accident. The plaintiff's theory at the present trial, as was presumably true at the trial in the police court, was that the real purpose of the defendant's visit to the box yard on that day was to meet the plaintiff, and secure from him a settlement of his indebtedness to defendant.

Toschi testified in the police court that he and the defendant went to the box yard together, but that he did not know the purpose for which the visit was made. At the trial of the case at bar he testified that he and the defendant visited the box yard for the purpose of looking for some "sweat boxes." On cross-examination at the trial of the present case, his attention having been first called to his testimony given in the police court, he declared that he did not remember having testified in the last-mentioned court that he did not know the purpose of the visit to the box yard, and the witness, Hayden, as well as the police judge, Briggs, were permitted, against the objection of the defendant, to testify in rebuttal at the trial of this case that Toschi did so testify in the police court.

While the particular purpose of the visit of the defendant and Toschi to the box yard would appear to be of little importance in its bearing upon the case as made by the pleadings, since there is no dispute that a fight took place between defendant and plaintiff and there is sufficient evidence to support the finding that the last named was the aggressor, still we are not prepared to say that the testimony offered for the discovery of such purpose was not material. As stated, the theory of the plaintiff seems to have been that the defendant went to the box yard for the express purpose of asking the former for a settlement of the trifling financial differences between them, and that the meeting, so far as defendant was concerned, was not a supervenient circumstance, as the testimony of Toschi and the defendant in the present trial would indicate. We think Toschi's testimony in the respect referred to was material and admissible, for whatever it might be worth, as bearing upon the question whether the defendant or the plaintiff was the aggressor in the affray which followed the meeting of the two men. The jury, or, as in this case, the judge, might, considering it with the other facts, infer from the circumstance that the meeting between the two men was purely accidental, and that the defendant broached the subject of plaintiff's indebtedness to him in a gentle frame of mind and that hostilities were initiated by the plaintiff, while, on the other hand, when considered in connection with the evidence of other facts, the circumstance that the meeting was deliberately planned or preconceived by defendant might afford some ground for the inference that the latter approached the plaintiff in a belligerent manner and started the fight.

[7] At any rate, we do not think the allowance of the testimony of Hayden and Briggs in impeachment of Toschi is of sufficient importance to justify a reversal on that ground alone.

[8] There is no merit in the contention that a proper foundation for the impeaching testimony was not laid. The witness was asked if he did not, in the presence of certain persons, in the trial in the police court, when giving his testimony, make the statement referred to. The witness stated that he remembered the occasion to which counsel referred, that he remembered that the persons named were present, and that he then gave testimony. This is all that the statute requires. "If the witness understood the circumstances of the time and place, the object of this section of the Code is satisfied." People v. Yee Foo, 4 Cal. App. 730, 89 Pac. 450.

[9] Nor did the answer, "I don't remember," given by Toschi to the question whether

he had made the alleged inconsistent statement in the police court, render it improper to show, by way of impeachment, that he did in fact make such statement at the time mentioned. As is said in People v. Mar Gin Suie, 11 Cal. App. 42, 55, 103 Pac. 951, 958: "We think that the defendant was entitled as a matter of fairness to have it clearly appear whether the witness did or did not make the inconsistent statement and that he was not precluded under the rule from showing that the witness did make such inconsistent statement merely because he answered that he did not remember whether he had made it or not"—citing Greenleaf on Evidence (16th Ed.) § 42.

[10] It is also contended that the court erred to defendant's prejudice in allowing testimony impeaching certain statements made by the defendant himself, the ground of the objection to said testimony being that a proper foundation therefor had not been previously prepared.

The defendant was asked by counsel for plaintiff whether he testified at the trial in the police court that he knocked the plaintiff to the ground, to which he replied that he had no recollection of so testifying on the occasion mentioned. This was a sufficient foundation for the allowance of the testimony of the police judge and the witness Hayden that the defendant did testify or admit in the police court that in the encounter with plaintiff he knocked the latter to the ground.

Likewise a sufficient foundation was established for the admission of the testimony of the witness Hayden, by way of impeachment of defendant, that the latter stated under oath in the police court that he "beat the said C. J. Ehat or did him as well as he could, or words to that effect."

There are some other rulings on the evidence to which the defendant objected and excepted which are of no special importance, and therefore do not command special notice.

[11, 12] 2. The attack upon the findings is without substantial merit. The plaintiff testified that the defendant struck the first blow and that he thereupon retaliated by striking defendant; that the latter, a younger, larger, and heavier man than plaintiff, knocked him to the ground, beat him about the head, and kicked him in the ribs. The result of the beating thus administered to him was to cause his jaw to swell, his shoulder to be dislocated, two ribs to be fractured, and one of his ears to be injured. He was left in a dazed condition on the ground, and, as before shown, was assisted to the office of a physician by the witness Arieta. He further testified, as we have seen, that he was confined to his room for some eight days, and unable, by reason of the injuries so received, to perform the amount of labor that he was capable of performing prior to the trouble. Dr. Craycroft, who attended plaintiff, said that "at that time he had a dislocated shoulder joint, and a couple of fractured ribs and some contusions on the face. * * * I had to put him to bed for a few days on account of the ribs, not account of the shoulder." There was other testimony corroborative of plaintiff and the doctor relative to the general nature and seriousness of the injuries received by the former.

The defendant flatly contradicted plaintiff as to the origin of the difficulty leading to the fight, claiming that plaintiff struck the first blow, and that he merely returned the blows to defend himself. But the court was justified in finding that plaintiff was wantonly and without excuse beaten and injured by defendant from the testimony produced by plaintiff. Counsel for appellant in another connection says in his brief that, in order to find for plaintiff, the testimony of defendant and his witness, Toschi, must be disregarded. This is quite true, but we must assume that the court, being the exclusive judge of the credibility of the witnesses and the weight, effect and evidentiary value of the testimony, did regard the evidence produced by the defendant as unworthy of credence, and that, from its point of view, it found, in considering it, good and sufficient reasons for so regarding it.

There is, it is true, as counsel for the appellant asserts, no evidence which supports the finding that the injuries inflicted upon the plaintiff by the defendant caused the former "to receive a nervous shock," and it is also true that we have found no evidence which justifies the finding that plaintiff's head was "cut in several places." But those findings may be entirely eliminated and disregarded, and still the remaining findings, which are sufficiently justified and sustained by the evidence, fully and amply support the judgment.

The court found upon sufficient evidence that the defendant "did violently and willfully assault the plaintiff, and did then and there strike and bruise and knock plaintiff down and kick him"; that "said bruising, beating and kicking * * * did cause plaintiff's head to be bruised and swollen; * * * did cause plaintiff's left shoulder joint to be dislocated; did cause plaintiff's body to be bruised and two of plaintiff's ribs to be cracked, and, further, did cause plaintiff * * * to be sick to such an extent that he was confined to his bed for about eight days immediately following said beating."

[13] These findings, supported, as we have seen, by the evidence, are manifestly sufficient to uphold the judgment.

[14] 3. We cannot say that the amount of damages awarded to the plaintiff is excessive. It is very clear that plaintiff was so severely injured that he was unable for many weeks to pursue his usual employment at all and for many months his condition, as the result of his injuries, such as

that he could not perform the same amount of work that he could formerly or prior to the difficulty with defendant. His earning power was therefore impaired, and this, as before stated, was, of course, an important item to be considered in estimating the damages—an item which, in the extent to which it should operate as a factor in the admeasurement of damages, must be left to the intelligence and the sense of justice of those who must decide the questions of fact. This item would manifestly include prospective loss in wages as well as loss in that respect already sustained. The expense—the doctor's fees, etc.—incurred by necessary attention during the period the plaintiff was disabled and ill is also an item to be considered, and, moreover, it was within the power of the court to add to the actual damages found, if warranted by the evidence in so doing, such exemplary damages as would represent a just punishment for the wantonness of the acts of the defendant resulting in the injuries complained of.

After a careful review of the record, we perceive no ground upon which interference with the judgment and the order could be justified, and they are therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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17 Cal. App. 439

BERTONNEAU v. SOUTHERN PAC. CO.

(Civ. 1,050.)

(District Court of Appeal, Second District, California. Nov. 13, 1911.)

1. CONTRACTS (§ 2*)—LAWS GOVERNING.

Generally contracts are governed by the law of the place where they are made.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 2, 41, 145; Dec. Dig. § 2.*]

2. CARRIERS (§ 109*)—FREIGHT—LAWS GOVERNING.

Civ. Code, § 2200, which exempts carriers of specified valuables, etc., from liability in excess of $50, unless they have notice of the nature of the freight, etc., did not apply to a through shipment from another state over connecting lines; the place of performance of the contract, as affecting the applicability of laws, not being determined by the place of delivery, and the code provision not being applicable on the theory that it affects only the remedy.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 496; Dec. Dig. § 109.*]

Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by Louis L. Bertonneau against the Southern Pacific Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. W. McKinley, for appellant. Sidney J. Parsons, for respondent.

JAMES, J. Plaintiff brought this action to recover the sum of $1,000, alleged to be the reasonable value of certain goods, wares, and merchandise which had been committed to the custody of defendant as a common carrier for transportation from the city of Spokane, Wash., to Pasadena, Cal. Judgment was in favor of plaintiff in accordance with the prayer of his complaint, from which judgment defendant has appealed. The appeal is to be considered upon the judgment roll, together with a bill of exceptions. The sufficiency of the evidence to sustain the decision of the court, and the failure of the trial court to find upon certain affirmative allegations contained in defendant's answer, are the only questions presented for review.

[1, 2] The plaintiff in his complaint alleged that the goods, wares, and merchandise were shipped from Spokane, Wash., on the 29th day of January, 1908, over the railway line of the Oregon Railway & Navigation Company and the railway line of the defendant, and that the plaintiff caused the freight to be prepaid upon said merchandise, and "that the defendant then and there agreed to deliver the said goods, wares, and merchandise safely to A. Bertonneau in the city of Pasadena, Cal." In allegations following these it was set out that the merchandise was shipped without any contract being made limiting the amount of damages in case the goods were lost or destroyed, and that the freight charges were fixed in accordance with this contract, and were prepaid at the time of shipment. None of these allegations of fact were denied but the defendant by its answer did deny the further allegations of plaintiff's complaint as to the loss of the goods and the amount of damage, and then in the answer the following affirmative allegation appeared: "Defendant, according to its information and belief, alleges that the goods mentioned in plaintiff's complaint were all contained in one package and consisted of gold, silver, platinum, precious stones, imitations thereof, pictures, glass, chinaware, statuary, silk, laces and plated ware, and that at the time of the receipt thereof this defendant had no notice of the nature of said freight, and no notice was given to this defendant or to the Oregon Railway & Navigation Company, or to any of the agents, servants, or employés of any of the carriers of said goods as to the nature of said freight."

We call attention here to the condition of the pleadings, by which it was admitted on the part of defendant that by the contract of shipment it agreed to transport the goods of plaintiff from the city of Spokane to the city of Pasadena. This admission results from the failure of defendant by its answer to deny any of the allegations of the complaint as to the making of the contract for carriage. The court made its findings as to the character of the goods shipped only in general terms, referring to them as goods, wares, merchandise, and household goods, although the evidence showed that they were goods of the character and kind described by defendant in its answer. By finding 6, however, it was determined that at the time of making the shipment defendant and its agents were informed of the class, kind, and nature of the goods contained in the package shipped; and in another finding it was stated that at the time of shipment it was made known to defendant, through the agents of the Oregon Railway & Navigation Company, that the value of the merchandise was more than $1,000.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Defendant claims the benefit of the provisions of section 2200 of the Civil Code of California, under which, if the allegations contained in paragraph 6 of defendant's answer are true as to the facts, plaintiff was not entitled to recover more than $50 for the loss of his merchandise. The provisions of the section referred to are as follows: "A common carrier of gold, silver, platina, or precious stones, or of imitation thereof, in a manufactured or unmanufactured state; of timepieces of any description; of negotiable paper or other valuable writing; of pictures, glass, or chinaware; of statuary, silk, or laces; or of plated ware of any kind, is not liable for more than fifty dollars upon the loss or injury of any one package of such articles, unless he has notice, upon his receipt thereof, by mark upon the package or otherwise, of the nature of the freight; nor is such carrier liable upon any package carried for more than the value of the articles named in the receipt or the bill of lading." Necessarily, assuming that the law of California is to be looked to to determine the liability of the carrier for the loss of freight intrusted to it for transportation, and if there is any evidence to sustain the finding of the trial court that defendant had notice of the kind and character of the goods shipped, the failure of the trial court to find specifically that the merchandise was of the kind described in section 2200 of the Civil Code would be immaterial. From a careful examination of the testimony as set out in the bill of exceptions, it must be concluded that the evidence was insufficient to justify the court in determining that defendant did so have notice of the kind and character of the goods committed to its charge. There is, then, directly presented the one question, and it is so admitted by counsel for both plaintiff and defendant, as to whether in determining the extent of the liability of defendant for the admitted loss of plaintiff's goods the statute of California is to be invoked, or whether the common-law liability assumed by a carrier of freight applies in this case in its fullest extent. It was stipulated between counsel that all of the law of the state of Washington, in which state the contract of shipment was made, might be taken notice of by the trial court and by this court, and it is also agreed that in the state of Washington there is in existence no statute by which any limitation is placed upon the common-law liability of a carrier. It must be admitted that the general rule affecting the determination of the liabilities of parties to a contract requires that the law of the place where the contract is made shall govern. This rule admits of some variation in practice, dependent sometimes upon the question as to where the contract is to be performed, and always subject to the intention of the parties as expressed or implied from their acts and conduct at the time of making the contract. "The law of the place where the contract is made governs in determining the liability of the carrier, unless the parties at the time of making it had some other law in view." Palmer v. Atchison, etc., R. R. Co., 101 Cal. 187, 35 Pac. 630. This case cites with approval, among other cases, that of Liverpool, etc., Steam Co. v. Phenix Insurance Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788, in which the Supreme Court of the United States exhaustively reviews different decisions touching this question, and, after noting the conflict existing between various of the authorities, deduces a general rule as follows: "This review of the principal cases demonstrates that according to the great preponderance, if not the uniform concurrence, of authority, the general rule that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country." We cite, also, 2 Wharton on Conflict of Laws, § 471b; 1 Hutchinson on Carriers, § 201 et seq. Unless, then, some fact, circumstance, or condition appears affecting the contract for shipment as it was made in this case, which would entitle defendant to invoke the law of this state in limitation of the amount of recovery, it follows that the rights of the parties must be measured by the common-law rule.

Defendant insists that such a condition is shown by reason of the fact that performance of the contract was to be made on its part in the state of California. If we consider only the fact that the goods were to be delivered at Pasadena, Cal., as including all of the obligation denoted by the meaning of the word "performance," then undoubtedly the position of appellant is well taken. But attention has already been called to the condition of the pleadings where, by a failure of defendant to deny the making of the contract in the terms as alleged by plaintiff, it admitted that the service of transportation agreed to be performed by it was to commence at Spokane, Wash., and to continue until the goods had been delivered at Pasadena. The authorities hold that in such a case it cannot be said that performance shall be deemed only to have been made at the place where delivery is contracted for. Mr. Hutchinson in his work on Carriers, above cited, and at section 210, vol. 1, says: "On principle it would seem that the carrier's contract does not vary with each jurisdiction in which it may be partly performed, for the service rendered is single; the transportation performed and the liability assumed being the measure on the one side by which the compensation to be paid on the other side is determined. Whatever is done in intermediate states is a part of the single act of transportation from the place of departure to the place of destination in performance of an obligation assumed and undertaken in some one state, and which is indivisible. The obligations arising out of a contract can only be created by the laws of one state, and force and effect should be given them in conformity with the law of the state which created them. These obligations should not vary from time to time as goods pass from state to state. * * * Sec. 215. The state which creates the rights arising out of a particular contract having been ascertained, full force and effect should be given by sister states on the ground of comity to the foreign facts thus created, even though the same rights would not have been created by the law of the forum." In our opinion, therefore, the decisions holding that the law of the place where performance is due is the law which must govern in fixing the liabilities of the parties to a contract, have no application to the facts of this case.

But appellant advances a further contention. It is argued that, giving the rule of lex loci contractus full effect, and admitting its application to this case, that still the statute of California must govern, inasmuch as its provisions are provisions affecting the remedy to be pursued by the parties, and not a right arising out of the contract. It may be admitted that any statute which affects only the remedy is binding upon the forum administering such remedy, regardless of the law governing the same matters as it may exist in the country where the contract was made. But we do not agree with counsel in his contention that only the remedy is here affected. The statute, when it proposes to limit the liability of a carrier, affects the obligation assumed by the latter. When the contract for carriage was made in the state of Washington, it was made subject to the common-law rule creating a liability against the defendant, in the event that the goods to be transported by it were lost or destroyed, to an amount of the reasonable value of such goods. Upon entering into the contract of shipment, as it was there made, defendant assumed this obligation to answer to plaintiff for loss according to the full extent of the rule referred to. "The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made. These are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party and the right acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicated, according to their settled legal meaning. When it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force." McCracken v. Hayward, 2 How. (43 U. S.) 608, 11 L. Ed. 397. "The action springs from the obligation, and hence the 'cause of action' is simply the obligation. * * * The cause of action is therefore to be distinguished, also, from the 'remedy' which is simply the means by which the obligation or the corresponding action is effectuated. Pomeroy on Pleading and Practice, § 453." Frost v. Witter, 132 Cal. 421, 64 Pac. 705, 84 Am. St. Rep. 53.

There was some evidence to sustain the finding of the court that information was given at the time of the shipping to the agent of the railway company at Spokane as to the value of the goods of plaintiff being in excess of $1,000, and therefore this finding cannot be held to have been erroneously made. No other questions are argued in the briefs of counsel. From the conclusions we have expressed it follows that the decision of the trial court must be sustained.

The judgment is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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17 Cal. App. 428

LA PORTE v. WILLIAMS, Police Court Justice. (Civ. 1,077.)

(District Court of Appeal, Second District, California. Nov. 10, 1911.)

1. CRIMINAL LAW (§ 260*)—JUSTICES OR POLICE COURTS—APPEAL—NOTICE.

Where an appeal is taken from a justice or police court on a statement of the case, it is not essential that accused or his counsel shall have notice, after the hearing on the appeal, when the judgment will be rendered.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 260.*]

2. CRIMINAL LAW (§ 260*) — APPEAL FROM JUSTICES AND POLICE COURTS—DECISION ON APPEAL.

Under Pen. Code, § 1264, providing that when the judgment of the appellate court is given, it must be entered on the minutes, and a certified copy of the entry with a copy of the opinion remitted to the clerk of the court from which the appeal was taken, the superior court, on appeal from a judgment of the police court on a statement of facts, may forthwith transmit its finding and judgment affirming the conviction to the police court.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 260.*]

3. Bail (§ 73*)—Deposit of Cash—Application to Fine.

Under Pen. Code, § 1297, authorizing application of money deposited as bail in satisfaction of a fine imposed, the police court, on the superior court certifying its judgment affirming a conviction in the police court, may apply the bail money to the extent of the fine, in the execution of the judgment.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 256; Dec. Dig. § 73.*]

Application for a writ of prohibition by Francine La Porte against Warren L. Williams, Justice of the Police Court of the City of Los Angeles. Denied.

G. F. McCulloch, for petitioner.

PER CURIAM. The petition and affidavit set forth the arrest of petitioner for vagrancy, her plea of not guilty, and the trial and conviction before a justice of the police court. From this an appeal was taken to the superior court on a statement of the case as provided by section 1468 of the Penal Code. This appeal was heard in the superior court and the judgment affirmed. It is averred that without waiting 10 days, the superior court certified its judgment to the court below, and that the justice will apply the bail money to the extent of the fine in execution of the judgment. This petition prays that the justice be prohibited from so doing.

It is not claimed that defendant and her counsel had no notice of the hearing upon the appeal, but simply that they had no notice of the time when the court rendered its judgment and decision.

[1] We are not advised that when an appeal is taken from a justice's or police court upon a statement of the case, it is essential that the defendant or his counsel have notice after the hearing when the judgment and decision will be entered. No good reason suggests itself why they should be present, or how they could avail themselves of any rights by such notice.

[2] There is nothing in the contention that the superior court should not transmit its findings and judgment to the lower court for 10 days. The method of procedure on appeal in criminal cases from justices' and police courts is controlled by part 2, title 9 of the Penal Code. Brown v. Superior Court, 72 Cal. 16, 13 Pac. 70. Section 1264 of the title above named provides that when the judgment of the appellate court is given it must be entered in the minutes, and a certified copy of the entry, with a copy of the opinion attached thereto, forthwith remitted to the court from which the appeal is taken.

[3] Section 1297 of the Penal Code authorizes the application of money deposited as bail in satisfaction of a fine, and the refunding of the surplus, if any, to the defendant.

We see no merit in the application, and the same is denied.

17 Cal. App. 475

In re LOHEIDE'S ESTATE. (Civ. 890.)

(District Court of Appeal, Third District, California. Nov. 15, 1911. Rehearing Denied by Supreme Court Jan. 12, 1912.)

1. Executors and Administrators (§ 293*)—Payment of Claims—Set-Off.

The rule permitting a set-off of a share of a distributee as against a debt owing by him to the estate will not be applied, so as to work immediately as of the death of the deceased, if such application would operate to the detriment of the estate, and cannot be invoked to protect the administrator, who is a distributee, against his debt to the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1164–1168; Dec. Dig. § 293.*]

2. Executors and Administrators (§ 480*)—Accounting—Debts Due Estate.

Under Code Civ. Proc. §§ 1613, 1615, making an administrator chargeable in his account with the whole of the estate coming into his possession at its appraised value, but not charging him with debts remaining uncollected without his fault, an administrator is answerable for the amount of a debt as appraised in the inventory, unless it appears that it was not collectible; and his mere act in charging himself with a note and crediting himself with the same note is not a statement that it remained uncollected without fault on his part.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 480.*]

3. Executors and Administrators (§ 88*)—Accounting—Debts Due by Administrator to Estate.

An administrator who was indebted to an estate for an amount for which he had given his note, and who was solvent at the time he assumed the office of administrator, and was insolvent at the time of his accounting, did not sufficiently excuse his failure to pay the debt due the estate by merely showing that he would have had to sacrifice his private business in order to pay the indebtedness.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 393, 393½; Dec. Dig. § 88.*]

4. Executors and Administrators (§ 480*)—Accounting—Charges—Debt Due by Administrator.

Where an administrator who is under bond is indebted to the estate, for which he has given his notes, and he was solvent at the time he assumed his duties, and was insolvent at the time of accounting, and had not paid such notes, the distributees were entitled to have him charged with the notes, without a corresponding balance by a credit for the notes as uncollected; otherwise the surety might urge that the statement discharged the administrator for any dereliction in his duty to collect.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 480.*]

5. Executors and Administrators (§ 484*)—Payment of Claims—Debt Due by Administrator.

Where the distributees of an estate formed a corporation during the settlement, which was to be the sole distributee and the administrator was secretary and manager of such corporation, his act in renewing or replacing notes, owing by him individually to the estate, by giving new notes to the corporation, with nothing to show that the heirs or stockholders received such new notes as an advance paid them on their distributive shares, was not a sufficient reason for not charging the administrator with moneys in the amount due on the notes, instead of crediting him with the amount due on them as an advance to the sole distributee, the corporation.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 484.*]

6. EXECUTORS AND ADMINISTRATORS (§ 484*) —ACCOUNTING—CREDITS.

The rule that an executor will not be given credits on settlement of account for payments made under the terms of the will, and for distributive shares turned over, but that the items are to be withdrawn therefrom and considered on distribution of the estate, is applicable to the account of administrators, and will apply to items of advancements made to the heirs by the administrator.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 484.*]

7. EXECUTORS AND ADMINISTRATORS (§ 504*) —EXCEPTIONS TO ACCOUNTING — DUTY OF COURT.

On the accounting of an administrator, it was the duty of the court to satisfy itself of the correctness of the account, and to charge matters against him which were properly chargeable, even though not called to its attention by exceptions taken.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 504.*]

Appeal from Superior Court, Humboldt County; George D. Murray, Judge.

Accounting by William L. Loheide, administrator of the estate of William H. Loheide, deceased. From an order and decree of settlement of final and supplemental account, the administrator appeals. Affirmed.

Denver Sevier and C. P. Cutten (Thomas, Beedy & Lanagan, of counsel), for appellant. J. F. Quinn and L. F. Puter, for respondent W. H. MacKinnon. G. W. Hunter, for respondent Estate.

CHIPMAN, P. J. This is an appeal by W. L. Loheide, administrator of the estate of William H. Loheide, deceased, from an order and decree of settlement of his final and supplemental accounts. In his final account he charged himself with a large number of items commencing October 26, 1907:

To cash on hand in Humboldt County Bank, $695.09, and to various sums of money received from various sources to January 18, 1909, amounting in all to....	$14,120 30
To this he adds the following:	
1907. Cash on hand in Hibernia Savings & Loan S'y S. F....	2,164 94
Dec. 31/07. Cash interest, in Hibernia S. & L. S'y	39 64
June 30/08. Cash interest, in Hibernia S. & L. S'y....	4 52
Total receipts	$16,329 40

On the credit side of his account are found, on several pages of the transcript, the items of payments commencing October 11, 1907, and ending January 29, 1908, amounting in all to $17,173.71, leaving due the administrator, $844.31.

Written objections and exceptions were filed by William H. MacKinnon, as assignee of an interest in said estate, attacking the correctness of a large number of these credit items, on the ground that none of the amounts was incurred or was necessary in the management of the estate, but related to matters personal to the administrator. Special objection is made to two items of disbursement of $1,314.45 each to the administrator and his attorney, on the ground that the administrator "is indebted personally to said estate in the sum of $25,995.22½ and interest on two promissory notes, due and payable before the filing of said final account, and which amount said administrator has failed to account for to said estate, * * * and he has failed to pay the same, being financially able to do so, and not accounted in cash to the estate for the same."

On March 15, 1910, the administrator filed a supplemental account as to "amounts advanced by administrator W. H. Loheide, deceased, subsequent to report dated Jan. 29, 1909." Then follows a large number of items, commencing January 6, 1909, and ending March 7, 1910, aggregating $7,213.25. He then states what purports to be an account between the administrator and W. H. Loheide estate:

Jan. 29/09, to Mch. 15/10.

By charges against estate..........	$7,213 25	
" " Mrs. M. E. Speegle...	1,698 99	
" " G. H. Loheide.........	460 20	$9,372 44
Dr.		
To amt. collected Jan—09 to Mch. 15—10		2,935 06
		$6,437 38
Paid for writing in connection with the account....		7 50
Bal. due administrator....		$6,444 88

The charges to Mrs. Speegle and G. H. Loheide are in the nature of advancements to them as heirs of deceased. He then charges himself with sundry items, of date March 15, 1910, as receipts subsequent to report of January 28, 1909, amounting to $2,935.06.

To many items of this supplemental account, the W. H. Loheide Estate Company makes objection. From its objections it appears that W. H. Loheide died on October 7, 1907, and W. L. Loheide, appellant, was appointed administrator of said estate; that deceased left as his heirs four children—W. L. Loheide, the administrator of said estate, Manda E. Speegle, George H. Loheide, and Robert C. Loheide, all of whom were of age at their father's death; that, during the month of January, 1908, the said heirs formed a corporation, called the "W. H. Loheide Estate Company," and, on January 29, 1908, said heirs conveyed to said corporation all their interest in and to the property of said estate, "subject to the administration of said estate." The items of the final and supplemental accounts objected to will be hereafter considered, so far as now in question. The estate company also charges mismanagement on the part of the administrator, and prays for his removal from his trust.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Contestant MacKinnon excepts to each and every item of the supplemental account, because the administrator had not accounted for the sum of $25,995.22½ and interest due the estate from the administrator personally on the two certain promissory notes heretofore mentioned. The matter thereafter came on to be heard, and, on April 18, 1910, the court filed its opinion, wherein it directed the manner in which the final and supplemental accounts should be settled, and it was adjudged that the administrator, "in addition to being charged with the moneys with which he has charged himself in his said final account, be also charged with money in the amount that was due January 27, 1909, on notes of William L. Loheide and E. D. Vorrath to W. H. Loheide for $20,000, dated January 29, 1904, to wit, the sum of $20,000, and with moneys in the amount that was due January 29, 1909, on the note of William L. Loheide and E. D. Vorrath to W. H. Loheide for $5,990.45, dated August 10, 1907, to wit, the sum of $3,690.45, and with all the other property belonging to said estate which has come into his possession, and be credited with all said property which remains or which should remain on hand for distribution, as well as with all disbursements which are proper charges against said estate, as hereinafter specified, and that said final account be and the same is hereby amended, corrected, and restated as follows, to wit." The court then states the debit side of the account, charging the administrator with the moneys he charged himself with, also with the promissory notes already mentioned, making the total amount of money thus charged to be $40,019.85. The other items are all descriptive of property taken from the inventory and the appraised value carried out, aggregating $84,081.87. Total charges, $124,101.72.

The court then credits the administrator, first, with "property hereinabove charged to the administrator and remaining on hand for distribution"—money in the sum of $32,316.63. Then follow the items charged from the inventory, aggregating in all $116,398.50. Second, the administrator is credited with disbursements which are specifically mentioned, and which, together with previous items, aggregate the sum with which the administrator is charged, to wit, $124,101.72.

The court then takes up the supplemental account and restates it, charging the administrator with receipts, $2,935.06. The court credits the administrator with disbursements in the sum of $2,727.22. Excess of receipts over disbursements, $207.84.

The result of this accounting, as we understand the findings, is that the administrator is charged with cash on hand	$32,316 63
And the balance above	207 84
	$32,524 47

And also with certain property in his keeping remaining for distribution. This cash balance includes the promissory notes due the estate from the administrator, and the principal question presented on the appeal is as to the correctness of the court's decision in charging these notes up as money on hand for distribution.

It appears from the evidence that appellant and one Vorrath executed their promissory notes to W. H. Loheide, one of which was for $20,000, dated January 29, 1904, and the other for $5,990.45, dated August 10, 1907, on which latter there remained unpaid the sum of $3,690.45. Deceased died October 7, 1907, and these notes became assets of his estate. A corporation was formed by the heirs, to which they conveyed their interest in all the property of the estate. The articles of incorporation were read in evidence, and marked "Exhibit A," and the deed of the heirs to the corporation was also read in evidence, and marked "Exhibit B," but neither of these instruments appears in the record. The administrator (appellant) testified: "I, myself, owed the estate on two promissory notes, $25,945. These notes, I presume, were due and payable prior to the date of filing my account. I have not collected these notes, but I have paid them by giving the estate new notes. The notes would have outlawed, if Mr. Vorrath and myself had not given new notes. [This could not have been true of note made in 1907.] I made out the new note to the Loheide Estate Company. * * * I was engaged in business at the time of my father's death and up to the date of filing the final account. That business was on a paying basis. * * * That was a solvent business. The assets of it were worth $30,000. * * * We owned the stock of goods as partners. Mr. Vorrath and I were on each of these notes. * * * I have also credited myself with * * * commissions and also attorney's fees. I ask the court to allow me credit for these two items, notwithstanding that these notes which I owed the estate, and upon which there is still a balance due of $23,695, remain unpaid, and although I was solvent and had assets during the administration of the estate. * * * If I had paid these notes when due, I would have had to sacrifice the business to do so. The note was good, and there was no reason for forcing it to be paid. It would have sacrificed the business to do it; that is, my own private business. When I gave this new note to the corporation, the corporation did not pay into the estate as cash the amount of the note I gave. The old note was an asset of the estate, and was appraised at its face value. * * * The new notes were dated the 2d day of February of this year (1909). The old notes would have outlawed on Sunday, the day before. Mr. Vorrath executed them with me. They were executed to the W. H. Loheide Estate Co. When the final distribution is made, the corporation will own the notes." It further appeared that at the hearing of his account the administrator was insolvent, and that he subsequently made an assignment for the benefit of his creditors, and that the United States Fidelity & Guaranty Company is security upon the administrator's bond for $80,000. As he was insolvent in January, 1909, he must have been insolvent when he gave his new note in February. There is evidence that the administrator was an officer of the corporation—its secretary and manager—and had control of most of the shares; that he borrowed money from the Bank of Eureka, and promised to secure the loan by pledge of shares of the corporation; that he tendered a certificate, and when its genuineness was challenged he admitted it was fictitious, and that he had already pledged his shares to another bank. The corporation thereupon assumed this particular liability, but it appeared that he was still indebted in a large sum to the Bank of Eureka, among other creditors. If it be true that the notes given by Loheide & Vorrath would have "outlawed" on February 2, 1909, it must follow that they were due and payable four years before that date and during the entire period of appellant's administration.

[1] The claim of appellant now is that "the doctrine of set-off applies at once and automatically as of the date of the death of the creditor and ancestor," citing 2 Woerner on Administration, § 564, and numerous cases found cited in the notes to the text. The author says: "The indebtedness of a legatee or distributee constitutes assets of the estate, which it is the executor's or administrator's duty to collect for the benefit of creditors, legatees, and distributees. Hence such indebtedness may be deducted from any legacy or distributive share of the debtor." Many phases of this doctrine are presented in the text, but the cases seem to be illustrative of the right in the estate to have the distributive share of an heir set off against his indebtedness to the estate. The doctrine is never applied to the detriment of the estate, and cannot be invoked to protect the administrator who is at once a distributee of and a debtor to the estate. In some jurisdictions, a lien is held to exist on the distributee's share, which will be enforced for the purpose of equalization among the heirs. But it has otherwise been held. See note 2, star section 1237; and Mr. Woerner says it is doubtful whether an administrator has any prior right to demand payment of a debt due by an insolvent heir to the intestate out of the land in the hands of such heir, or his vendee, or attaching creditor. In this state it was held, in William Hill Co. v. Lawler, 116 Cal. 359, 48 Pac. 323, that the order of distribution is conclusive of the rights of all parties, assignees as well as heirs, and whether they appear or not; and it is held that all persons claiming ownership, whether directly or through the heirs, may have their respective rights conclusively ascertained, if not adverse to the estate. In re Burton, 93 Cal. 459, 29 Pac. 36.

[2, 3] An administrator is chargeable in his account with the whole of the estate of the decedent coming into his possession at the value of the appraisement contained in the inventory. Code Civ. Proc. § 1613. He is not accountable for any debts due to the decedent, "if it appears that they remain uncollected without his fault." Id. § 1615. But, if it does not so appear to the court, the administrator must be held answerable for the amount of a debt due the decedent, as appraised in the inventory. In re Sanderson, 74 Cal. 199, 203, 15 Pac. 753. Merely charging himself with the note and crediting himself with it is not a statement that it remained uncollected "without fault" on the part of the administrator. Id. It was also held in that case that there is no presumption of duty performed. The presumption is that the administrator could have collected the note, in the absence of satisfactory showing that it was not collected without any fault in him. The only excuse tendered in the case here is that he would have had to sacrifice his private business in paying the note. But his primary duty was to the trust he had assumed. He was not authorized to show favor to himself as a debtor to the estate greater than to any other person. He had no right to use the credit of the estate to promote his personal gain, or to maintain a business which might suffer if he drew out of his capital enough to pay what he owed the estate. In Estate of Walker, 125 Cal. 242, 57 Pac. 991, the administrator admitted that he "should be charged with a debt due from him to the estate as money on hand," but that on the settlement of his final account he might show "that he has never at any time while administrator had the means to enable him to pay the debt or any part thereof." In reply the court said: "Further than this, unquestionably, the contention could not logically go, since, as he cannot sue himself, and yet it is his duty to collect the debt for the estate, he must be held officially liable for any money he could have so applied at any time during his official term. If he has not so applied it, he has not faithfully executed his trust according to law, and his sureties may also be held; for it is so nominated in the bond." Then follows a very instructive discussion of principles which should control, both as to the consequences to the ad-

ministrator and his bondsmen, where in fact he was insolvent and unable to pay anything at the death of decedent, or at any time during his incumbency as administrator. It was held that in such a case "the fiction of the law," by which he became chargeable with his debt as money in hand, should not be made to work injustice. "In fictione juris semper acquitas existit." In the course of the discussion, Judge Temple said: "I am not disposed to deny that, so far as the administrator has the means to pay, he and his sureties may be charged with the money as in the hands of the administrator." In Sanchez v. Forster, 133 Cal. 614, 65 Pac. 1077, the court held that the rule laid down in section 1447, Code of Civil Procedure, as to the restrictions placed upon executors, the section is not applicable to administrators. The action was against the sureties of an administrator. The court said: "The liability of these defendants for the debt of the administrator depends upon the fact as to whether or not the debt was uncollected through his fault. Or bringing the question directly to the door of the administrator, it may be said his sureties are liable, if, during his administration of the estate, he had the financial ability to pay the debt and failed to do so." See Estate of Thomas, 140 Cal. 397, 73 Pac. 1059.

[4] It seems to us that the learned trial judge was fully justified in charging the administrator with the debt due the estate which he had the means to pay, but did not pay. As he is concededly insolvent, it suggests the inquiry why he should concern himself about the decree of the court, as it fixes no additional liability upon him. The answer may be found in the fact that the administrator gave a bond in a large sum, and that his sureties may have had something to do in promoting the appeal.

If we understand appellant, he claims that he should be charged with the notes, and should have the charge balanced by a credit on the other side of the account for the notes as uncollected. Should the account be settled as thus stated, it might be urged by the surety company that the administrator was purged of any dereliction of duty, and they thus be discharged of liability for any breach of his trust. Even though there are no creditors of the estate, the heirs are entitled to have brought into it for distribution all that legally and rightfully belongs to it; and if the sureties are liable the estate may look to them to make good the delinquency of the administrator. There is no evidence in the record that there are no creditors of the estate. There is a statement in the final account that the only debt "which has been presented and duly allowed during the period embraced in the foregoing account" is as follows: "Tonjes Doscher, Prom. note $900."

Whether notice to creditors has been published does not appear; nor do we find that this note has been paid. There are credits in the final account for interest paid and in the supplemental account two payments of $25 each and one of $50, but the note is not paid. Whether there are other creditors does not appear; nor does it appear that there were no others, nor that the time for filing claims is passed. It is probable that there are no other debts, as the court otherwise would not have settled the final account. Whatever the fact may be, it would not affect materially the point under discussion.

[5, 6] It is next claimed "that the administrator should not have been charged with moneys in the amount due on his two promissory notes to the decedent, but should have been credited with the amount due on them, as an advance to the sole distributee of the estate," the Loheide Estate Company. This because he delivered a substitute for the old notes to the estate company, "which accepted such substitute." Estate of Moore, 96 Cal. 522, 31 Pac. 584, is cited to the proposition that a distributee or legatee who has received his distributive share or legacy cannot be heard to object to a credit therefor in the settlement of the administrator's account, citing, also, 2 Woerner on Administrators, p. 1153. We know nothing of the facts attending the making of this new note, except as we learn them from the testimony of the administrator already quoted. He was secretary and manager of the company. The new note was probably made to the estate company, because the heirs had all joined in a conveyance of their interests in the estate to the corporation, and it was naturally enough made the payee of this new note, which was not given as an advancement, but, as appellant testified, because the old notes "were about to outlaw." There is nothing in the record tending to show that the heirs or stockholders of the corporation received this note as an advance paid them on their distributive shares. Furthermore, it has been held by the Supreme Court that, while an executor is entitled to be reimbursed for payments made under the terms of the will and for distributive shares which he may have turned over, "credits therefor are not to be given upon the settlement of accounts, but are to be retired therefrom and considered upon the distribution of the estate." Estate of Willey, 140 Cal. 238, 242, 73 Pac. 998, 999. We see no reason why the rule is not applicable to the account of administrators. What has been said will apply to all the items of advancements made to heirs by the administrator.

[7] Some criticism is made of the order, in that by it the exceptions and objections of MacKinnon were disallowed, and the exceptions of the estate company allowed; whereas the latter made no reference in its objections to the notes in question. Suffice

it to say, it was the duty of the court to satisfy itself of the correctness of the account (Estate of Moore, 121 Cal. 635, 639, 54 Pac. 148); and if it found the administrator justly chargeable with money it would be the duty of the court to charge him with it, whether or not called to the court's attention in the exceptions taken. Why the court charged the administrator as it did, and at the same time disallowed MacKinnon's objections, among which was a demand that this charge be made, is not apparent. MacKinnon's objections ran to a large number of items, many of which the court disregarded, and it may have been an inadvertence, and it intended its order to apply more particularly to these miscellaneous items. However this may be, the action of the court is not sufficient ground for reversal.

The order settling the final and supplemental accounts is affirmed.

We concur: HART, J.; BURNETT, J.

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17 Cal. App. 511

HENLEY, HALFHILL & NICKLIN v. CLAGUE. (Civ. 995.)

(District Court of Appeal, Second District, California. Nov. 20, 1911.)

Brokers (§ 49*) — Commissions — Contract of Employment—Performance.

An owner of certain real estate, desiring to exchange the same for city property on which were certain mortgages, employed plaintiffs as brokers to effectuate the exchange, requiring as a condition precedent that an extension of time for the payment of the mortgages be secured within 10 days. Plaintiffs procured defendant, the owner of the city property, to indorse a written acceptance on the contract and an agreement to pay $1,000 commission for the exchange, which was never consummated, because no extension of time for payment of the mortgages was obtained. *Held*, that it was plaintiffs' duty to procure such extension, in the absence of which he could not recover commissions.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 49.*]

Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by Henley, Halfhill & Nicklin against William Clague. Judgment for defendant, and plaintiffs appeal. Affirmed.

Davis, Kemp & Post, for appellants. T. F. McDonald and Tanner, Taft & Odell, for respondent.

ALLEN, P. J. The action is one to recover commissions by real estate brokers. Judgment went for defendant, from which, and an order denying a new trial, plaintiff appeals.

The facts are these: One Doig was the owner of certain real property in Orange county. In October, 1908, he executed an instrument through which he declared that he had placed with plaintiff his property, which he desired to exchange for certain specified property in the city of Los Angeles; that upon the latter property were certain mortgages; that as a condition precedent to the trade an extension of time for the payment of such mortgages should be secured, 10 days being given therefor. Plaintiff procured defendant, who was the owner of the Los Angeles property, to indorse on such written proposition an acceptance thereof upon the terms therein stated, and an agreement to pay $1,000 commission for said exchange. The extension of time for the payment of the mortgages was never procured by any one, and the exchange was never effected, notwithstanding which plaintiff, as a broker, claims from defendant, Clague, the $1,000 commission to be paid upon the exchange.

We perceive no error in the record. The condition precedent to the exchange was one over which neither Doig nor Clague had any control; the record disclosing that these incumbrances were owned by third parties. Doig's proposition was based upon the procurement of the extension of time by some one not specified. Clague accepted the proposition made by Doig upon the terms stated therein. It is obvious from a reading of the agreement that it was the intention of the parties that the plaintiff should procure the extension of time, a necessary condition precedent to the exchange, without which neither party contemplated an exchange. Plaintiff never procured such extension, nor did any other person, and, under the agreement, no contract of exchange was enforceable. Plaintiff never found a customer willing and able to enter into a contract for the sale or exchange of the property absolutely, but only upon a condition which was never performed, and the performance of which devolved upon plaintiff.

Judgment and order affirmed.

We concur: JAMES, J.; SHAW, J.

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17 Cal. App. 486

PEOPLE v. WHITE. (Cr. 370.)

(District Court of Appeal, First District, California. Nov. 17, 1911.)

1. Indictment and Information (§ 41*)—Information — Preliminary Examination — Compliance with Statute.

An information will not be set aside on the ground that accused was not, before the preliminary examination, informed of his right to the aid of counsel in every stage of the proceedings, as required by statute, where the magistrate's docket shows that accused was, before the preliminary examination began, advised "of his right to counsel," and that accused knew of his right to counsel on the examination, and elected to proceed without counsel.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 41.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. Indictment and Information (§ 41*)—Preliminary Complaint—Holding Over to Answer—Order—Sufficiency.

Where the complaint sets forth the charge of murder against accused, an order indorsed on the back of the complaint, holding accused to answer for the offense in the "within deposition," is in conformity with Pen. Code, § 872, except in the use of the word "deposition," instead of the word "complaint," and is sufficient to support an information filed by the district attorney.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 165; Dec. Dig. § 41;* Criminal Law, Cent. Dig. § 420.]

3. Indictment and Information (§ 41*)—Preliminary Examination—Binding Over to Answer—Commitment.

Where a proper order by a magistrate, holding accused charged with murder to trial, is made, that the commitment prescribed by Pen. Code, § 877, does not name the person murdered does not invalidate an information filed by the district attorney, since, under section 809, the order holding accused to answer is the basis for the filing of an information.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 41.*]

4. Indictment and Information (§ 41*)—Preliminary Examination—Binding Over to Answer—Commitment.

The defect in a commitment of one held to answer for murder arising from the failure to name the person murdered is not a ground for the discharge of accused from custody, where a proper order holding him for trial has been indorsed on the complaint, but the commitment may at any time be amended, so as to make it fully describe the offense.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 41.*]

5. Indictment and Information (§ 41*)—Preliminary Examination—Failure to Sign Docket.

The failure of an examining magistrate, holding one to trial, to sign his docket until after the filing of the information does not affect the validity of the information.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 41.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Thomas White was charged by information with murder, and from an order setting aside the information the People appeal. Reversed and remanded.

Attorney General Webb and Benj. K. Knight, for the People. W. G. Williams and D. C. Clark, for respondent.

HALL, J. Defendant was charged by information filed by the district attorney with the crime of murder. In due time he made a motion in the superior court that the information be set aside, "upon the ground that before the filing of said information the defendant had not been legally committed by a magistrate." The motion was granted, and the people appealed to the Supreme Court, which court, being of the opinion that the appeal should have been taken to this court, transferred the case to this court for determination of the appeal.

The first ground urged by respondent in support of the order setting aside the information seems to be that defendant was not, before the preliminary examination, informed of his right to the aid of counsel in every stage of the proceedings.

The statute provides that: "When the defendant is brought before the magistrate upon an arrest, either with or without warrant, on a charge of having committed a public offense, the magistrate must immediately inform him of the charge against him and of his right to the aid of counsel in every stage of the proceedings." The docket entry of the magistrate shows that when defendant was brought before the magistrate on the 17th day of May, 1911, he was by the magistrate "advised of his rights to counsel," and the examination of the charge was set for May 19, 1911.

The record shows that on the calling of the matter by the magistrate on May 19, 1911, the defendant and the district attorney were present, and the district attorney requested the magistrate to appoint a reporter to report the proceedings, which was done, and the reporter was duly sworn. Thereupon the district attorney made this statement: "If your honor please, in order that the record may be straight in this case, as I understand it, the other day the defendant was duly arraigned in court by having the complaint read to him and being informed of all his rights to counsel at all stages of the proceedings, also of his right to have witnesses here at the preliminary examination, and the examination was set at this time by consent, and with the understanding that if Mr. White desired further time to employ counsel that he would have the right to it. I presume, may it please the court, that the matter may be disposed of, first, as to whether he is ready to go ahead at this time without counsel." Immediately following this statement by the district attorney, the record shows the following proceedings: "Court: Have you an attorney? Have you employed an attorney to defend you in this action? Defendant: No; I have no attorney. Court: A lawyer? Defendant: No; I expect I will have to get one in the big trial. Court: You understand that this is the time set for your preliminary examination? Defendant: Yes. Court: Are you ready for your examination now? Defendant: Yes, sir. Court: You don't desire any further time? Defendant: No, no; do it to-day. Q. You want to proceed without a lawyer? A. Yes; until the next court comes, I am satisfied."

[1] As was suggested by the trial court when passing upon the motion to set aside the information, the magistrate should have carefully followed the statute and informed the defendant "of his right to the aid of counsel *in all stages of the proceedings*," and should have seen to it that his docket entries showed an exact compliance with the

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

law in this regard. But, even if the docket entry to the effect that he was "advised of his right to counsel" does not show a full compliance with the requirement of the law that he must be informed of his right to the aid of counsel *in every stage of the proceedings*, it is perfectly clear from the record, as above set forth, that, before the examination, defendant was informed and had knowledge of his right to the aid of counsel upon the examination, and with such knowledge elected to proceed with the examination without counsel. Under these circumstances, defendant should not be heard to complain after his commitment that he was not sufficiently informed of his right to counsel when first brought before the magistrate.

[2] It is next urged by defendant that the commitment of defendant is not valid, for the reason that the name of the person charged to have been murdered does not appear in the commitment. The order holding him to answer is indorsed on the back of the complaint, and is in exact conformity with the statute requiring such order to be so indorsed, except that the word "deposition" is used, instead of the word "complaint" (Pen. Code, § 872), but this has been held to be immaterial. People v. Lapique, 10 Cal. App. 672, 103 Pac. 164. The complaint fully sets forth the charge against the defendant, and is beyond criticism, as a charge of murder. By the terms of the order indorsed on the complaint, defendant was held to answer for the offense "in the within deposition mentioned" and this made the complaint a part of the order. The order holding the defendant to answer was thus in strict accord with the requirements of the statute, and entirely sufficient to support the information filed.

[3,4] The fact that the commitment to the sheriff (Pen. Code, § 877) does not name the person murdered does not invalidate the information filed by the district attorney. Indeed, any such defect in the warrant of commitment is not a ground for the release of the prisoner from custody, if a proper order has been indorsed on the complaint. In such case, the warrant of commitment to the sheriff may at any time be amended by the magistrate, so as to make it fully and formally describe the offense set forth in the complaint referred to, and thus made a part of the order holding the defendant to answer to the charge. Ex parte Keil, 85 Cal. 309, 24 Pac. 742.

Section 872 of the Penal Code provides that: "If, however, it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, the magistrate must make or endorse on the complaint an order, signed by him, to the following effect: It appearing to me that the offense in the within complaint mentioned (or any offense, according to the fact, stating generally the nature thereof) has been committed, and that there is sufficient cause to believe the within named A. B. guilty thereof, I order that he be held to answer to the same."

It is this order that evidences the action of the magistrate in holding a defendant to answer before the superior court, and is the basis for the filing of an information against the defendant. Pen. Code, § 809. For this reason, any omission of the name of the person murdered, in the commitment issued to the sheriff or entered in the docket, does not invalidate the information, nor justify the setting aside of the information, upon the ground that the defendant had not been legally held to answer, where, as in this case, the provisions of section 872 have been strictly complied with.

[5] And for the same reason the failure of the magistrate to sign his docket until after the filing of the information does not affect the validity of the information.

No other reasons have been suggested to support the contention of defendant that he had not been legally committed by a magistrate.

The grounds urged in support of the order made by the trial court are insufficient to support the order, and it is reversed, and the cause remanded for further proceedings upon the information filed by the district attorney.

We concur: LENNON, P. J.; KERRIGAN, J.

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17 Cal. App. 493

SUMMERS v. HAMMELL, Sheriff, et al.

(Civ. 988.)

(District Court of Appeal, Second District, California. Nov. 18, 1911. Rehearing Denied by Supreme Court Jan. 17, 1912.)

1. EXECUTION (§ 293*)—REDEMPTION FROM SALE—RIGHT TO REDEEM.

Code Civ. Proc. § 701 provides that a judgment debtor may redeem, or that the redemption may be made by a creditor having a subsequent lien by a judgment or mortgage. *Held* that, where plaintiff was a simple contract creditor of the execution debtor at the time of the sale, and did not become a judgment creditor until the full period of redemption had expired, the fact that he was delayed in obtaining his judgment by reason of a series of holidays declared by the Governor during the progress of the suit did not entitle him to redeem on equitable considerations.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 835-844; Dec. Dig. § 293.*]

2. EXECUTION (§ 295*)—REDEMPTION FROM SALE—TIME.

Act June 3, 1906 (St. 1906, p. 8) § 1, providing that any act or proceeding required by law to be performed within any time in the month of June, 1906, prior to the last day of the month, may be performed on any day not later than the 10th day of July, 1906, as if it had been performed within the time wherein such act required it to be performed, does not extend the time within which redemption may be made by a subsequent judgment creditor from a prior sale on execution against the same debtor.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 846–850; Dec. Dig. § 295.*]

Appeal from Superior Court, Los Angeles County; W. R. Harvey, Judge.

Action by E. A. Summers against W. A. Hammell, Sheriff of the County of Los Angeles, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Jones & Weller (C. F. Culver, of counsel), for appellant. Arthur M. Ellis, for respondents.

JAMES, J. This appeal is from a judgment entered, dismissing the action of plaintiff after demurrer to her amended complaint had been sustained by the superior court.

The facts, as alleged in the amended complaint filed by plaintiff, are briefly as follows: On the 12th day of June, 1905, the sheriff of Los Angeles county, under authority of a writ of execution issued out of the superior court, sold to the defendant Franklin Oil Company certain real property belonging to a corporation called the "New Franklin Oil & Refining Company," which latter was then the judgment debtor of the said Franklin Oil Company. Thereafter, on the 17th day of November, 1905, plaintiff here commenced an action against the New Franklin Oil & Refining Company, in which action judgment was rendered in her favor on the 5th day of July, 1906. On the 9th day of July, 1906, she tendered and paid to the sheriff of Los Angeles county the amount of money which would be required to be paid upon redemption of the New Franklin Oil & Refining Company's property, and demanded of the sheriff a certificate of redemption, which was refused. It was further alleged in the amended complaint that, because of the numerous holidays declared by the Governor of the state from the 18th of April, 1906, to the 2d day of June, 1906, it was impossible for plaintiff to obtain a trial of her action against the New Franklin Oil & Refining Company, and that she exercised diligence in the prosecution of her said action.

Twelve months from the date of the sale of the real property to the Franklin Oil Company expired on the 12th day of June, 1906. Therefore the whole period during which redemption could be made from the sale, either by the judgment debtor or any holder of a subsequent judgment lien, had fully run. Sections 702, 703, Code Civ. Proc. Counsel for plaintiff make two contentions as against the action of the trial court in sustaining the demurrer to the amended complaint and entering judgment of dismissal; they are these: First, that under the allegations of plaintiff's amended complaint equitable grounds are shown by reason of which her right to redeem the property of her judgment debtor from the sale made under the execution should be sustained; second, that an act of the Legislature, approved in 1906 (Stats. 1906, p. 8), had the effect of making her redemption effectual, even though it was not attempted to be made until nearly 13 months had elapsed after the date of the execution sale.

[1] As to the claim made, that the cause of action as alleged presents ground for equitable consideration, we are not in accord with the position taken by appellant. By section 701, Code of Civil Procedure, defining who may be entitled to redeem property from the effect of an execution sale, it is provided, first, that the judgment debtor, or his successor in interest, may so redeem, or that the redemption may be made by a creditor having a subsequent lien by judgment or mortgage on the property sold. By her own allegations, it appears here that plaintiff did not become a judgment creditor of the New Franklin Oil Company until July, 1906, at which time the full period of redemption had expired. She is not insisting, and cannot claim, that as a judgment creditor having a lien on the property she was prevented from asserting the right of a redemptioner by reason of conditions beyond her power to control, and which prevented her from exercising such right, notwithstanding her own diligence in the matter. During all of the time when it is alleged that certain holidays proclaimed by the Governor of the state interfered in delaying the progress of her action against the New Franklin Oil & Refining Company, plaintiff was the holder of no judgment lien against the property which had theretofore been subjected to execution sale. It might as well have happened that, because of congestion of business in the courts, plaintiff had been delayed in securing a trial and judgment in her action, and, if such a condition existed, just as strong an appeal for equitable relief would have been furnished. We are satisfied that a case is not presented which calls at all for equitable consideration, or the granting of any relief agreeable to such a plea.

[2] We have next to consider the effect of the act of the Legislature of June 3, 1906, section 1 of which reads as follows: "Any act or proceeding appointed, required or limited by or in pursuance of law to be performed or taken on any day or within any time in the month of June, 1906, prior to the last day of said month, may be performed or taken on any day not later than the 10th day of July, A. D. 1906, with the same effect as if it had been performed or taken on the day or within the time wherein such act or proceeding was so appointed, required

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

or limited to be performed. The provisions of this act shall not apply to criminal actions." If the provisions of this act are applicable to the situation as disclosed by the allegations of plaintiff's complaint, then clearly its effect must be to extend the period of redemption for nearly 30 days beyond that fixed by section 702, Code of Civil Procedure. It has been held several times by our Supreme Court that a statute, such as the one here under consideration, cannot have the effect of extending the period of redemption after judgment and execution sale, because the result would be that the obligation of the contract would be impaired thereby, which the Constitution of the state and the United States Constitution will not permit. The proposition advanced in this behalf may be answered against the contention of appellant by the citation of the following cases: Welsh v. Cross, 146 Cal. 621, 81 Pac. 229, 106 Am. St. Rep. 63; Tuohy v. Moore, 133 Cal. 516, 65 Pac. 1107; Malone v. Roy, 134 Cal. 344, 66 Pac. 313.

The judgment is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

17 Cal. App. 508

DRESSER v. ALLEN et al. (Civ. 991.)

(District Court of Appeal, Second District, California. Nov. 20, 1911.)

1. Exceptions, Bill of (§ 42*)—Settlement—Time.

Where no notice of entry of judgment had been served, so that plaintiff was entitled to have a bill of exceptions settled for a review of the evidence on appeal from the judgment, it was not material that the time had expired within which a bill might be settled for use on motion for a new trial.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 42.*]

2. Quieting Title (§ 44*)—Evidence—Findings.

In an action to quiet title, evidence *held* insufficient to show title in plaintiff.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 44.*]

3. Adverse Possession (§ 63*)—Adverse Claim—Necessity.

Where plaintiff had been in possession for 14 years, paying taxes on the property, and had inclosed the same, but the facts demonstrated that she did such acts under a claim of title, pursuant to a certain contract of purchase, and did not claim adversely to the record owners, she thereby acquired no title by prescription.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 333–357; Dec. Dig. § 63.*]

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by Mary E. Dresser against Levi Allen and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Riley & Hubbell, for appellant. Haines & Haines and Sylvester Kipp, for respondents.

ALLEN, P. J. The action was one to quiet title, with pleadings in the usual form. Findings and judgment went for defendants, from which judgment plaintiff appeals upon a bill of exceptions.

[1] Respondents insist that upon a review of the case this court is precluded from an examination of the bill of exceptions, because it was not settled within time. The judgment was entered on the 21st day of February, 1910. On that date, plaintiff filed with the clerk and served upon defendants a notice of intention to move to vacate the decision and for a new trial, designating the grounds, and stating that the same would be made upon a bill of exceptions. The bill of exceptions was not served until the 18th of April, 1910, 56 days after the entry of the judgment. At the time fixed by the court for settlement of the bill, plaintiff announced her abandonment of proceedings under the notice of intention to move for a new trial. The court thereupon overruled the objections to the settlement, and settled the bill. No notice of the entry of the judgment was served upon the plaintiff. We are of opinion that the court was warranted in settling the bill of exceptions; 10 days not having elapsed from notice of the entry of judgment. Possessing the right to have the bill of exceptions settled within 10 days after notice of the entry of judgment, through which, upon an appeal from such judgment, the evidence may be considered, it is of no materiality that, in the first instance, the intention was to use such bill upon a motion for a new trial. It matters not what may be the purposes for which the bill was expected to be used; it is sufficient if it be settled within the time requisite for use upon appeal from the judgment.

[2] Appellant's sole contention relates to the insufficiency of the evidence to support the findings of the court. The material facts presented by the bill of exceptions are these: In 1895 plaintiff entered into an agreement with one Mulford for the purchase of the premises described in the complaint. It is appellant's contention that Mulford in the negotiations acted as the agent for the heirs of Fletcher, claiming to be the owners of the premises. The contract between Mulford and plaintiff was oral. Plaintiff was to pay one-third cash and the balance in 2 and 3 years. Mulford put plaintiff into possession of the premises, and during the year following the making of the contract she paid the one-third cash stipulated. She never paid any portion of the deferred payments. Mulford at the time the contract was made held a conveyance from one of the Fletcher heirs, executed after the heir had arrived at the age of 18 years, but before he had attained his majority. How many of the Fletcher heirs were living is not shown, other than

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that there was one in addition to the minor making the conveyance. Fletcher's title to the property was disputed by other persons, and it was necessary to settle and adjust all of these claims, in order that a good title might be conveyed to plaintiff. Mulford procured defendant Allen to advance the money with which the claims for outstanding titles were compromised, and procured the minor, after attaining his majority, to convey his interest to Allen. Allen subsequently conveyed to Kipp, his codefendant, who now holds the record title to the premises.

[3] While plaintiff for 14 years was in possession of these premises, paying taxes thereon, and having inclosed the same, there is nothing in the record indicating that she held adversely to the record owners; in fact, there is ample evidence in the record tending to show that she held the premises under a contract with Mulford, and claimed that the titles held by Allen were in trust for her. We find nothing, therefore, sufficient to warrant the court in determining that plaintiff held a title by prescription. There is no claim that she held any other kind of a title, and, as a consequence, there is nothing which would warrant the court in making a finding otherwise than as made.

Judgment affirmed.

We concur: JAMES, J.; SHAW, J.

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17 Cal. App. 491

COOPER v. NICHOLS. (Civ. 860.)

(District Court of Appeal, Third District, California. Nov. 17, 1911.)

ELECTIONS (§ 307*)—CONTESTS—DISMISSAL—COSTS.

Where two election contest cases were consolidated for the purpose of recounting the votes according to Code Civ. Proc. §§ 1111-1127, the court dismissing one of the cases on motion of contestant therein must allow contestee his costs.

[Ed. Note.—For other cases, see Elections Cent. Dig. § 333; Dec. Dig. § 307.*]

Appeal from Superior Court, Del Norte County; J. L. Childs, Judge.

Election contest by Ashley Cooper, contestant, against W. L. Nichols, contestee. From a judgment of dismissal on motion of contestant, contestee appeals. Reversed.

J. F. Quinn and James McNulty, for appellant. G. W. Howe, for respondent.

CHIPMAN, P. J. Plaintiff commenced the action, as contestant, against the defendant, as contestee, for the office of county clerk of Del Norte county for the purpose of having a recount of the vote cast for said office at the general election held on November 8, 1910.

It does not appear when the complaint was filed, but on December 27, 1910, defendant filed a general and special demurrer to the complaint, and on the same day the minutes of the court show the following proceedings: "This being the time set for a special session of court to count the ballots in the case of West Duley vs. Thomas Peacock and Ashley Cooper vs. W. L. Nichols, and on motion of Howe these cases are consolidated for the purpose of counting. Quinn and McNulty appear for Peacock and Nichols. Quinn moves to set aside citations 980-981 and motion is denied. Quinn moves to dismiss action 980-981 and motion is denied. Quinn demurs to 980-981 and demurrer is overruled." Then follows in the transcript the answer of defendant, filed December 27, 1910. Following the answer, the transcript reads: "(Title of Court and Cause.) No. 981, Judgment. On motion of the contestant and plaintiff, Ashley Cooper, in the above entitled cause, it is hereby ordered and adjudged that this cause be dismissed, and this action being one of two contest cases which were by this court on Dec. 27, 1910, consolidated, and joined for the purpose of recounting votes according to sections 1111 to 1127 inc. of the Code of Civil Procedure, and, it appearing to the court as just and fair, it is hereby ordered that each party to this action pay his own costs and disbursements incurred. Dated in open court this 6th day of January, 1911. John L. Childs, Judge of the Superior Court of Del Norte County, State of California."

Defendant appealed from that part of the judgment of dismissal reading, "and, it appearing to the court as just and fair, it is hereby ordered that each party to this action pay his own costs." The notice of appeal is directed to "plaintiff and to his attorneys, Messrs. Geo. W. Howe and Arthur L. Dorn," from which it may be inferred that it was one of the attorneys for plaintiff and contestant who appears in the minutes to have made the motion to consolidate the cases referred to in the minutes.

The facts disclosed by the record differ but slightly from the facts appearing in the case of Duley v. Peacock (No. 859) 119 Pac. 1086, decided by this court November 8, 1911. In that case the action was dismissed on motion for a nonsuit, and the present case was dismissed on motion of the contestant. The two cases had been consolidated, and were heard together. The same question is presented in both appeals. On the authority of the case of Duley v. Peacock, the judgment is reversed, with directions to the court below to so modify it as to allow to the contestee his costs in the action.

We concur: HART, J.; BURNETT, J.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

17 Cal. App. 451

KOKOLE v. SUPERIOR COURT, TEHAMA COUNTY, et al. (Civ. 912.)

(District Court of Appeal, Third District, California. Nov. 13, 1911.)

1. NEW TRIAL (§ 154*)—MOTION—STATEMENT—SETTLEMENT—TIME—DISMISSAL OF PROCEEDINGS.

Judgment having been entered July 12, 1910, and notice thereof served on petitioner on the same day, petitioner also served on that day a notice of intention to move for a new trial. On November 29th following, he served and filed his proposed statement, and on December 5th defendants served and filed proposed amendments thereto. No further steps were taken until June 20, 1911, when defendants served a notice of motion to dismiss the notice of motion for a new trial, or the proceedings for settlement of the statement on motion for a new trial, on the ground of inexcusable neglect, and plaintiff's failure to engross, present for settlement, have statement settled, and otherwise proceed in the matter of his appeal; and on June 23, 1911, petitioner filed an alleged notice of appeal. *Held*, that the time prescribed by Code Civ. Proc. § 939 within which petitioner could appeal from the judgment having expired, the trial court properly dismissed the proceedings on the settlement of the statement for inexcusable neglect.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 312, 313; Dec. Dig. § 154.*]

2. CERTIORARI (§ 5*)—SCOPE OF REMEDY—RIGHT TO APPEAL.

An order granting a motion to dismiss proceedings for the settlement of a statement on a motion for new trial for inexcusable neglect in preparing and applying for the settlement thereof being a special order after final judgment, from which an appeal may be taken as authorized by Code Civ. Proc. § 939, subd. 3, petitioner, on the dismissal of such proceedings, had a plain, speedy, and adequate remedy by appeal, which he could have taken within 60 days after the order was entered, and therefore could not have a writ of review, under the rule that such writ will lie only where an inferior tribunal has exceeded its jurisdiction, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.*]

3. NEW TRIAL (§ 12*)—EFFECT OF MOTION—STAY OF PROCEEDINGS.

Where a judgment was rendered against petitioner for the recovery of certain lands, the pendency of a motion for new trial did not operate to stay the issuance of a writ of possession, which it was the duty of the clerk to issue, as a ministerial act, on application of the party entitled thereto.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 17, 253; Dec. Dig. § 12.*]

Petition for a writ of review by John Kokole against the Superior Court of Tehama County, and another. Demurrer to petition sustained, and writ discharged.

John Kokole, in pro. per. McCoy & Gans, for respondents.

HART, J. This is a petition for a writ of review.

It appears from the petition that petitioner instituted an action, on December 12, 1909, in the respondent superior court against M. R. Hook, the town of Red Bluff, a municipal corporation, and the members of the board of trustees of said town for the purpose of securing a decree reforming a certain deed, by which certain land was conveyed by said petitioner to said Hook, so that said deed would conform to the intention of the parties with respect to the description of the property so conveyed.

After issue joined and several continuances of the trial of the cause, the action came to trial on the 16th day of June, 1910, before the respondent Hon. J. E. Prewett, judge of the superior court in and for the county of Placer, who had been requested by the judge of the respondent court to sit in the trial of said cause. The cause having been tried, findings of fact, conclusions of law, and judgment against petitioner and in favor of the defendants were filed, entered, and docketed. Thereupon the following proceedings were had: July 12, 1910, notice of motion for a new trial was filed by the petitioner here (plaintiff in said action); July 14, 1910, cost bill and notice of judgment were filed; August 9, 1910, stipulation filed, extending time to prepare statement on motion for a new trial to September 11, 1910; October 21, 1910, plaintiff was granted 30 days, in addition to the time allowed by law, in which to serve statement on motion for a new trial; November 29, 1910, statement on motion for a new trial filed; December 5, 1910, proposed amendments to statement filed; June 20, 1911, motion to dismiss proceedings in the matter of the settlement of the statement on motion for a new trial for want of due diligence in presenting the same for settlement; June 23, 1911, motion to dismiss proceedings in re statement on motion for a new trial was argued, submitted, and taken under advisement, and on July 8, 1911, the court filed its written opinion granting said motion. On August 1, 1911, a writ of possession was issued on the judgment, and the petitioner was, by virtue thereof, dispossessed of the disputed property.

The petition alleges that petitioner was given no notice of the judgment in said action, "and was unable to prepare an appeal in said cause;" that therefore "the court was without jurisdiction to issue a writ of possession," etc. The prayer of the petition asks that a review be had by this court of the proceedings leading to the issuance of the writ of possession, and that said writ and "all proceedings herein be annulled" and set aside as in excess of the jurisdiction of the court.

It is plainly manifest that, under the circumstances as revealed by the record before us, an appeal court would be powerless to now afford petitioner relief in any event, much less that asked for in this proceeding.

[1] According to the petition, the judgment,

as we have seen, was entered on July 12, 1910. On the same day, according to the records of the cause (the documents and papers filed therein having been introduced and received in evidence in this proceeding), notice of entry of said judgment was served on the petitioner; the sheriff having made a return of such service on said day, with the petitioner's acknowledgment of service, over his signature, indorsed on said notice. On said July 12, 1910, the petitioner served and filed a notice of intention to move for a new trial. On the 29th day of November, 1910, the petitioner, as seen, served and filed his proposed statement. On December 5, 1910, the defendants in said cause served and filed proposed amendments to said statement. No further steps of any character seem to have been taken in the cause until the 20th day of June, 1911—15 days beyond 6 months after the proposed amendments to the statement were served on petitioner and filed—when the defendants served upon the petitioner a notice of a motion to dismiss the notice of motion for a new trial, or the proceedings looking to a settlement of the statement on motion for a new trial, on the ground of the "inexcusable neglect and failure of plaintiff to engross, present for settlement, have settled, and otherwise proceed in the matter of his appeal." Said motion was noticed for the 23d day of June, 1911. As seen, the court, after hearing argument on said motion, granted the same.

On said 23d day of June, 1911, the petitioner filed a document, evidently prepared by himself, designated a "Notice of Appeal for Transfer from Tehama County to Sacramento, California." This document contains a statement that the plaintiff (petitioner) "appears and asks the superior court of the county of Tehama, state of California, to transfer" the action to Sacramento county. It is probable that the petitioner thus sought to notice an appeal to this court from the final judgment, but it is obvious that, even if the notice had been sufficient in form, he was entirely too late for such an appeal; the judgment having been, as we have shown, entered on July 12, 1910—nearly a year before the filing of said notice. Section 939, Code Civ. Proc.

From the foregoing statement, involving a brief history of the cause giving rise to this petition, it will readily be observed that petitioner wholly fails to present a case here which calls for or would justify the interposition of the extraordinary remedy which he seeks to invoke. That petitioner was guilty of inexcusable negligence in the matter of preparing the necessary record upon which to press his motion for a new trial, no one who knows anything about such matters will have the temerity to deny. Section 659, subd. 3, Code Civ. Proc. That it was within the jurisdiction of the court to entertain and decide the motion to dismiss the proceedings on the settlement of the statement is equally clear and incontrovertible.

[2] A writ of review will lie only where "an inferior tribunal, board or officer, exercising judicial functions has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor in the judgment of the court, any plain, speedy, and adequate remedy." The order granting the motion to dismiss the proceedings referred to is a special order, made after final judgment, and from which an appeal may be taken. Section 939, subd. 3, Code Civ. Proc. It is therefore manifestly true that petitioner had a plain, speedy, and adequate remedy by appeal from said order, which he could have taken within 60 days after the same was entered.

[3] The issuance of the writ of possession —in other words, the writ in execution of the judgment—was not the act of the court, but a mere ministerial act of the clerk of the court, whose duty it was to issue the writ upon the application of the defendants; the pendency of a motion for a new trial not operating to stay proceedings upon the judgment. People ex rel. Carpentier v. Loucks, 28 Cal. 69; Harris v. Barnhart, 97 Cal. 546, 32 Pac. 589; Knowles v. Thompson, 133 Cal. 245, 65 Pac. 468. Even if we were authorized by the record to order the proceedings on the judgment to be set aside—that is, to annul the act of the clerk of the court in issuing the writ of assistance—such an order could avail petitioner nothing, since he has lost his right to appeal from the judgment by neglecting to take such appeal within the time within which such appeals may be taken under the statute.

In justice to ourselves, it is but right to explain that the petitioner appeared in the application for the order to show cause herein in propria persona, and that his want of proficiency in the use of the English language made it doubtful to the members of the court, in the brief time to which we were limited in the examination of his petition, whether the alternative writ should issue or not. For that reason, we ordered the record, the review of which was prayed for, certified to this court.

We may well further explain that the petitioner came into this court to present his side of the controversy without the aid of counsel. It seems that he thus conducted the litigation in the court below. Indeed, it appears from the record before us that the learned trial judge repeatedly advised and besought him to secure counsel, and on one occasion ordered an adjournment of the trial, or some proceeding incidentally growing out of the trial, that he might do so. But, it seems, he paid no heed to the advice of the trial judge in that regard.

The petitioner is a man advanced in years, and is unable to speak our language so that he can be readily or well understood. Indeed, he was, at the hearing of this proceeding, unable to make himself understood by the justices, so imperfectly does he speak the English language. He does not pretend, however, to be versed in the law; and, even had he been able to make himself understood, it is very clear that he could have afforded no assistance to the court in the decision of the question submitted by his petition, assuming that the question so presented was one upon which there existed ground for legitimate controversy. These observations proceed from a conviction, based upon what we have seen of the petitioner, that he labors under the mistaken belief that there is merit in his asseverations that he has not been fairly treated in this litigation, and that he is just as capable of disclosing the errors, if any, upon which he bases his complaint and securing their correction as a lawyer would be. There can be no doubt that the petitioner honestly believes that he has not been justly treated in the decision by which the proceedings on the settlement of his proposed statement on motion for a new trial were dismissed, and he therefore deprived of the opportunity to appeal from the order denying him a new trial, had such order, if the motion had been made, been entered against him. But such belief is, it is very plain from the record here, founded in and harbored by erroneous notions of the law; for there is absolutely no real or just ground for its support. But he would, indeed, be bereft of all feeling who would not sympathize in full measure with a litigant so unfortunate as to have permitted himself—not a lawyer, or at all familiar with the procedure by which the law must be uniformly administered—to become possessed of the belief that he could, with any hope of success, personally represent himself in important litigation, and that he could, unaided by one skilled in the technical and abstruse rules governing remedies and procedure, a clear comprehension of which often puzzles lawyers of no mean ability, preserve and protect all his rights in the action. The appearance of the venerable petitioner in this court, silently appealing for relief from what he has allowed himself to conceive to be an unjust judgment, was pathetic in the extreme, yet, even if his belief were well founded as to said judgment, this court is powerless to afford him any relief or aid to that end in this proceeding. Indeed, by his own negligence, according to the record here, he has lost all ground for hope of relief, if any he was entitled to, and we can see no other alternative for him but to submit to the mandates of the judgment.

The demurrer to the petition must be sustained, and the writ discharged.

It is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

161 Cal. 672

VALLEJO FERRY CO. v. LANG & McPHERSON. (Sac. 1,867.)

(Supreme Court of California. Dec. 27, 1911. Rehearing Denied Jan. 22, 1912.)

1. STATUTES (§ 76*)—SPECIAL LEGISLATION.

Special legislation not being prohibited under Constitution of 1849, the special charter of the city of Vallejo enacted in 1872, and conferring upon the city the authority to license ferries, was not invalid, although St. 1855, p. 183, incorporated in Pol. Code, §§ 2892, 2893, which was a general law, conferred authority upon the boards and county supervisors to license ferries.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 77½–78½; Dec. Dig. § 76.*]

2. STATUTES (§ 67*)—SPECIAL LEGISLATION — RETROSPECTIVE OPERATION OF CONSTITUTIONAL PROVISION.

Const. 1879, art. 4, § 25, prohibiting local or special laws in the matter of licensing ferries, is prospective, and so special provisions in municipal charters relating to the licensing of ferries are affected only by subsequent general laws.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 69; Dec. Dig. § 67.*]

3. FERRIES (§ 30*)—LICENSES.

Act Cong. Sept. 9, 1850, c. 50, § 3, 9 Stat. 452, providing that all navigable waters shall be common highways free to the inhabitants of the state, does not inhibit the licensing of ferries.

[Ed. Note.—For other cases, see Ferries, Cent. Dig. § 77; Dec. Dig. § 30.*]

4. FERRIES (§ 15*) — FRANCHISE — MODE OF GRANTING.

Where a city had the power to grant franchises for ferries, one operating a ferry without a franchise to the prejudice of a duly licensed ferry cannot attack the mode in which the city granted the franchise.

[Ed. Note.—For other cases, see Ferries, Cent. Dig. §§ 34–37; Dec. Dig. § 15.*]

Department 2. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by the Vallejo Ferry Company against Charles Lang and Adrian McPherson, doing business as Lang & McPherson. From a judgment for plaintiff, defendants appealed. Affirmed.

W. H. Morrissey, Keogh & Olds, and P. B. Lynch, for appellants. Frank R. Devlin and L. G. Harrier, for respondent.

HENSHAW, J. Plaintiff was operating a ferry between the city of Vallejo and Mare Island by authority of a franchise granted to it by the city of Vallejo. Defendants began to operate an opposition ferry without any permit or franchise from any person whatsoever, and in violation of the terms of the franchise granted by the city of Vallejo to the plaintiff. Thereupon the plaintiff sued and obtained an injunction against defendants, and from this judgment defendants appeal.

[1] Their varying contentions upon appeal all revolve about the central proposition that the city of Vallejo had no power to grant a franchise. Without regard to the question whether this defense may be asserted by defendants, who do not pretend to be operating under any franchise, license, or permit whatsoever, and who for aught that appears are violating the penal laws of the state in collecting ferry fares and tolls (Pen. Code, 386), upon the merits appellants' contention is unsound. The city of Vallejo was incorporated in 1872 by a charter which (section 10, subd. 13) conferred upon its board of trustees the power "to grant licenses and franchises in the manner provided by law for boards of supervisors of counties for constructing, keeping and taking tolls on roads, bridges, ferries, wharves, chutes and piers within the limits of said city of Vallejo." Appellants' argument is that, by the general law then upon the statute books, this power to grant ferry franchises was vested in the board of supervisors (Pol. Code, 2892, 2893); that these sections of the Political Code are, in effect, but re-enactments of the statute of 1855 (Stat. 1855, p. 183), which was a general law conferring authority upon the supervisors to establish ferries; that, therefore, there could be no valid special law authorizing the city of Vallejo to establish ferries even under the Constitution of 1849; and that the attempt so to do in the charter provision of the city of Vallejo is therefore void. The position is unsound. Under the Constitution of 1849, special legislation was not forbidden, nor was the conferring of special powers upon municipalities by their charters, even when a general law upon the same subject-matter stood upon the statute books. Smith v. Judge, 12th District, 17 Cal. 547; Brooks v. Hyde, 37 Cal. 379; S. F. v. Canavan, 42 Cal. 541; Ex parte Burke, 59 Cal. 6, 43 Am. Rep. 231; Nevada School Dist. v. Shoecraft, 88 Cal. 372, 26 Pac. 211; Wigmore v. Buel, 122 Cal. 144, 54 Pac. 600; People v. Levee Dist. No. 6, 131 Cal. 30, 63 Pac. 676.

[2] The provision in the Constitution of 1879 forbidding local or special laws in enumerated cases, and in particular (article 4, subd. 25) in the matter of "chartering or licensing ferries, bridges or roads," was prospective and did not operate to destroy the force of existing special laws. Such special laws or provisions in municipal charters became subject only to the general laws subsequently passed by the Legislature touching the same subject-matter. Ex parte Chin Yan, 60 Cal. 78; Meade v. Watson, 67 Cal.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

591, 8 Pac. 311; Rollins v. Wright, 93 Cal. 395, 29 Pac. 58, and cases supra. Ex parte Helm, 143 Cal. 555, 77 Pac. 453, relied upon by appellants, reaffirms the established doctrine to this effect, and declares that cities or towns existing under special acts of the Legislature at the time the Constitution of 1879 went into effect continued to exist under such acts until they elect to organize under the general laws provided by the Legislature for that purpose. Such cases as Kennedy v. Board of Education, 82 Cal. 492, 22 Pac. 1042, People v. Henshaw, 76 Cal. 436, 18 Pac. 413, and Ex parte Ah You, 82 Cal. 339, 22 Pac. 929, dealt with the effect upon special charters of general laws passed after the adoption of the Constitution, and have no bearing upon the question under consideration.

[3] Appellants point out that the act of Congress of September 9, 1850, admitting California into the Union as a state, provides that: "All the navigable waters within said state shall be common highways, and forever free as well to the inhabitants of the said state as to the citizens of the United States." The argument founded upon this seems to be that to require a franchise or a permit for the conduct of a ferry upon such waters is an invasion of the right of free navigation and in violation of the act of Congress. The proposition is, of course, absolutely untenable (Cardwell v. American Bridge Co., 113 U. S. 205, 5 Sup. Ct. 423, 28 L. Ed. 959), but is mentioned only in conformance with our practice to make recognition of any federal question that is presented.

[4] The city of Vallejo having the power to grant this ferry franchise, and having in fact granted it, these appellants cannot be heard to attack the method adopted by the city in so doing. It matters not, therefore, whether the Broughton act (Stats. 1893, p. 288) is or is not applicable to the disposition of a ferry franchise in the city of Vallejo, or that in fact the city in granting the franchise sold it to the highest bidder. Norris v. Farmers' & Teamsters' Co., 6 Cal. 590, 65 Am. Dec. 535; Chard v. Stone, 7 Cal. 117; Kansas, etc., Ry. Co., v. Kans., etc., Ry. Co., 129 Mo. 62, 31 S. W. 451; Owens v. Roberts, 6 Bush (Ky.) 608.

The errors at law occurring in the course of the trial of which complaint is made have to do with the introduction of evidence touching the questions herein discussed. It is unnecessary to set them forth at length. Suffice it to say that the court's rulings were in consonance with the views here expressed as to the power of the municipality to grant the franchise in question, and were therefore sound.

For these reasons, the judgment appealed from is affirmed.

We concur: MELVIN, J.; LORIGAN, J.

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161 Cal. 710

HUDGENS v. CHAMBERLAIN et al.

(S. F. 5,322.)

(Supreme Court of California. Dec. 28, 1911. Rehearing Denied Jan. 22, 1912.)

1. Corporations (§ 123*)—Pledge of Stock—Sale by Pledgee—Breach of Duty.

Though one to whom property is pledged as security for debt, with general powers to sell it any time after default and himself purchase it, may sell it any time thereafter, though the market be depressed, so long as the sale be fair and bona fide, notwithstanding this may enable him to buy it at a temporarily low price, yet his power must be exercised in good faith to obtain what the stock is worth at the time of sale, so that he and another separate and independent pledgee of the same kind of stock having conspired to jointly put it on the market in such large quantities as to create a panic and force down the price, and thus buy it at less than its true value, they having done so are liable to him for the damage.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 509; Dec. Dig. § 123;* Pledges, Cent. Dig. §§ 152-170.]

2. Parties (§ 27*)—Joinder.

Where persons to whom plaintiff separately pledged stock conspired, in selling it on default, to jointly place it on the market in such large quantities as to create a panic and force down the market, and thus buy it at less than its value, and they so acted, with such result, he may join them in the same action; his damage being from their joint action.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 35; Dec. Dig. § 27.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by A. L. Hudgens against F. O. Chamberlain and another. From a judgment for defendants, plaintiff appeals. Reversed.

Campbell, Metson, Drew, Oatman & Mackenzie, for appellant. Morrison & Brobeck and Morrison, Cope & Brobeck (Edward Hohfeld, of counsel), for respondents.

LORIGAN, J. This is an appeal from a judgment entered in favor of defendants on demurrer sustained to the amended complaint of the plaintiff.

The second amended complaint alleged that plaintiff was indebted to F. O. Chamberlain on a promissory note in the sum of $12,000, and that, as collateral security for the payment of said note, plaintiff pledged to said Chamberlain 5,000 shares of the capital stock of the Florence-Goldfield Mining Company, under a written contract authorizing Chamberlain, at any time after default in the payment of said note, to sell said stock, or any part thereof, at public or private sale, without notice to plaintiff, and apply the proceeds to the payment of the indebtedness due on said note; that plaintiff was also indebted to defendant William Hinkel on two several promissory notes, executed at different times, each in the sum of $10,000, and that, as collateral security for the payment of each of said notes, plaintiff pledged to William Hinkel 5,000 shares of the capital stock of the said Florence-Goldfield Mining Company, respectively (or 10,000 shares for the two notes), under a contract similar in its terms to that executed in favor of Chamberlain and above referred to; that said Chamberlain and said William Hinkel, respectively, held said shares of stock pledged to them as collateral security under said contracts for the payment of their said respective notes until October 12, 1907; that a long time prior thereto, and on said latter date, said stock had been and was listed on the San Francisco Stock Exchange Board; that there existed an active daily demand therefor at prices ranging from $3 to $4 per share during said time, and that shares were daily sold and purchased at said figures, the number of shares, however, sold and purchased daily in said board seldom exceeding 4,000 shares.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is then alleged, as the gist of plaintiff's cause of action, that on or about the said 12th day of October, 1907, "the said defendants, F. O. Chamberlain and William Hinkel, for the purpose of cheating and defrauding said plaintiff, and for the purpose of enriching themselves at the expense of said plaintiff, fraudulently conspired together and collusively agreed that they would, on the said 12th day of October, 1907, in the said stock and exchange board, offer for sale the said shares of stock so pledged to them, as aforesaid, in quantities greater than the same could be sold at the then ruling market price, to wit, the sum of $3 per share under the then existing daily demands therefor in said stock and exchange board, and thereby create a panic in said stock and exchange board in connection with said shares of stock and with sales thereof, and thereby depreciate the then existing market value thereof, to wit, the said sum of $3 per share, and by reason of such panic and consequent depreciation of said market value purchase the same at greatly reduced rates from those for which the same were then and there being daily sold, to wit, the said sum of $3 per share, and that the said defendants did, on the said 12th day of October, 1907, offer for sale in said stock and exchange board the said shares of stock, as aforesaid, in such quantities, and did create a panic in connection therewith in the said stock and exchange board, and did, by reason thereof, depreciate the price of the said stock at said time from $3 per share to about the average sum of $2 per share, and that at the said time there was sold by the said defendants for their joint account about 11,900 shares of said capital stock for the sum of $24,560, the said sum being an amount about $11,140 less than the said market value of said shares in said stock and exchange board at said time, and at which the same were being sold and had been sold for on the preceding day and at the opening of the said stock and exchange board on the said day, all of which was done in pursuance of said fraudulent conspiracy and collusive agreement of the said defendants to have the said stock depreciated in value and sold at depreciated prices, and for the purpose of enriching themselves at the expense of said plaintiff by a purchase of said stock at such depreciated prices, and not for the purpose of securing to them the payment of the said promissory notes, or any part thereof, and that at the said sales the said defendants purchased jointly the greater portion of the said 11,900 shares of stock to and for their own use and benefit;" that, by reason of said conspiracy and collusion and fraudulent agreement, and through said fraudulent sales and purchases, plaintiff suffered damage in the sum of $11,140, for which he prayed judgment.

A demurrer to the complaint was interposed by defendants and sustained, and this appeal involves solely the correctness of the ruling of the superior court in that respect.

[1] The position of respondents in support of the ruling of the lower court sustaining their demurrer is, as stated in their brief, that reliance is placed by appellant on his right of recovery solely upon the facts alleged, namely, that, in the exercise of a perfectly lawful power of sale and the consequent putting of the pledged property upon the market for sale, the price theretofore prevailing was lowered, and the property bid in at a price of about $2 per share, instead of the price of $3 theretofore prevailing, accompanied with the further allegation that these things were done with the selfish intention upon the part of respondents to profit by their acts, and that these acts resulted in damage to the plaintiff. And it is claimed that, as the allegations of the complaint showed that the defendants were exercising lawful rights in making the sale in a lawful way, the facts alleged, that their lawful acts and lawful method of sale were with the intention of bidding in the stock for themselves at a reduced rate, do not make their conduct actionable, relying on Boyson v. Thorn, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233, People v. Schmitz, 7 Cal. App. 330, 94 Pac. 407, 419, 15 L. R. A. (N. S.) 717, and Parkinson v. Building Trades Council, 154 Cal. 581, 98 Pac. 1027, 21 L. R. A. (N. S.) 550, the principle of which cases is that, where a party is exercising an absolute legal right, such exercise cannot be considered as wrongful or actionable, merely because a malicious motive or intent may have prompted its exercise. If the allegations of the complaint amounted to nothing more than the construction placed on them by respondents, there could be no question of the correctness of their position in support of the ruling on the demurrer.

It is, of course, well settled that a pledgee, under such contracts as are shown here, may sell the property pledged in satisfaction of the pledges, and purchase the same at the sale thereof; the only requirement being that the sale shall be fair and bona fide. After default, he has a lawful right to sell them at any time, and as long as the sale is made at market prices the mere fact that they are sold in an unfavorable condition of the market, and consequently bring a low price, affords no ground for complaint on the part of the pledgor. The pledgee is under no obligation to take any chances on the market, or wait for a more favorable one than exists when he elects to sell. If any limitation was to be placed upon the condition of the market at which the sales of the pledged property were to be made after default, the pledgor should have provided for this in his contract. Having failed to do so, when the lawful right to sell has accrued, the pledgee may dispose of the pledges at market rates, no matter what the condition of the market may be; nor will it be of any moment that by selling the stock on a depressed market he is afforded an opportunity of purchasing the property at the rates then happening to prevail, and which may be the result only of a temporary depression of the market.

But we do not construe the complaint as alleging facts showing simply that the defendants, upon the default of the plaintiff, proceeded merely to exercise their legal rights to sell the stock in the then condition of the market, unaffected by any action on their part. On the contrary it appears from the allegations of the complaint that these defendants held their stock independently of each other, and each block of stock as a separate pledge for the payment of their individual notes, and they collusively agreed to jointly offer for sale the separate shares of stock pledged to each, with the sole purpose of thereby depreciating the value of the stock in the then existing market, thereby creating a panic, and as a result thereof lessening the value of the stock, so as to be able to purchase it at greatly reduced figures; and that they did so. We think this clearly states a cause of action.

The relation existing between parties to a transaction, where collateral is placed in the hands of the pledgee as security for the payment of a debt, with power of sale in case of default, is in the nature of a trust relation. The responsibility of the pledgee to the pledgor is similar to that of a trustee; he holds the stock for specific purposes, namely, to return it to the pledgor, should the indebtedness it is given to secure be paid, or, if, under a power of sale, it is disposed of, to pay over to the pledgor any surplus which may remain; and, as an incident to such trust relation, the power of sale which is vested in the pledgee must be exercised with ordinary care and prudence and in good faith for the benefit of both the pledgor and the pledgee, and to obtain what the stock is worth at the time the pledgee concludes to sell it. Jones on Pledges and Collateral Security, subd. 631b, p. 679; German American State Bank v. Spokane, etc., R. & N. Co., 49 Wash. 359, 95 Pac. 261; Newsome v. Davis, 133 Mass. 343; Napier v. Central Georgia Bank, 68 Ga. 637.

And where, as in the agreement at bar, a general power to sell at any time, without notice, is given, and the right to purchase at such a sale conferred on the pledgee, it is no answer to a complaint that the sale was made without due regard to the rights of the pledgee to say that a literal compliance with the terms of the power were carried out, because, no matter to what extent unlimited power to deal with the pledged property is given, the law implies, from the relation of the parties, that these powers shall be exercised in good faith, and with due regard to the interests of the pledgee. The fact, too, that under our Code the contract of pledge may provide for the purchase of the pledged property by the pledgee himself, which was not permitted at common law, affords an additional reason why the pledgee is to be held to the strictest good faith in dealing with the pledged property.

In the matter at bar, either one of the defendants, under the general power to sell the stock pledged to him, might have made a sale of it in the open market, or at private sale at market rates, at any time after default of the pledgor. Neither was required to wait for a more favorable market than existed when the power of sale was exercised, and if the market happened then to be depreciated he was under no obligation to wait for a more favorable one, and if the effect of selling upon the then existing market was to permit him to purchase the stock at figures less than prior or subsequent market rates, and his motive in selling at the time was to purchase the stock at the then prevailing rates, this could afford no ground of complaint by the pledgor, because the pledgee had done nothing to depreciate the market, but took it as he found it when he had a right to exercise his power of sale and his equally legal right to become a purchaser with any other bidder at market rates.

But this is not the situation made by the complaint. Here the respondents had no pledges of the stock for their joint benefit, but as independent pledgees. Each was under both a legal and moral obligation to deal with the pledged stocks in good faith, and to exercise reasonable care and prudence to obtain as near their value upon a sale as they were worth. Instead of doing this, it is alleged that they entered into a collusive agreement, whereby they should deal jointly with the stock held by them independently, not for the purpose of securing by a sale thereof payment of the indebtedness due on their respective promissory notes, but so as to afford an opportunity to purchase the stock for their own benefit and advantage at the expense of the plaintiff; that in order to accomplish this they secretly agreed that they would place on the market the stock held independently by them as pledgees in such large quantities as would create a panic and depreciate the ordinary market value of the stock, and thereby force the ruling price down, so that they might become purchasers of it; that they placed the stock on the market for that purpose; and that it had the effect intended. These allegations show that the defendants were not attempting to proceed in a lawful manner to assert their legal rights as pledgees. Their legal duty was to proceed in good faith to acquire the best obtainable price for the pledged stock, and, while they owed no duty to the plaintiff to wait for a stronger market than existed when they elected to sell, they did owe him the duty of taking no joint measures to purposely create a weak one, and when they secretly joined their forces, combined their stock, held independently, and unloaded it on the market in quantities larger than they knew the market could sustain, with the intention and for the purpose of depreciating its value, and thereby enabling them to purchase it for their own benefit, they were not acting in good faith, nor with regard to the rights of the plaintiff, but in violation of their obligation to him; and for the damage which plaintiff sustained thereby an action will lie, and the complaint in that respect sufficiently stated a cause of action.

[2] While there can be no doubt from the discussion in the briefs that the demurrer was sustained by the trial court on the ground that it stated no cause of action, it is further insisted by respondents that if this point was not well taken the demurrer was nevertheless properly sustained for various special grounds of attack made on the complaint. As one of these, it is claimed that the defendants were improperly joined as parties. There is no force in this. The defendants are charged in the complaint with having conspired together to violate their duties to plaintiff with reference to the pledged property, and that, as a result of their joint action in this respect, plaintiff sustained the damage complained of. Hence they were properly joined as defendants. The other claim, that the complaint is in certain respects ambiguous and uncertain, we do not think tenable.

The judgment appealed from is reversed.

We concur: HENSHAW, J.; MELVIN, J.

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17 Cal. App. 540

GARIBALDI et al. v. GRILLO et al.
(Civ. 863.)

(District Court of Appeal, Third District, California. Nov. 23, 1911. Rehearing Denied by Supreme Court Jan. 22, 1912.)

1. Appeal and Error (§ 878*) — Questions Reviewable — Party Entitled to Complain.

Where, in a suit to quiet title to a placer mining claim, the court found that neither party owned the land, or any part thereof, and plaintiff appealed from the judgment entered and from an order denying a new trial, defendant, who did not appeal, could not attack the findings and conclusions of law as to the land claimed by him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3573–3580; Dec. Dig. § 878.*]

2. Mines and Minerals (§ 38*)—Quieting Title to Mining Claims—Stipulations.

Parties in a suit to quiet title to a placer mining claim may stipulate as to their conflicting rights, but they may not, by stipulation, relieve themselves from proving at the trial that they made a discovery of gold, either in placer, or in veins, or lodes in the land, as contemplated by the federal statutes; and a plaintiff, in a suit to quiet title to a placer mining claim, who bases his claim on his mining location, must show a discovery of gold sufficient to satisfy the federal statutes.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 38.*]

3. Mines and Minerals (§ 17*) — Mining Claims—Discovery.

Discovery is the source of a miner's title, and is an essential requisite to a valid location, and must precede the location, and this rule applies alike to lode and placer locations, and, as far as the character of the deposits will admit, the principles governing lodes apply to placers.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 24–28; Dec. Dig. § 17.*]

4. Mines and Minerals (§ 38*)—Mining Location—Discovery—Requisites.

Whether a discovery sufficient for a valid mining location under the federal statutes has been made is for the jury, under the instructions of the court that there must be such a discovery of mineral as will give reasonable evidence of the fact, either that there is a vein or lode carrying the mineral, or, where it is claimed as a placer ground, that it is valuable for such mining.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 108; Dec. Dig. § 38.*]

5. Mines and Minerals (§ 38*)—Location—Discovery—Evidence.

Evidence *held* to support a finding that plaintiff, suing to quiet title to a placer mining claim, had not made a sufficient discovery for valid location under the federal statutes.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 38.*]

Appeal from Superior Court, Amador County; Fred V. Wood, Judge.

Action by Frank Garibaldi and another against John B. Grillo and others. From a judgment denying relief to either party, plaintiffs appeal. Affirmed.

A. Caminetti and Robert C. Bole, for appellants. C. P. Vicini and Wm. J. McGee, for respondents.

CHIPMAN, P. J. Action to quiet title to a placer mining claim.

[1] The court made findings that neither plaintiffs nor defendants were, "at the commencement of the action, or at any other time, the owners of" the land severally claimed by them, or any part thereof. Plaintiffs appeal from the judgment and from the order denying their motion for a new trial. Defendants do not appeal, and are in no po-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

sition to attack the findings and conclusions of law respecting the land claimed by them. Trevaskis v. Peard, 111 Cal. 599, 44 Pac. 246.

Appellants contend that they made sufficient proof of location and of discovery of gold. There was evidence that they made a location of the ground about August 22, 1908, by staking the corners, posting notice, and having the land surveyed. There was no evidence that they marked the boundaries of the claim, so as to be readily traced. The notice of location was duly recorded August 24, 1908. The action was commenced February 6, 1909.

The proof of work done or discovery of gold on the claim by plaintiffs is slight, and is as follows: Plaintiff Garibaldi testified: "Q. You were present in assisting and prospecting the claim and taking samples out? A. Yes, sir. Q. Just describe what you did. A. Just took two pans of dirt and prospected them one at each place, two places. Q. That was before you located there? A. Yes, sir. Q. You found gold? A. (The witness nodded his head.) Q. Have you ever prospected the ground before? A. No, sir. Q. You know that it had gold, from other parties telling you, in paying quantities? A. Yes, sir."

On cross-examination, he testified: "I did not do any work on this claim. I did not see any old corner with sticks. I did not know Skinner. I knew Christensen. I did not know that any man was in possession of this claim. There is no gravel on the surface. I saw lava on the ground; it is hard lava. I do not know how deep it is. I do not know if it is 15 feet deep. I do not know if it is 50 feet deep in some places. There was gravel on the rims. I mean by rims the place between the bedrock and the surface. There is water on the dirt in the winter."

Plaintiffs rested on this proof, but in rebuttal plaintiff Devencenzi testified: "I have been frequently over the ground for several years before we located it. Our location called for 30 acres. No one was in possession of the ground at the time of our location. There was evidence of mining having been done years ago in the gulch that goes through the land, but no evidence of any recent work whatever. We put our notice of location in a box that was nailed to a tree."

Plaintiffs say in their brief: "It is not claimed that, prior to making the location under consideration, plaintiffs actually discovered gold in paying quantities upon the claim located. Appellants contend that such a discovery was not necessary." Furthermore, that the fact that the parties "entered into a stipulation at the outset of the trial that the land in controversy is unpatented placer mineral land of the United States dispensed with any necessity for proof regarding the formation and peculiar characteristics of the particular district in which the claim is located."

[2] The stipulation referred to was "that the land in controversy is unpatented placer mineral land of the United States." The parties were competent to stipulate as to their contending and conflicting rights, but they could not by stipulation, relieve themselves from proving at the trial that they had made a discovery of gold, either in placers, or in veins, or lodes, in the land, as contemplated by the laws of the United States. Chrisman v. Miller, 197 U. S. 313, 25 Sup. Ct. 468, 49 L. Ed. 770. Plaintiffs do not pretend to have established their right to the land otherwise than by virtue of their mining location. As they had until the end of the year 1909 to do the assessment work, it was not necessary to make such proof at the trial, but it was necessary to show that they had made a discovery of gold, such as would satisfy the statute.

[3] Discovery is the source of the miner's title, is an essential requisite to a valid location, and must precede the location, and the rule applies alike to lode and placer locations. 1 Lindley on Mines, §§ 335 and 337, and cases cited in notes. So far as the character of the deposits will admit, the principles governing lodes apply with equal force to placers. Id.

[4] No arbitrary rule as to what will constitute a sufficient discovery can be stated which will govern all cases, either in respect of lodes or placers. This is an illustration of the innumerable instances where the courts must, by the application of the rule of reason, determine what the Legislature has failed to define, or finds itself incapable of defining. And hence whether a discovery has been made is a question of fact for the jury to determine, under the guidance of the court. The United States statute does not prescribe what is necessary to constitute a discovery, but there have been many judicial declarations in relation thereto, not always, it must be admitted, free from conflict. Differences, however, may be traced rather to the conflicting peculiarities of the cases than to any substantial difference in respect of certain essential requisites. In the case, supra, reported in 197 U. S., 25 Sup. Ct., 49 L. Ed., some definitions are found as given by that court. The case went up on writ of error from the Supreme Court of this state, where it is reported in 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63. It was there held, as to oil, that to constitute a discovery "the law requires something more than conjecture, hope, or even indications. The geological formation of the country may be such as scientific research and practical experience have shown to be likely to yield oil in paying quantities. Taken with this there may be other surface indications, such

as seepage of oil. All of these things combined may be sufficient to justify expectation and hope that, upon driving a well to sufficient depth, oil may be discovered, but, one and all, they do not, in and of themselves, amount to a discovery." The Supreme Court of the United States affirmed this judgment, and from the opinion we quote: "There must be such a discovery of mineral as gives reasonable evidence of the fact, either that there is a vein or lode carrying the precious mineral, or, if it be claimed as placer ground, that it is valuable for such mining." The court quotes the definition given by the United States Land Department as follows: "Where minerals have been found, and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met."

[5] Tested by these principles, we cannot say that the learned trial court was without warrant in holding that plaintiffs fell short, in their evidence, of meeting the statutory requirements as to a discovery of valuable minerals. It is only necessary to turn back and read the evidence of plaintiff Garibaldi to confirm the conclusion reached by the trial court. He testified: "Just took two pans of dirt and prospected them one at each place, two places. Q. You found gold? A. (The witness nodded his head.)" He had never before prospected the ground, and only knew from hearsay that the ground contained gold in paying quantities. He "saw lava on the ground," but did not know its depth: "There was gravel on the rims, * * * the place between the bedrock and the surface. There is no gravel on the surface." He does not state where on the claim he took the two pans of gravel. Plaintiff Devencenzi testified that "there was evidence of mining having been done years ago in the gulch that goes through the land, but no evidence of any recent work whatever." He does not state whether this gulch cut through the lava; nor does he state that any gold was found in this gulch. It is common knowledge that in this state, where a lava flow is found inclosed by walls of bedrock, an ancient channel is usually found underneath the lava. And gold is often, but not always, found in such channels in paying quantities. Here, however, we have no description of the ground indicating a flow of lava through an old channel. The evidence is wholly insufficient, it seems to us, to show that plaintiffs made a "discovery," within the meaning of the mining laws.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

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17 Cal. App. 565

QUANCHI v. BEN LOMOND WINE CO.

(Civ. 870.)

(District Court of Appeal, First District, California. Nov. 29, 1911. Rehearing Denied Dec. 29, 1911; Denied by Supreme Court Jan. 22, 1912.)

1. Limitation of Actions (§ 13*)—Estoppel to Rely on Limitations.

A maker of a note, who, before the running of limitations, obtains an extension of the time of payment, is estopped from availing himself of the defense of limitations, though the extension indorsed on the note was not signed by him.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 56-58; Dec. Dig. § 13.*]

2. Limitation of Actions (§ 145*)—Extension of Time—Consideration.

An increased rate of interest, to be paid by the maker of a note to the payee, and the payee's promise to forbear suing on the note, constitute a sufficient consideration for a contract to extend the time of payment.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 592; Dec. Dig. § 145.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by V. Quanchi against the Ben Lomond Wine Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Wyckoff & Gardner, for appellant. James A. Hall and Netherton & Torchiana, for respondent.

KERRIGAN, J. This is an appeal on the judgment roll, without a bill of exceptions, from a money judgment in favor of plaintiff. The complaint was in two counts, and the question raised in this appeal concerns only the first count. In that count it is alleged, and the court found, that on September 3, 1902, the defendant executed and delivered its promissory note to the plaintiff, by the terms of which it promised to pay to the plaintiff, 90 days from said date, the sum of $1,462.31. "That thereafter, and at the request of defendant, and for its benefit, the following indorsements were made on the back of said instrument, to wit: "Dec. 5, 1902. Recd. on account of principal $500. Dec. 5, 1902. Extension of this note and payment for the same is extended for one year from date to be due and payable at the rate of 8 per cent int. until paid on or before Dec. 5th, 1903, for the balance due on this note, and this note is not transferable to anyone, and payment for same only to be made to me personally. V. Quanchi." The complaint further alleged, and the court found, that, by virtue of the terms of said note, the defendant promised to pay plaintiff the amount therein specified, but that no part thereof has been paid except the said sum of $500, leaving due and unpaid from defendant to plaintiff the sum of $963.31, with interest thereon at the rate of 8 per cent. per annum from the 5th day of December, 1902. The defendant, in addition to a specific denial of the allegations of the complaint, pleaded that the cause of action was barred by subdivision 1 of section 337, and subdivision 1 of section 339 of the Code of Civil Procedure. The action was commenced on December 4, 1907. Defendant claims that the indorsement on the back of the note, not having been signed by it, does not come within the provisions of section 360 of the Code of Civil Procedure, and that therefore the statute of limitations has run. Section 360 reads as follows: "No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] We think, however, that the facts of this case do not involve the question of a new promise or acknowledgment which section 360 requires to be writing; but the question involved is whether the defendant, having induced the plaintiff to make said indorsement on the note, and thus to suspend any action against it for one year, is not estopped from availing himself of the statute of limitations. We think it is.

In most of the adjudicated cases of this character, where the doctrine of estoppel in pais is invoked, the question arose where there had been an express promise not to plead said statute; but in principle the same question is involved where the obligor, in the case of a written instrument, asks for and receives an extension of time, but fails to sign the agreement of extension made for his benefit and acted upon by the obligee. In both cases there is a request which is acted upon to the detriment of the party forbearing. As was said in Gaylord v. Van Loan, 15 Wend. (N. Y.) 308, where there was an agreement not to plead the statute of limitations: "By pleading the invalidity of the extension the defendant is guilty of bad faith, and upon general principles should be estopped from availing himself of that defense. No one ought to be permitted to disregard his own deliberate lawful agreement to the injury of another. The principle which should debar the defendant from setting up the defense is a familiar one."

"When the act or promise of one man causes another to do or forbear to do something which he otherwise would have done, the other is estopped from taking advantage of the act or omission caused by his own act or promise." Cowart v. Perrine, 21 N. J. Eq. 101.

Here the request for an extension was made at the instance of the defendant. It was agreed to and acted upon by the plaintiff. The plea that such an extension is void is a fraud upon the plaintiff. Had the defendant not requested an extension, the plaintiff would have brought his suit in time.

In Smith v. Lawrence, 38 Cal. 24, 99 Am. Dec. 344, Smith, the payee of two notes, by a valid agreement in writing, signed by him only, promised the defendant, the payor, that he would forbear to sue or demand payment thereof until the happening of a particular event. The court held that the statute was suspended until the event occurred, and in so holding the court said: "No sufficient reason is suggested why the agreement is not valid. It is not necessary, as insisted by defendant, that he should have signed the agreement in order to render it valid, for the agreement did not provide that any act should be performed by him; but it is enough that it was binding upon the plaintiff. * * * Accepting the contract as valid and binding upon the plaintiff, it precluded him from suing upon the notes until the happening of the event mentioned in the contract. During that period his cause of action was suspended, and during the same period the statute of limitations did not run. * * * The payee of the notes is entitled to the full term of four years in which to commence his action, and the extension of the time for the payment of the notes did not deprive the payee of any portion of that time."

It has been held that where one has agreed to forbear in the prosecution of a suit about to expire under the statute of limitations, where the person liable had in a conversation, in consideration of such forbearance, promised to pay, such oral promise was binding. Said the court: "The conversation referred to occurred before the statute had run, and it was a distinct promise to pay in consideration that the plaintiff below would not sue. If, therefore, she relied upon this promise, if she was thereby lulled into security, and thus allowed the six years to go by before she commenced her suit, with what grace can the defendant now set up the statute? * * * Plaintiff relied and acted upon it; she has been misled to her injury; but for the defendant's promise she would have commenced her action before the six years had expired." Armstrong v. Levan, 109 Pa. 177, 1 Atl. 204. To the same effect is Bancroft v. Roberts, 91 N. C. 363. See, also, Quick v. Corlies, 39 N. J. Law, 11; Jordan v. Jordan, 85 Tenn. 561, 3 S. W. 896; Mann v. Cooper, 2 App. D. C. 226.

In State Loan, etc., v. Cochran, 130 Cal. 245, 62 Pac. 466, 600, the obligee refrained from bringing suit upon a certain obligation upon the written request of the obligors until the statute had operated. There the court held that request for delay was neither a promise nor acknowledgment of the debt, within the terms of section 360 of the Code of Civil Procedure, but nevertheless the statute of limitations could not be pleaded as a bar upon the principle of estoppel. Referring to section 360, the court said: "The statute refers only to two of the recognized means by which the operation of the statute may be avoided, namely, acknowledgments and promises, and to require these to be in writing; there is nothing in it to imply otherwise an intent to alter the law. But apart from the statute it has always been recognized law that if, pending the running of the statute, the time of payment is extended by the creditor with the assent of the debtor, the statute does not run during the time of the suspension; nor is it necessary that the contract extending the time for payment be signed by the debtor."

Here the court cites many authorities, among them the case of Bridges v. Stephens, 132 Mo. 538, 34 S. W. 555, which reviews the decisions in many jurisdictions, and holds, as correctly stated in the syllabus, that "an agreement by the debtor, before the debt is barred, not to plead the statute of limitations, need not be in writing; it not being an acknowledgment of the indebtedness or promise to pay within the meaning of" the statute.

In 1 Wood on Limitations (2d Ed.) § 76, it is said: "While a promise not to plead the statute, whether made before or after the debt is barred, does not amount to an acknowledgment thereof or a promise to pay it, yet if made before the debt is barred and in consideration of the forbearance to sue, and the creditor does forbear to sue upon the faith of the promise, it is binding upon the debtor, and at least has the effect to keep the debt on foot until the statutory period *dated from such promise* expired * * * by way of estoppel."

We have been cited to the case of Pena v. Vance, 21 Cal. 142, as opposing the right of plaintiff to recover, on the ground that the extension was not signed by the defendant. This case was decided in the early history of our jurisprudence, and has not since been cited or adopted by our courts, or any other court of last resort that we have been able to find; and, in view of the contrary expressions in subsequent cases in this state just referred to, it can hardly be relied on as a precedent. Furthermore, the question of estoppel was not raised in that case; the only point presented being the sufficiency of the indorsement of extension by the creditor.

[2] The increased rate of interest that the plaintiff was to receive and his promise to forbear constituted a sufficient consideration for the contract to extend the time of payment. State Loan, etc., v. Cochran, supra; Bridges v. Stephens, supra; Hobart v. Verrault, 74 App. Div. 444, 447, 77 N. Y. Supp. 483.

There is nothing in the point claimed by defendant that the action was commenced too late under the extension of time given for payment.

The judgment is affirmed.

We concur: LENNON, P. J.; HALL, J.

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17 Cal. App. 502

HALL et al. v. WRIGHT. (Civ. 874.)

(District Court of Appeal, Third District, California. Nov. 18, 1911. Rehearing Denied by Supreme Court Jan. 17, 1912.)

1. Deeds (§ 128*) — Estates Created — Remainders—Rule in Shelley's Case.

Where property is conveyed to a mother for life, with remainder to the heirs of her body, those interested in the remainder take by purchase, and not by inheritance.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 413–415; Dec. Dig. § 128.*]

2. Deeds (§ 133*)—Estates Created—Remainders.

The remainder created by deed to one for life, with remainder to the heirs of her body, is a contingent interest future in character; and the person to whom and the time of the happening of the event on which it is limited to take effect are uncertain at the time of the execution of the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 368–371; Dec. Dig. § 133.*]

3. Deeds (§ 133*) — Estates Created — Remainders.

The remainder created by a deed to one for life, with remainder to the heirs of her body, does not vest until the death of the life tenant, because she can have no heirs of her body prior to her death, and in the interval all her children may die, and the entire estate vest in unborn grandchildren.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 368–371; Dec. Dig. § 133.*]

4. Deeds (§ 133*) — Estates Created — Remainders.

The interests of unborn grandchildren in the contingent remainder created by deed to a mother for life, with remainder to the heirs of her body, are not void because of the impossibility of the contingency on which they are limited to take effect, nor can such interests be deemed as mere possibilities, as they do not depend on the law of succession to determine whether or not they will take effect; and they cannot be defeated by the testamentary or other act of the ancestor.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 133.*]

5. Deeds (§ 133*) — Interest Created — Remainders.

Civ. Code, § 694, declaring that a future interest is vested when there is a person in being who will have a right to the immediate possession of the property on the ceasing of the intermediate interest, does not apply to a future contingent remainder in unborn grandchildren of a grantee for life, with remainder to the heirs of her body.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 133.*]

6. Deeds (§ 133*)—Interest Created—Remainders — "Vested Remainder" — "Contingent Remainder."

Where the preceding estate created by deed is limited, so as to determine on an event which must happen, and the remainder is so limited to a person in being, and ascertained, that the preceding estate may, by any means, determine before the expiration of the estate limited in remainder, the remainder is vested; but, where the preceding estate is limited, so as to determine only on an event which is uncertain and may never happen, or where the remainder is limited to a person not in being, or not ascertained, or when it is limited, so as to require the concurrence of some uncertain event, independent of the determination of the preceding estate and the duration of the estate limited in remainder, to give it a capacity of taking effect, the remainder is contingent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 368–371; Dec. Dig. § 133.*

For other definitions, see Words and Phrases, vol. 2, pp. 1503–1506; vol. 8, pp. 7615, 7305–7307, 7828, 7829.]

7. DEEDS (§ 133*) — ESTATES CREATED — REMAINDERS — "VESTED REMAINDER" — "CONTINGENT REMAINDER"—"THEN."

Under a deed to a mother for life, "then" to the heirs of her body forever, the heirs take a future contingent, and not a vested, interest, within Civ. Code, §§ 694, 780, declaring that a future interest is vested when there is a person in being who will have a right to immediate possession on the ceasing of the precedent interest, and that when a remainder on an estate for life is not limited on a contingency defeating such precedent estate it is deemed to be intended to take effect only on the death of the taker; the word "then" referring to the time of the expiration of the life estate.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 368–371; Dec. Dig. § 133.*

For other definitions, see Words and Phrases, vol. 8, pp. 6941–6946; vol. 8, p. 7815.]

Appeal from Superior Court, Sonoma County; Emmett Seawell, Judge.

Action by M. Olive Hall and others against S. B. Wright. From a judgment for plaintiffs, defendant appeals. Reversed.

F. A. Cromwell, for appellant. T. J. Butts, for respondents.

BURNETT, J. The action is for specific performance of a written contract for the purchase of a tract of land in Sonoma county. The facts are not disputed, and the only question of law presented is, as agreed by counsel, "whether or not the plaintiffs have a present title in fee in the lands involved which they can convey by deed to the defendant."

It is stipulated that on the 20th day of April, 1883, W. S. M. Wright was the owner in fee of the premises, and on that day he executed a deed thereof to Mrs. M. O. Hall "for the natural life of the said party of the second part, and then to the heirs of her body begotten forever." On said date Mrs. Hall had five living children, two of whom have since died, and two other children have since been born. The interests, if any, of the deceased children have been distributed to Mrs. Hall, and she and all the living children have joined in the deed which has been tendered to appellant. One of the said children is a minor, and Mrs. Hall has been appointed the guardian of his person and estate, and by an order of the superior court she had been authorized and directed to sell the minor's interest in the property.

Appellant states his case substantially as follows: Section 779 of the Civil Code provides: "When a remainder is limited to the heirs of the body of a person to whom a life estate in the same property is given, the persons, who, on the termination of the life estate, are the successors or heirs of the body of the owner for life, are entitled to take by virtue of the remainder so limited to them and not as mere successors of the owner for life." In other words, the remaindermen take, so it is asserted, as purchasers under the deed, and not as heirs of the life tenant. Section 780 of the same Code is: "When a remainder in an estate for life or for years is not limited on a contingency defeating or avoiding such precedent estate, it is to be deemed intended to take effect only on the death of the first taker, or the expiration, by lapse of time, of such term of years." It is contended, therefore, that since the life estate vested by the deed in Mrs. Hall was not to be defeated or avoided by any contingency, by the operation of the above section, it follows that the estates of the remaindermen are not to be deemed to take effect until the death of Mrs. Hall. There are no words in the grant that preclude the application of the said provision of the Code. Hence no "heirs of the body" of Mrs. Hall have any vested interest in the land. The two deceased children had no interest, and therefore Mrs. Hall took no interest from them. They who take the remainder in fee will be those who are the "heirs of the body" of Mrs. Hall at the time of her death. It would follow that if one of the children of Mrs. Hall should die prior to the latter's death, leaving a child, such child would take an interest in fee as a remainderman, although the parent of such child in his lifetime and the lifetime of Mrs. Hall had attempted to convey his interest. If all of the children of Mrs. Hall and all their issue were dead at the time of the termination of the life estate, the remainder would revert, under the deed, to W. S. M. Wright; but since he has died it would vest in his heirs or devisees. The conclusion is that the children of Mrs. Hall have no present interest in the lands; hence their deed conveys nothing, and the deed of M. O. Hall can convey only her life estate.

On the other hand, respondents cite section 690 of the Civil Code, providing that, "A future interest entitles the owner to the possession of the property only at a future period," and section 694 of the same Code to the effect that, "A future interest is vested when there is a person in being who would have a right defeasible or indefeasible to the immediate possession of the property upon the ceasing of the intermediate or precedent estate," and contend "that under these two sections the interest which the heirs of M. O. Hall would take in the property would be a vested future interest, because at the time said deed was made there were persons in being who would have the right indefeasible to immediate possession of the property upon the ceasing of the life estate of said M. O. Hall." It is also declared that the general rule is that, "in the absence of the contrary intention, a remainder limited to a class vests in such of the objects as are in esse and answer the description at the death of the testator, if they take by will, or upon the execution of the deed, if they take by deed, subject to open and let in any that may be afterwards born before the determination of the particular estate." A large number of cases is cited in support of the foregoing rule.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is also claimed that the word "heirs," as used in the deed, should be construed to mean "children," for the reason that under this construction alone is it possible to give effect to the whole of the deed. For the general rule is that a conveyance to the "heirs" of a living person is void for uncertainty, as before his death it cannot be ascertained who will be his heirs; but, if the grantor means "children" when he uses the word "heirs," the uncertainty is avoided. Under the foregoing view, it is claimed that the whole of the fee is vested, since the age of the life tenant, as stipulated by the parties, precludes the possibility of the birth of another heir.

[1-5] The case, however, of County of Los Angeles v. Winans, 13 Cal. App. 234, 109 Pac. 640, not cited by either party, is directly in point, and seems altogether decisive of the controversy. In the opinion in that case, the subject involved herein received very careful consideration; and it was held, as stated in the syllabus, substantially in the language of the court that: "When property in this state is conveyed to a mother for life, with remainder to the heirs of her body, those interested in the remainder take by purchase, and not by inheritance. Such remainder is a contingent interest, future in character, and the person to whom and the time of the happening of the event upon which it is limited to take effect were both uncertain at the time of its creation. Since the uncertainties at the time of the creation of the contingent remainder continue to exist until the death of the life tenant, it did not and could not vest until her death, because she could have no 'heirs of the body' prior to her decease. In the interval all her children may die, and the entire estate might vest wholly in her unborn grandchildren. The interests of unborn grandchildren in the contingent remainder are not void because of the impossibility of the contingency on which they are limited to take effect; nor can such interests be regarded as mere possibilities, such as the expectancy of an heir apparent, as they do not depend upon the law of succession to determine whether or not they will take effect, and they cannot be defeated by the testamentary or other act of the ancestor. Section 694 of the Civil Code, relating to a vested future interest 'in a living person,' has no application to a future contingent remainder in unborn grandchildren."

[6] In discussing this section of the Code, the court said that it was in effect the enactment into a statute of the rule laid down in Fearne on Contingent Remainders and Executory Devises (Butler's 6th Ed. p. 216), and should be read in connection with the language of Fearne, which immediately follows it, to wit: "In short, upon a careful attention to this subject, we shall find that wherever the preceding estate is limited, so as to determine on an event which must certainly happen, and the remainder is so limited to a person in esse, and ascertained, that the preceding estate may, by any means, determine before the expiration of the estate limited in remainder, such remainder is vested. On the contrary, wherever the preceding estate is limited, so as to determine only on an event which is uncertain and may never happen, or wherever the remainder is limited to a person not in esse, or not ascertained, or whenever it is limited, so as to require the concurrence of some dubious uncertain event, independent of the determination of the preceding estate and duration of the estate limited in remainder, to give it a capacity of taking effect, then the remainder is contingent." The views of the court in the said Los Angeles case, in which a rehearing was denied by the Supreme Court, are entirely in accord with the contentions of appellant here.

[7] It seems impossible to make any distinction between the deed in that case and the one to be construed by us. By placing in juxtaposition the expressions limiting the estates, we can see that they are almost identical, and must receive the same interpretation. In the former, the deed conveyed the lands to Mrs. Emma Means "for and during the term of her natural life and upon her death to the heirs of her body." Here the limitation is "for the natural life of the said party of the second part and then to the heirs of her body begotten forever." If in the one case the "heirs of the body" take a future contingent, and not a vested, interest, so it must be in the other case. It cannot be doubted that this view gives effect to the ordinary signification of the terms employed, and harmonizes the apparently conflicting sections (694 and 780) of the Civil Code. It may be remarked that the word "then" clearly refers to the time of the expiration of the life estate. The language would be exactly equivalent if it were "for the natural life of the said party of the second part and 'afterward' to the heirs of her body begotten forever."

The attention of the learned trial judge was probably not called to the aforesaid decision. At any rate, it is controlling, and the judgment is reversed.

We concur: CHIPMAN, P. J.; HART, J.

17 Cal. App. 571

JOHNSON v. ALL NIGHT AND DAY BANK.

(Civ. 1,000.)

(District Court of Appeal, Second District, California. Nov. 29, 1911. Rehearing Denied Dec. 29, 1911.)

1. Banks and Banking (§ 175*)—Delivery of Draft for Collection — Actions — Pleadings.

In an action for the amount of a draft indorsed and delivered by plaintiff to defendant bank, with instructions to collect the money and pay the same to plaintiff, an answer, denying that plaintiff indorsed and delivered to the bank a draft with instructions to pay the same to plaintiff, and that it accepted the same with an agreement to collect the money and pay to plaintiff, and further alleging that plaintiff delivered to it a draft and deposited the same with it for collection to the credit of a third person, and that thereafter the bank collected the money and paid the proceeds to the third person, states facts, in the affirmative defense, constituting a good defense, though the answer proper is evasive and presents no issue.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 175.*]

2. Banks and Banking (§ 175*)—Delivery of Draft to Bank for Collection—Evidence—Sufficiency.

Evidence *held* to show that plaintiff indorsed and delivered a draft to a bank for collection for plaintiff, authorizing a recovery for the failure of the bank to pay over the proceeds to plaintiff.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 175.*]

3. Bills and Notes (§ 209*)—Transfers—Delivery.

A negotiable instrument may be transferred by delivery, where the intent so to transfer is made apparent.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 423, 497; Dec. Dig. § 209.*]

4. Banks and Banking (§ 175*)—Delivery of Drafts to Banks for Collection—Actions—Burden of Proof.

In an action for the amount of a draft indorsed and delivered by plaintiff to a bank for collection for plaintiff, the bank has the burden of showing that the draft has been paid over to plaintiff, or, if to some one else, by his authority.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 175.*]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by John O. Johnson against the All Night and Day Bank. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

D. K. Trask, for appellant. Tanner, Taft & Odell, for respondent.

ALLEN, P. J. The action was brought to recover the amount of a draft, dated August 13, 1910, alleged by plaintiff to have been by him drawn upon a bank in South Dakota and indorsed and delivered to defendant, with instructions to collect the money and to pay the same to plaintiff when collected. It is further averred that the defendant bank collected the sum of $1,500 on the draft and failed and refused to pay the same to plaintiff. Defendant by its answer denies that plaintiff indorsed and delivered to it a draft with instructions to collect and pay the same to plaintiff, and that it accepted the same with an agreement to collect the money and pay to plaintiff. For a further answer, defendant alleges that plaintiff delivered to it a sight draft and deposited the same with defendant for collection to the credit of one H. E. Dixon; that thereupon, at the request and in the presence of plaintiff, defendant executed and delivered to plaintiff a duplicate deposit slip in the name of H. E. Dixon for collection; that thereafter, on August 17, 1910, defendant collected the money and paid the proceeds over to said Dixon. The action was tried by the court without a jury. The court finds that on the 13th day of August, 1910, plaintiff delivered to defendant his sight draft and deposited the same with defendant to the credit of H. E. Dixon for collection. The court further finds that plaintiff instructed defendant to collect said draft and pay the proceeds thereof to said Dixon. This last finding is outside of the issues. The court also finds that the defendant executed a duplicate deposit slip, as receipt for said draft, in the name of H. E. Dixon, and on the 17th day of August, 1910, upon surrender by said Dixon of said duplicate deposit slip, defendant paid the sum of $1,500, the proceeds of said draft, to said Dixon. Judgment was entered accordingly, from which judgment plaintiff appeals.

[1] We are of opinion that appellant's contention, that the answer does not state facts constituting a defense, cannot be sustained. While the answer proper is evasive and presents no issue, the affirmative defense alleges the drawing of the draft and its deposit to the credit of Dixon for collection, and the subsequent payment, upon collection by the bank, to Dixon. Whether or not plaintiff deposited the draft to the credit of Dixon for collection is the only matter in issue by the answer.

[2] It is insisted by appellant that the finding of the court, that when plaintiff delivered to defendant the draft he deposited the same to the credit of Dixon for collection, is not supported by the evidence. A careful review of all of the evidence presented by the transcript satisfies us that plaintiff's contention in this regard must be sustained. The material evidence is confined to the testimony of one Green, an employé of defendant bank, and that of plaintiff. Green testifies: That plaintiff and Dixon called at the bank together, and plaintiff produced a duplicate deposit slip issued to him by a bank in South Dakota, showing that plaintiff had on deposit there the sum of $1,500. That plaintiff wanted the money on this deposit slip,

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and Green stated to him that said slip did not represent money, that it was merely a receipt for his deposit; that "the only way I can get you any money on this is for you to make a draft on the bank, attach this deposit ticket, and as soon as they wire payment I can turn the money over to you, or give you credit for it." That after some conversation plaintiff told Green to fix up a draft, which he did, and presented it to Johnson, and Johnson signed it and handed it to Dixon, and Dixon said: "That is all right. I will just indorse this." But Green said to Dixon, "Your indorsement will do no good, but may do no harm." The draft thus indorsed was handed back to Green, and Green made out a receipt for the draft and handed it to Johnson. That Johnson asked what the paper was that he had handed to him, and Green told him it was a receipt for the draft. That plaintiff said, "Well, I don't want this, do I?" And Dixon said, "Yes, keep that," when Johnson replied, "You take care of it," and handed it to Dixon. Dixon then said to Green, "If I am to handle this it better be made out in my name," and Johnson said "Fix it up to suit yourself." Thereupon Green took up the receipt he had issued to plaintiff and issued another one in the name of Dixon. Green on behalf of the bank wired to South Dakota, and on August 17th, receiving instructions to pay the draft, turned the money over to Dixon. Green during the progress of his testimony testified that he told plaintiff that if Dixon held the receipt he would be entitled to the money, and that plaintiff said, "That is all right." At another time he testified that the issuance of the receipt to Dixon was occasioned by a statement of Green to the effect that if Dixon indorsed the draft the receipt should be in his name. But upon cross-examination, with reference to the statements of Johnson in regard to the draft, Green says: "I am not positive of the words he said, but from the instructions I gleaned that Dixon was to get the money." Plaintiff testifies positively that he never told Green that the money could be paid to Dixon; that he did not know there was a receipt issued to Dixon; that he never told anybody to deposit it to the credit of Dixon; that he never told Green that it would be all the same for Dixon to receive the money, or for it to be deposited to his credit; that not a word was said at the bank in his presence about the money being deposited to Dixon's credit. Dixon did not appear as a witness; in fact, the record shows that he was a confidence operator, and that this whole transaction, so far as Dixon was concerned, was a fraudulent scheme to get possession of $1,500 of plaintiff's money. It is nowhere claimed that Dixon paid anything for an assignment of the draft, or that he ever procured an assignment thereof, or was in any view its owner. Defendant's reliance, being entirely based upon the proposition that plaintiff when he drew the draft deposited the same to the credit of Dixon for collection, is, in our opinion, without basis. While Green does testify to some facts which might indicate instructions to pay the money when collected to Dixon, and statements which, if true, might estop plaintiff from claiming the money if paid to Dixon, yet when the testimony of Green is analyzed it is demonstrated that upon his cross-examination he qualifies all of his previous statements, and there remains in his testimony but a statement of an inference which he drew from statements made by plaintiff, the purport of which he does not pretend to give. In the respects above set forth, and in other respects, the testimony of Green is very contradictory and unsatisfactory. We think the record discloses that the defendant bank received this draft for collection as the agent of plaintiff upon an agreement to deposit to his credit the amount thereof, or to pay to him the money; that there were no instructions to deposit it to Dixon's credit; that the bare issuance to Dixon of a memorandum of deposit by Johnson of the draft did not of itself warrant the payment of the money to Dixon.

[3] While it is true that a negotiable instrument may be transferred by delivery, if the intent so to transfer is made apparent, there is nothing in this record to show any such intent upon the part of plaintiff, or any agreement with reference to the transfer of the draft. The matters testified to by Green are violative of every rule of banking, unusual in character, and would be far from convincing had he not thereafter qualified the same by a practical withdrawal of such statements.

[4] In actions of this character the burden is certainly upon the bank to show that this draft which it received as a collection agent had been paid over to plaintiff, or to some one by his authority. We find nothing warranting such finding, and the findings of the court as made are unsupported.

Judgment reversed and cause remanded.

We concur: JAMES, J.; SHAW, J.

17 Cal. App. 527

KENNEY v. GROGAN. (Civ. 1,013.)

(District Court of Appeal, Second District, California. Nov. 23, 1911.)

1. SALES (§ 214*)—CONTRACT—TIME OF PASSING TITLE.

A contract to sell a crop of olives does not pass the title immediately, so as to place on the buyer subsequent injury thereto by frost, in the absence of negligence by the seller in handling it; the crop not only not being in a state to be delivered, because not mature, but the seller being required to pick, pack, and deliver it at the shipping point to the buyer.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 214.*]

2. SALES (§ 266*)—IMPLIED WARRANTY.

By express provision of Civ. Code, § 1764, except as prescribed by the article containing such section, a contract of sale or agreement to sell does not imply a warranty.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 743–779; Dec. Dig. § 266.*]

3. SALES (§ 272*) — WARRANTY — "MERCHANDISE NOT IN EXISTENCE"—INACCESSIBLE TO EXAMINATION.

A crop of olives, nearly matured at time of contract for sale thereof, is not within Civ. Code, § 1768, providing that one who agrees to sell merchandise, "not then in existence," warrants that it shall be sound and merchantable at the contemplated place of production, and as nearly so at the place of delivery as can be secured by reasonable care, or section 1771, providing that one who sells or agrees to sell merchandise "inaccessible to the examination of" the buyer thereby warrants that it is sound and merchantable.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 747; Dec. Dig. § 272.*

For other definitions, see Words and Phrases, vol. 5, p. 4481.]

4. SALES (§ 441*)—WARRANTY—MERCHANTABLENESS—EVIDENCE.

Even if olives were sold with a warranty of merchantableness, evidence that they had, by reason of damage from frost, become more or less shrunken, that thereby their keeping quality was interfered with, and the oil therefrom would not be termed first class, and would not remain sweet as long as that from better fruit, does not show that they were unmerchantable.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 441.*]

5. SALES (§ 72*)—CONTRACT—CONSTRUCTION.

The provision of a contract for sale of a crop of olives, that oil olives were to be "picked when ripe enough to yield an average amount of oil," refers only to time of picking, and does not fix their quality as being that required to produce any particular amount of oil.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 72.*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Henry H. Kenney against C. P. Grogan. From an order denying the motion for new trial, plaintiff appeals. Reversed.

Geo. S. Richardson and G. P. Adams, for appellant. Geo. S. Hupp, for respondent.

JAMES, J. In this action plaintiff had judgment for an amount of money which constituted only a small part of the sum demanded. He appeals from an order denying his motion for a new trial.

On November 26, 1909, the plaintiff, who was the owner of an olive orchard located at Sespe, in the county of Ventura, Cal., made a contract to sell the crop of olives then growing upon the trees to the defendant. A written contract was signed by the parties at the time, which expressed in brief form the agreement of Kenney to sell and Grogan to buy the olives; it being stated therein that the purchase was made "at the same prices, conditions, and terms as the Olive Growers' Association of Santa Barbara." The prices, conditions, and terms, as expressed in the Olive Growers' Association contract referred to, were as follows: "Prices f. o. b. nearest shipping point: $50 per ton for all oil olives (picholenes excepted) when shipped in less than car load lots, and $52 per ton when shipped in sufficient quantities to secure car load rates, $100 per ton for all pickling olives that will run 11/16 in. diameter and larger. Pickling olives to be picked when black and red, and oil olives to be picked when ripe enough to yield an average amount of oil. Payments: ½ of the purchase price of olives will be paid on demand as fast as they are delivered, and the remaining ½ will be paid 30 days after the completion of the delivery." As testified to by the plaintiff, and not denied by the defendant, at the time the contract was entered into, all olives on the trees were then nearly ripe and about full grown. The first shipment of oil olives was made by the plaintiff to the defendant on January 10, 1910, consisting of 3,640 pounds; on January 17th following, 13,500 pounds were shipped, and thereafter, on February 7th, February 24th, and February 25th, additional of the oil olives were forwarded by plaintiff to defendant, at which last-mentioned date shipments ceased, the entire crop having been picked and transported. The total weight of the olives furnished was 37,938 pounds. In addition to the oil olives, pickle olives valued, according to the contract price, at $10.58 were furnished. The contention of the defendant was, and which the trial court by its judgment sustained, that none of the oil olives furnished by the plaintiff were merchantable; that defendant had refused to accept the fruit for that reason. The particular findings of the court which were responsive to this issue read as follows: "That the defendant did not accept said olives, but notified the plaintiff that he would make them into oil for the plaintiff, and hold the said oil subject to plaintiff's order. That the said olives so shipped were badly frosted, were soft and pulpy, and were not of a merchantable quality, and could not have been returned by defendant to plaintiff, except at a total loss of said olives, as they would not bear reshipping, and that defendant made the same into oil, for the purpose of diminishing the plaintiff's loss, and that the oil produced from said olives is of a very inferior quality, and that there is no regular market price for olive oil of such poor quality."

There are but two questions, as we view the case, presented for consideration: First, whether there was implied from the conditions of the contract made between plaintiff and defendant any warranty that the olives, when delivered to the defendant, should be of merchantable quality; and, second, whether, assuming that such a condition is to be implied, the evidence was sufficient to warrant the court in determining that the olives furnished were not of merchantable quality. It may be assumed in considering these questions that the evidence is sufficient to show that the defendant protected himself by sufficient notice to the plaintiff of his determination not to accept the olives proffered in fulfillment of the contract, and that his acts, as shown by the testimony, with reference to his having manufactured the olives into oil, would not estop him from denying that he had made such an acceptance. It appears quite clear from the testimony that the oil olives, when delivered to defendant, had been affected by frost. As to the time when they became so affected, whether before or after the making of the contract of purchase by defendant, it cannot be told from any of the testimony as it is set out in the bill of exceptions. The defendant, by his own testimony, qualified himself as a man of much experience in the handling of olives and the manufacturing of that fruit into oil and pickles. It is a fair inference from the testimony, while it is not expressly so shown, to conclude that the defendant examined the crop of olives before he made the contract of purchase; for it does not appear that he had not the opportunity of so doing, and it does appear that at the time the contract was made the crop was in an almost mature state. In the language of plaintiff, "the olives were nearly ripe and about full grown." Assuming, however, that the damage done to the crop by frost occurred after the making of the contract and before the fruit was delivered to defendant, the question presents itself as to whether, under the circumstances of the case, the defendant is entitled to claim the benefit of any of the sections of the Civil Code relating to warranty of condition of personal property upon sale thereof.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] One of the contentions of appellant is that the contract or agreement of sale had the effect of transferring title to the olive crop immediately upon the execution thereof. If such is the case, then, where plaintiff was chargeable with no negligence in the handling of the crop, any loss occasioned by reason of damage thereto by frost would be the loss of the owner, the defendant, and not the vendor. But, as we interpret the contract, it was not such a one as contemplated the immediate passing of title to the olives. The crop was then not in a state to be delivered, and not only was it to be left upon the trees until it had become sufficiently mature, but, also, the vendor was required to pick, pack, and deliver it at the shipping point to the carrier. Under conditions of this kind, it is well established that title to merchandise so sold will not pass until delivery is made. Walti v. Gaba (Sup.) 116 Pac. 963; Blackwood v. Cutting Packing Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199; Benjamin on Sales, § 318 et seq.; Williston on Sales, § 218.

[2, 3] As the title to the olives did not pass upon the making of the contract, but only upon delivery to the defendant, did the plaintiff, by implied warranty, assure defendant that the fruit when delivered would be of marketable quality? Section 1764 of the Civil Code provides that, "except as prescribed by this article, a mere contract of sale or agreement to sell does not imply a warranty." There are a number of sections of the same Code dealing with the same subject, and it seems to be conceded by respondent that, unless some authority is found in those sections justifying his claim of an implied warranty made as to the olive crop, then such a warranty cannot be inferred. Our Supreme Court, in Browning v. McNear, 145 Cal. 272, 78 Pac. 722, has said: "It is further contended that if there was not an agreement to sell by sample there was an implied warranty that the goods should be sound and in merchantable condition when delivered upon the barge. The theory appears to be that this is the rule as to all executory sales, as distinguished from the rule applicable to executed sales. In this state the question as to whether there is an implied warranty must depend upon the provisions of our Civil Code." In the case of Bill v. Fuller, 146 Cal. 50, 79 Pac. 592, the same question was considered, but it was not decided, under the circumstances of that case, that any warranty as to merchantable quality of fruit contracted for should be implied. On behalf of respondent, it is claimed that the provisions of either or both of sections 1768 and 1771, Civil Code, may be invoked for his benefit. Section 1768 reads as follows: "One who agrees to sell merchandise, not then in existence, thereby warrants that it shall be sound and merchantable at the place of production contemplated by the parties, and as nearly so, at the place of delivery, as can be secured by reasonable care." Section 1771 provides that: "One who sells or agrees to sell merchandise inaccessible to the examination of the buyer, thereby warrants that it is sound and merchantable." In our opinion, it cannot be said that the merchandise here contracted for was not in existence at the time of the making of the contract, nor that it was inaccessible to the examination of the buyer. The testimony showed, without contradiction, that at the time the contract was made the fruit was on the trees, where it could be observed by the vendee, had he desired to examine it, and that at no time was it inaccessible to his examination. It was in existence as a crop practically matured when he made his contract to purchase it. It was not a crop to be grown in the future, as was the case in Blackwood v. Cutting Packing Co., supra. Even under the common law,

unaffected by any of the provisions of our Code, under circumstances such as are shown in this case, the rule of cavaet emptor would apply, and no warranty would be inferred for the benefit of the vendee. Benjamin on Sales, § 644. We do not mean to be understood by this statement as intending to suggest that an entire destruction of the fruit by the elements would not have relieved the vendee from all of the obligations of his contract. Title not having passed under the contract of sale, it was obligatory upon the vendor to deliver the crop contracted to be furnished, and which was then in existence, to his vendee, before he could claim the right to payment therefor. But it does not appear, even by the strongest testimony given upon that subject—that of the defendant himself—that the fruit was so affected as to its quality as to be wholly useless and unsalable.

[4, 5] We even think, under the testimony, that the court was not justified in finding that the olives were of unmerchantable quality. The most that can be said of defendant's claim in this regard is that, while the olives furnished were capable of being manufactured into olive oil, the quality of oil produced was of an inferior grade. We quote his testimony upon this subject: "The average wholesale price of olive oil made of good olives is about—we get about $1.75 at the present time per gallon. Well, I should consider $1 a gallon would be a good price for this oil, as it stands over there now. The price was the same on or about the 29th day of April this year. I think I am familiar with olive oil and as to the quality of olive oil. The olive oil that was produced from these olives is a very inferior grade of oil. It couldn't possibly be used for table oil. When I say table oil, it might possibly be used by Italians. They buy a very low grade of oil to use. You couldn't sell it to first-class families for cooking oil even. As to the keeping qualities of oil that is produced from frosted olives, it is good from 2½ to 3 years. It is a well-known fact that this oil does not keep, and we simply consider it as unmerchantable, or being an inferior grade of oil, and we get rid of it as soon as we can. It is considered an unsalable oil when it is made. We don't put it in the same class as first-class oil; consequently we get rid of it as soon as we can. It becomes rancid sooner than oil produced from olives not frosted. I can't state how much quicker. * * * I think I could sell it for a dollar a gallon." The testimony showed in general effect that the olives which have been damaged by frost become more or less shrunken, that their keeping quality is interfered with, and, as the defendant stated in his testimony as we have quoted it, the oil produced from such olives would not be termed first-class oil, and would not remain sweet for as great a length of time as oil produced from better fruit. To our mind, this evidence did not show that the olives as furnished by the plaintiff were of unmerchantable quality; the evidence did show that they were not high-grade fruit, but rather of an inferior sort. There was nothing in the contract of purchase to show that any special grade or quality was expected to be furnished. That term of the contract which provided that oil olives were to be "picked when ripe enough to yield an average amount of oil" only referred to the state of ripeness at which it was desired that the fruit should be picked, and was not a term fixing the quality of the fruit as being that required to produce any particular amount of oil. Referring to the term "merchantable," Williston on Sales (section 243) states the following: "The requirement, when it exists, that goods shall be merchantable does not require that the goods shall be of first quality, or even that they shall be as good as the average of goods of the sort. * * * If there is no warranty of fitness for a particular purpose, the buyer cannot claim more than that the goods, with their defects known, shall be salable as goods of the general kind which they were described or supposed to be when bought." Our conclusion is that, under the circumstances of this case, including the conditions surrounding the making of the contract between the parties to this action, there was no implied warranty imposed upon the plaintiff as to the quality which the olives should possess at the time of delivery; and that, further, even conceding that an implied warranty as to merchantable condition became a part of the contract, then the evidence is insufficient to sustain the finding of the court, wherein it is determined that the fruit as furnished was unmerchantable. The evidence did not show that the contract, either in an express way, or by the acts of the parties, was modified or changed, or that there was any agreement under which plaintiff became bound to accept the oil manufactured from his olives, in lieu of payment according to the terms of his contract.

The order is reversed.

We concur: ALLEN, P. J.; SHAW, J.

17 Cal. App. 497

JOHNSTON v. BURNETT. (Civ. 1,008.)

(District Court of Appeal, Second District, California. Nov. 18, 1911.)

1. COMPROMISE AND SETTLEMENT (§ 5*)—ACCORD AND SATISFACTION (§ 11*)—ACTS CONSTITUTING.

Where there was a dispute between an attorney and a client as to the compensation of the attorney for services in collecting notes, and the attorney deducted from the sum collected the compensation claimed and remitted the balance by check, accompanied by the statement that the check was in full settlement, and the client accepted and cashed the check, an "accord and satisfaction," within Civ. Code, §§ 1521, 1523, defining an accord as an agreement to accept something less than that to which the person accepting is entitled, and providing that an acceptance by a creditor of the consideration of an accord extinguishes the obligation, was established, though the client notified the attorney that he did not accept the check in full payment, and though the attorney agreed to furnish an itemized statement of account, but without withdrawing the offer made by him of the check in full settlement.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 10–16; Dec. Dig. § 5;* Accord and Satisfaction, Cent. Dig. §§ 75–83; Dec. Dig. § 11.*

For other definitions, see Words and Phrases, vol. 1, pp. 81–84; vol. 8, p. 7561.]

2. Accord and Satisfaction (§ 11*)—Acts Constituting.

Where a tender is made to a creditor of an amount less than that which is claimed to be due, and the amount is unliquidated, and the debtor offers payment as in full satisfaction, the creditor must either reject the offer or accept it on the terms of the tender.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 75–83; Dec. Dig. § 11.*]

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by J. S. Johnston against Frank W. Burnett. From a judgment for plaintiff, defendant appeals. Reversed.

J. W. McKinley (W. R. Millar, of counsel), for appellant. Davis, Kemp & Post, for respondent.

JAMES, J. This action was brought by plaintiff to recover the sum of $866.59, alleged to have been collected by defendant for the benefit of plaintiff and which defendant had refused to pay to plaintiff upon demand being made therefor. Prior to the year 1910 defendant as an attorney at law was employed by plaintiff to bring suit to enforce the collection of three promissory notes; each being for the principal sum of $2,000. After various proceedings had in the Superior and Supreme Courts, judgment in favor of plaintiff was finally affirmed, nearly two years after the suit was commenced. Defendant collected the amount due upon the judgment, which included, besides the principal sum of $6,000, interest amounting to about $1,100, together with costs. Of this sum he first applied $2,020.05 in extinguishment of an indebtedness owing by plaintiff to a certain banking institution, which he was authorized to do; then, after deducting, in satisfaction of his own demand for attorney's fees, the amount of $1,100, he remitted to plaintiff his check for the balance, plus $110 which had theretofore been advanced by plaintiff as costs. Accompanying this check was the following letter:

"Los Angeles, Cal., June 28th, 1910. Mr. J. S. Johnston, 624 I. W. Hellman Building, Los Angeles, Cal.—Dear Sir: I have at last, after nearly two years contest in court, succeeded in collecting the notes of Mrs. Blewett, which you acquired from W. H. Bates. The principal of the notes amounts to $6,000, and you advanced $110 toward the cost of the litigation. This amount I return to you as follows:

Paid to Citizens' National Bank, amount of your note, secured by assignment of judgment to me...	$2,020 05
My check herewith................	4,089 95
	$6,110 00

"Which check is given in full settlement of all matters between us. Your canceled note is inclosed. Yours truly, F. W. Burnett."

Prior to the sending of this check and letter by defendant, there had been a failure of the parties to agree upon the amount of the attorney's fee to be charged for the services rendered, and when plaintiff received the letter and check of defendant he objected to the amount deducted on this account. According to plaintiff's testimony, immediately thereafter he met defendant on the street and protested against the charge made for attorney's fees, and asked for a further itemized statement, which he testified defendant agreed to send him. However, before any further statement was furnished by defendant, the following letter was written by plaintiff and dispatched and was received by defendant in due course of mail: "Los Angeles, Cal., July 6, 1910. Frank W. Burnett, Esq., Citizens' National Bank Bldg., Los Angeles, Cal.—Dear Sir: I have been out of town for some time, and when returning I received your letter dated June 28th inclosing a check for $4,089.95, and my note for $2,020.05, canceled, in which you state that the within check is given in full settlement of all matters between us. I am this day cashing the check but I want it explicitly understood that it is not in full as a settlement of all matters between us. You have in your hands, according to my figures, $866.59, money collected by the Citizens' National Bank for me, and turned over to you. The judgment in this case was assigned by me to the bank, with instructions to them to pay off my note to them of $2,020.05, and deposit the balance to my account, and the action of the bank in turning over this money to you is without any authority whatsoever. I also call your attention to the fact that you have in your possession a bond of the Morcoreto Mercantile & Manufacturing Company delivered to you for your information. As per my conversation with you to-day, unless the sum above mentioned is paid to me within twenty-four hours after the receipt by you of this letter, I will bring suit against you to collect the same, and I hereby demand of you that you at once return the bond mentioned to me. Yours truly, J. S. Johnston."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Plaintiff at the trial admitted that he had cashed defendant's check and received the amount called for thereby. Among other defenses, the defendant urged that, by the acceptance of a check which was cashed by plaintiff, the account between the parties became settled, and that it could not thereafter be questioned as plaintiff sought to question it by this action. The case was tried before a jury and a verdict returned in favor of plaintiff for the sum of $500. The appeal is from the judgment and from an order denying a motion for a new trial.

[1] No question was made at the trial, or is here urged on the part of respondent, but that defendant had the authority and right to make application of the proceeds received upon satisfaction of the judgment entered on the promissory notes in the manner which he did apply them, except that it was and is contended only that in the application of such proceeds too great an amount was charged for the professional services rendered by defendant to plaintiff. Neither is it questioned that at the time the check and letter referred to were sent by defendant to plaintiff there was an existing dispute between defendant and plaintiff as to the amount of the charge to be made on account of attorney's fees. These facts appearing, the question is then presented as to whether, upon the tender of the check of the defendant to the plaintiff, with the statement that it was given in full satisfaction of all matters between the parties, and the appropriation of the check and money received thereon by the plaintiff, an accord and satisfaction was established which would preclude plaintiff from thereafter maintaining any action against defendant for the same account. Section 1521, Civil Code, provides that an accord is an agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled. Section 1523 of the same Code reads as follows: "Acceptance, by the creditor, of the consideration of an accord extinguishes the obligation, and is called satisfaction." If the plaintiff, upon receipt of defendant's check, had the legal right to apply the proceeds therefrom on account merely, saving to himself a right of action for any balance which he claimed to be due him by merely notifying defendant that he did not receive the money as in full satisfaction of the indebtedness, then the case as presented was a proper one to go to the jury, and its decision cannot be here disturbed. But we are of the opinion that this position cannot be sustained.

[2] Where tender is made to a party to whom a debt is owing of an amount less than that which is claimed to be due, and the amount claimed to be due is unliquidated, and the party making the tender in express terms offers the payment as in full satisfaction of the disputed account, the offeree in that case is bound, either to reject the offer, or to accept it upon the precise terms, denoted by the tender. Creighton v. Gregory, 142 Cal. 34, 75 Pac. 569; Weller v. Stevens, 12 Cal. App. 779, 108 Pac. 532. If he appropriates to his own use the amount tendered, he cannot afterwards be heard to say that he did so upon any terms other than those which the person making the offer imposed upon him. Such a state of facts is that precisely illustrated by the evidence in this case. It was said in Nassoiy v. Tomlinson, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695, where a similar case was considered: "The plaintiff cannot be permitted to assert that he did not understand that a sum of money, offered 'in full' was not, when accepted, a payment in full. * * * He was bound either to reject the check, or, by accepting it, accede to the defendant's terms. * * * He could not accept the benefit, and reject the condition. * * * The use of the check was ipso facto an acceptance of the condition. The minds of the parties then met, so as to constitute an accord." The fact that the defendant may have, upon the demand of plaintiff, after receipt of the check by the latter, agreed to furnish a further itemized statement of account, did not in any wise have the effect of withdrawing the offer made by defendant of the check in full settlement of matters of account then pending between the parties. It is not claimed, nor was it shown by any evidence heard at the trial, that defendant promised or agreed to remit any further sum than the amount for which his check was drawn, or that he in any way consented that plaintiff should apply the amount tendered as on account merely. As we view the case, by the uncontradicted testimony, the defense set up by defendant that there had been an accord and satisfaction, was clearly made out, and as a matter of law a judgment should have been directed in favor of defendant on that plea. The evidence does not sustain verdict or judgment.

The judgment and order are reversed.

We concur: ALLEN, P. J.; SHAW, J.

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17 Cal. App. 513

PEOPLE v. VINCILIONE. (Cr. 339.)

(District Court of Appeal, First District, California. Nov. 21, 1911.)

1. BRIBERY (§ 6*)—INDICTMENT—SUFFICIENCY.

Under Pen. Code, § 92, which makes it a felony to offer to give a bribe to any judicial officer, an indictment, charging that accused offered to give a justice of the peace a "portion" of a fee which accused "would" receive as attorney in a certain case if the justice would dismiss the case, is not insufficient as failing to charge an offer to give anything of present or prospective value.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Bribery, Dec. Dig. § 6.*]

2. Bribery (§ 1*)—Nature and Elements of Offense.

Under Pen. Code, § 7, subd. 6, defining a bribe to be anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence unlawfully the person to whom it is given, in his action, vote, or opinion, in any public or official capacity, a promise to give a public officer anything which may have a future existence and value, with intent to unlawfully influence him in his official action, constitutes bribery.

[Ed. Note.—For other cases, see Bribery, Cent. Dig. §§ 1–3; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 1, pp. 867–868; vol. 8, p. 7593.]

3. Indictment and Information (§ 176*)—Variance—Materiality.

Variance of 12 days between the time an offense is charged and is proved to have been committed is immaterial, where both days are within the statute of limitations, and it appears that but a single offense was charged to have been committed before filing of the indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 548; Dec. Dig. § 176.*]

4. Bribery (§ 7*)—Indictment—Conformity of Proof.

An indictment under Pen. Code, § 92, charging that accused offered to give a justice of the peace a portion of the fee which accused would receive as attorney if the justice would dismiss the cause, was sufficiently supported by proof that accused told the justice he was going to ask for a dismissal, and that when he got his fee he would "split" it with the justice.

[Ed. Note.—For other cases, see Bribery, Dec. Dig. § 7.*]

5. Criminal Law (§ 1159*)—Review—Sufficiency of Evidence.

A jury finding in a criminal case will not be disturbed on appeal, unless it plainly appears that there is no evidence to support it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074–3083; Dec. Dig. § 1159.*]

Appeal from Superior Court, Marin County; Edgar T. Zook, Judge.

Paul A. Vincilione was convicted of bribery, and he appeals from the judgment of conviction and from an order denying a new trial. Affirmed.

O. F. Meldon, for appellant. Attorney General Webb, for the People.

LENNON, P. J. The defendant was indicted by the grand jury of Marin county for the crime of offering a bribe to a judicial officer. Upon his trial the defendant was found guilty, and his appeal is from the judgment and the order denying him a new trial.

[1] It was evidently the purpose of the indictment to charge a violation of section 92 of the Penal Code, which makes it a felony for any person to give or "offer to give a bribe to any judicial officer," with the intent to influence his decision upon any matter which is before him for decision. It appears from the indictment that on the 2d day of August, 1909, one J. F. Renner was the duly elected, qualified, and acting justice of the peace in and for Sausalito township, in the county of Marin, and that there was then and there pending before said Renner, as justice of the peace, a certain cause, entitled "The People of the State of California v. Jane Doe Biggeo," wherein the defendant, Biggeo, was represented by Paul A. Vincilione, the defendant here, in his professional capacity of attorney and counselor at law. That portion of the indictment which describes the bribe and alleges the offer thereof charges, in substance, that the defendant, Vincilione, did unlawfully, willfully, corruptly, and feloniously offer to give to said J. F. Renner, as justice of the peace, "a *portion* of the fee which he (Paul A. Vincilione) *would* receive as attorney for the said defendant, Jane Doe Biggeo," if the said Renner would dismiss the case then pending against her, and that this offer was made by Vincilione as a bribe, with the intent to corruptly and unlawfully influence the decision of said Renner, as justice of the peace, in the cause pending before him.

The defendant contends, among other things, that the indictment does not state facts sufficient to constitute a public offense, in this: That the defendant is not specifically charged with having offered, as a bribe, anything which was of present or prospective value or advantage. In support of this contention, it is argued that, as the alleged offer of a bribe related solely to "a portion of the fee" which the defendant "would receive," and did not purport to embrace an agreed and ascertained fee, the indictment does not expressly or impliedly charge the defendant with having offered to the justice of the peace anything which had a real or potential existence, and that therefore it cannot be said that the alleged bribe had either a present or prospective value.

[2] A "bribe" is defined to be "anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence unlawfully the person to whom it is given, in his action, vote or opinion, in any public or official capacity." Pen. Code, § 7, subd. 6. This legislative definition of the word "bribe" has been held to embrace all the essentials of the crime of bribery (People v. Ward, 110 Cal. 373, 42 Pac. 894); and when construed in the light of the plain and ordinary meaning of the language employed it clearly contemplates that a promise to give a public officer anything, which may have a future existence and value, with the intent to unlawfully influence him in his official action, constitutes bribery.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The phrase "anything of value or advantage, present or prospective," implies a future existence and probable value of the thing offered, based upon present indications; and it is not necessary to a completion of the crime of offering to give a bribe that the thing offered as a bribe should have a present existence or a definite and ascertained value. To offer a thing in the future which, at the time agreed upon for future delivery, will have being and value is to offer a valuable thing, within the meaning of the statute; and, as the gravamen of the offense is the tendency which the thing offered as a bribe may have to pervert justice or corrupt official action, the crime is complete the moment an offer is made to give something to a public officer with a corrupt intent to unlawfully influence him in his official conduct, which may have a future existence and a prospective value. Any other interpretation of the statute would place a premium upon bribery, and even in the most flagrant cases make conviction impossible. While an attorney's fee is oftentimes elusive and evanescent, it certainly has at all times a prospective value; and, whether its future value be much or little, an offer to share it with a judicial officer in exchange for a favorable decision is sufficient to support an indictment for offering to give a bribe.

[3] The indictment was presented and filed on January 25, 1911, and the offer of the bribe is alleged therein to have been made on the 2d day of August, 1909. The evidence adduced at the trial was directed solely to an offer claimed to have been made on July 20, 1909, and because of this it is now claimed upon behalf of the defendant that there is a material and fatal variance between the allegations of the indictment and the proof offered in support thereof with respect to the time when the offense is charged to have been committed. The precise day on which an offense is committed need not be pleaded, unless time is of the essence of the offense; and as it clearly appears in the case at bar that but a single offense is charged to have been committed at a time anterior to the finding of the indictment, and within the period designated by the statute of limitations, the variance of 12 days between the time charged and that proved is immaterial. People v. Littlefield, 5 Cal. 355; People v. Lafuente, 6 Cal. 202; People v. Sheldon, 68 Cal. 434, 9 Pac. 457; People v. Rice, 73 Cal. 220, 14 Pac. 851; People v. Williams, 133 Cal. 168, 65 Pac. 323.

[4] There is no merit in the contention that the evidence is insufficient to support the verdict, because it was not shown that the offer to give a bribe was made in the precise language and upon the express condition set out in the indictment. The testimony upon the whole case sufficiently supports the verdict as against this objection of the defendant. Upon this phase of the case, Renner, the justice of the peace, as a witness for the people, testified in part that "Mr. Vincilione and I went out on the street. * * * He says, 'Fred, I am going to ask for a dismissal in this case.' He says, 'When I get my fee from these people, I will split it with you.' I said, 'All right.' There was nothing more said about the matter." The gist of the offense as charged in the indictment was the offer by the defendant to give a portion of his fee to the justice of the peace in the event of a dismissal of the action, and the quoted conversation of the defendant, coupled with the reply of Renner, was amply sufficient to warrant the jury in finding, as they did by their verdict, that the transaction impliedly, if not expressly, constituted an offer to give a bribe in the manner and form charged in the indictment. If ever there was any doubt in the minds of the jury as to the purpose of the conversation between the defendant and Renner, that doubt must have been dispelled by the undisputed fact, which appears in the record of the evidence before us, that the case pending before Renner was subsequently dismissed, and that later the defendant actually delivered to Renner a check for $25 which, as stated to several persons by the defendant, was given "to square" or "fix" the Biggeo case.

[5] In his defense, and as a witness in his own behalf, the defendant attempted to explain and justify his part in the transaction upon the theory that everything that was said and done by him and the justice of the peace arose out of facts and circumstances wholly disconnected with the alleged offer of July 20, 1909. It is now insisted in effect that the testimony upon the whole case is in harmony with the defendant's explanation of the transaction, and that therefore the verdict of the jury is contrary to the evidence. With this contention we cannot agree. The most that can be fairly claimed for the defendant is a conflict of evidence as to his motive and intent. Heretofore, when confronted by a question involving a conflict of evidence, the established rule of law required us to hold that the verdict of the jury was conclusive; but, even if it be conceded that the jurisdiction of this court has been recently enlarged to the extent of embracing and permitting a review of questions of fact in criminal cases, we would not be inclined to reverse a jury's finding of fact in any given case, unless it was plainly apparent that there was a total absence of evidence upon the whole case, or upon some essential and vital phase of the case.

The judgment and order appealed from are affirmed.

We concur: KERRIGAN, J.; HALL, J.

17 Cal. App. 518

PEOPLE v. CROSBY. (Cr. 198.)

(District Court of Appeal, Second District, California. Nov. 21, 1911.)

1. Criminal Law (§ 1023*)—Decisions Appealable.

Under Pen. Code, § 1237, providing when accused may appeal, neither a verdict nor an order overruling a motion in arrest of judgment is appealable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2583–2598; Dec. Dig. § 1023.*]

2. Criminal Law (§ 1081*)—Appeal—Notice.

Where, after accused's motions for a new trial and in arrest of judgment had been overruled, the trial court pronounced sentence, accused's counsel's statement that he would like to give notice of appeal from the verdict and the judgment denying the motions was sufficient notice of appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2722–2724; Dec. Dig. § 1081.*]

3. Rape (§ 51*)—Evidence—Sufficiency.

Evidence in a rape trial *held* insufficient to show resistance by prosecutrix, or that she was prevented from resisting by threats, within Pen. Code, § 261, but to sustain a finding that she was prevented from resisting by an intoxicating narcotic administered by or with the privity of accused.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71–77; Dec. Dig. § 51.*]

4. Criminal Law (§ 722½*)—Misconduct of Prosecuting Attorney—Asking Questions.

It was reversible misconduct for the prosecuting attorney, in a rape trial, to create an impression in the jurors' minds that accused was engaged in the "white slave trade" by asking the prosecutrix, as the last question on her redirect examination, whether accused said anything to her about putting her in a house of ill fame as he had done with other girls before that, especially since the trial judge sustained the objection on the sole ground that the question was leading.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1675; Dec. Dig. § 722½.*]

5. Criminal Law (§ 728*)—Misconduct of Prosecuting Attorney—Objections—Sufficiency.

Accused sufficiently preserved objection to the misconduct by objecting to the question as being inconsistent, irrelevant, immaterial, and leading, and as constituting gross misconduct.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1689–1691; Dec. Dig. § 728.*]

6. Criminal Law (§ 829*)—Instructions—Refusal—Matter Covered.

Instructions substantially covered by those given are properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

7. Criminal Law (§ 815*)—Instructions.

An instruction ignoring threats against and intoxication of prosecutrix in a rape trial as an element of the offense within Pen. Code, § 261, subd. 4, was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1922, 1986; Dec. Dig. § 815.*]

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

David Crosby was convicted of rape, and he appeals. Reversed.

Lewis R. Kirby, Oval Pirkey, and Eugene Daney, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was convicted of the crime of rape, and appeals from the judgment whereby he was sentenced to state prison for a term of 20 years.

[1, 2] Respondent insists that defendant is not entitled to a review of the alleged errors presented herein, for the reason that no appeal was taken from the final judgment. After defendant's counsel had made a purported motion for a new trial and motion in arrest of judgment, both of which were overruled, the court pronounced its judgment; whereupon counsel for defendant said: "At this time I would like to give notice of appeal, to the court and district attorney—appeal in this case from the verdict and the judgment of the court denying the motion for a new trial and arrest of judgment." No appeal lies from the verdict (section 1237, Pen. Code; People v. Garwood, 11 Cal. App. 665, 106 Pac. 113), nor from an order in arrest of judgment (Code citation, supra; People v. Mullen, 7 Cal. App. 547, 94 Pac. 867); and it is contended by respondent that under the method adopted in 1909, prescribing the manner of taking appeals in criminal cases, no appeal lies from an order denying a motion for a new trial. Without so holding, but conceding respondent's position that an appeal in a criminal case must be from the final judgment, we are nevertheless constrained to hold that the statement of defendant's counsel made, not upon the denial of the motions, but at the time the judgment was pronounced, must be deemed a sufficient compliance with the statute. It clearly appears that it was defendant's intention to seek a review of every adverse ruling of the court; and, where such is the case, he should not be deprived of his right of appeal merely on account of the notice including orders from which no appeals lies. The statute prescribes no form of notice, but requires that defendant shall in open court at the time judgment is rendered announce that he appeals.

[3] The grounds upon which appellant insists upon a reversal, and which merit consideration, are: First, that the evidence is insufficient to justify the verdict; second, misconduct on the part of the district attorney; and, third, the refusal of the court to give to the jury certain instructions requested by him.

"Rape," as defined by section 261, Penal Code, "is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances: * * * (3) Where she resists, but her resistance is overcome by force or violence; (4) where she is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution, or by any intoxicating narcotic, or anæsthetic substance, administered by or with the privity of the accused."

It appears from her own testimony that the prosecuting witness was a female, over the age of 17 years, living at her home with her family in San Diego; that on Sunday, February 19, 1911, defendant, an entire stranger, called with the purpose of employing her to display advertising cards in a drug store, where he was introducing and selling some sort of patent medicine; that she accepted the employment and went to work the following morning; that at noon defendant asked her to lunch and to go to dinner that evening with him; that, while she did not go to lunch with him, she did, at about 5:30 in the evening, accompany him to a public restaurant, where they were served in a public dining room by one of the waiters, who, with the meal, served them with some red wine from a bottle; that she drank one glassful thereof; that they remained at the restaurant from 5:30 until about 11 o'clock p. m., during which time she asked defendant to take her home, and he told her he was not going to take her home; that they left the restaurant, proceeding down one of the prominent streets for a distance of several blocks, passing other pedestrians on the street, and went upstairs to a lodging house, where she stood by while defendant registered, after which the landlord and defendant proceeded up another flight of stairs to the room assigned them, and she, following behind without protest, entered the room and spent the night in the embraces of defendant; that she knew it was wrong and improper for her to go with defendant to the room in this lodging house; but that defendant said he would make it good for her if she did not go; and that she did not make any outcry, or ask assistance, because defendant said he would slap her. No good purpose could be subserved by further narrating the evidence. Suffice it to say that it wholly fails to bring the case within subdivision 3 of section 261, Penal Code, in that the record does not disclose any resistance on the part of the prosecutrix, or the use of force and violence on the part of defendant. It is clear that she had ample opportunity to leave defendant at the restaurant, on the street, and in the lodging house, in each and all of which places the slightest cry or intimation of danger would, if required, have brought aid and protection. Notwithstanding this fact, she voluntarily accompanied defendant to the room, conscious of the purpose of going there and the impropriety of the act.

It is likewise clear that the evidence is insufficient to show that the prosecutrix was "prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution," as provided by subdivision 4 of said section 261. As a reason for not calling assistance, she assigns the fact that defendant said he would slap her face if she did. Surely it cannot be seriously claimed that any great bodily harm could have resulted from the execution of such threat. Her testimony shows that she told defendant that her folks would not like her being in a room with him, and that he said he would shoot her if she got out. It also appears that when defendant left the room in the morning he said to her that if, when he came back, he found her gone, he would shoot her. Giving these threats the full import of the words used in making them, nevertheless, they were not accompanied by any apparent power of execution. Moreover, they were not threats of *immediate* bodily harm, but had reference alone to what defendant would do in the future and after she had made her escape and was secure from his threatened attacks. The conduct of the prosecutrix towards defendant, from the time she went to dinner with him, as disclosed by her own testimony, is wholly inconsistent with the theory that she was prevented from resisting by reason of any threats made by defendant.

The only ground upon which the verdict can be justified, so far as shown by the record, is that the failure of the prosecutrix to resist was due to the fact that she was prevented from so doing by reason of some "intoxicating narcotic, or anæsthetic substance, administered by or with the privity of the accused." The prosecutrix testifies that she went to dinner with defendant about 5:30 p. m. With their meal, the waiter who served them filled their glasses with some red wine, poured from a bottle, and she drank one glassful. They remained at the table, if not until 11 o'clock, at least several hours. The meal, she says, consisted of soup and chicken sandwiches. There is no direct testimony that the wine or food was drugged; but, since it conclusively appears that she neither ate nor drank anything else during the entire time she was with defendant, her want of power to resist, if such was her condition, must be attributed to the effects of the wine which she drank several hours before going to the lodging house with defendant. The testimony of the prosecutrix touching the question is that after leaving the restaurant she "felt weak and dizzy," and that she went to sleep as soon as she went to bed, and says she, "I felt weak and dizzy, kind of." She further stated that she remembered that they left the restaurant immediately after defendant had paid the bill; that defendant took her arm; that she noted as she passed down the street that some of the lights were out in the stores; remembered going from Fourth street to Fifth street; that she passed a number of pedestrians to whom she said nothing; remembered going to the lodging house, going upstairs, and telling defendant that it was improper for him to take her there; that defendant went up the stairs first, and she stood at the top of the stairs while defendant went over to the landlord and engaged a room; that she knew what she was doing when she went up the stairs to the lodging house, and knew that it was wrong, but excused herself by saying, "I had to go," and, in reply to the question, "You could have called for assistance there, couldn't you, because you knew it was improper?" said: "I did not know what I was doing; I was under the drug." And to the question, "Did you see him give you any drug?" replied, "No." To the question, "Why did you not call for assistance from some of those people you were passing?" she replied, "Because I was too weak." She made no effort to scream because she could not; she did not speak to the landlord when defendant hired the room because, she says: "I was too weak; I did not feel like it." Further testimony is as follows: "Q. Why did you follow him upstairs when he hired that room, if you knew it was wrong to go, if you did not expect to go to that room and stay that night with Dave Crosby? A. He said if I did not go there he would make it good for me. Q. You could have told the landlord that this man was trying to bring you to the house, couldn't you? A. Yes, sir. Q. But you didn't say a word, did you? A. I was going to afterwards. Q. After when, after you got to the room and slept with him? A. No, sir. Q. When? A. Right after Dave got in and locked the door. Q. Why didn't you? A. I just happened to think about it. I was too weak and dizzy to call for the landlord afterwards." In further reply as to why she accompanied defendant, she said: "Because I was under the drug; I didn't know half the time what I was doing." A physician, called as a witness, stated that some 36 hours or more after the drinking of the glass of wine by the girl he happened to see her, rather accidentally, and made a mere cursory examination of her, and that she seemed extremely nervous, somewhat dazed, and had a rapid and irregular pulse. Asked what, in his judgment, caused the condition, he replied that he did not know exactly, but that he got the impression and was of the opinion that she was suffering from the effects of something in the shape of a narcotic. What it was he did not know, and could not tell how she got it, if at all. The mother of the prosecutrix testified that the day after the occurrence her daughter was a nervous wreck, that her eyes were dull, her memory not so good, and that she seemed dazed, and at times did not talk connectedly. While this evidence is weak and, from its nature, unsatisfactory, nevertheless, inasmuch as it tends to support the theory of the prosecution, and under the law, the weight to be given it is a question for the jury, we are constrained to hold that it was sufficient to justify the verdict rendered, had the jury not been influenced in so doing by error and the misconduct of the district attorney.

[4] The alleged misconduct consists in the act of the district attorney in asking the prosecutrix the question, "Did he (the defendant) say anything about putting you in a house of ill fame in Los Angeles?" adding, "as he had done with other girls before that." This was the last question asked by the prosecution on redirect examination. Defendant objected to the question upon several grounds, among others, that it was leading, and assigned it as gross misconduct on the part of the district attorney, in response to which the court stated: "I do not know whether the fact that it is redirect gives you any greater liberty than you had on direct as far as leading is concerned. Objection is sustained." The record is inconsistent with any theory which could justify or excuse the district attorney's misconduct. When the court sustained the objection upon the ground alone that the question was leading, the district attorney did not attempt to meet the objection by changing the form of the question. It is apparent that he not only knew the question with which he closed the examination was improper, but that he did not expect a favorable answer thereto. "Its only purpose was to get before the jury a statement, in the guise of a question, that would prejudice them against appellant." People v. Wells, 100 Cal. 459, 34 Pac. 1078; People v. Derbert, 138 Cal. 467, 71 Pac. 564, and cases there cited. "The prosecuting attorney may well be assumed to be a man of fair standing before the jury, and they may well have thought that he would not have asked the question unless he could have proved what it intimated." Cases supra. When the question is coupled with the statement of the district attorney that defendant had placed other girls in a house of ill fame in Los Angeles, thereby committing another crime, there can be no room for doubt, in the light afforded by the flimsy evidence offered by the prosecution, accentuated by the ruling of the court, that it was prejudicial in the highest degree to defendant's rights. The heinous character of the offense charged was one well calculated to arouse public passion and influence the mind of the average juror against the accused; indeed, the fact that defendant neglected to furnish the prosecutrix with dinner, while she was awaiting defendant's return, appears to have been a material omission affecting the case in the mind of at least one juror, who asked: "Did he brought your dinner there since you went there from the morning to 3 o'clock; did he brought dinner there to you?" In arriving at their verdict, the jury were no doubt influenced by a belief, based upon the question which embodied the statement made by the district attorney, that defendant had placed other girls in houses of ill fame, and that it was his in-

tention to so dispose of the prosecutrix; in other words, that he was engaged in what is commonly known as the "white slave trade."

[5] Conceding the misconduct, and that defendant was prejudiced thereby, respondent insists that he made no effort, by invoking the aid of the court, to remove from the minds of the jurors the prejudicial effect resulting therefrom, and hence appellant is not in position to complain thereof. In support of this claim our attention is directed to People v. Shears, 133 Cal. 159, 65 Pac. 295; People v. Babcock (Sup.) 117 Pac. 549; and People v. Ye Foo, 4 Cal. App. 730, 89 Pac. 450. None of these cases, however, is in point for the reason that it appears in each of them the defendant merely noted exceptions to statements outside the record, made by the district attorney during his argument of the case. In none of them was the act of the district attorney assigned as misconduct. In the case at bar, it appears that defendant not only objected to the question as being incompetent, irrelevant, immaterial, and leading, all of which objections were pertinent, but designated it and the statement as misconduct on the part of the district attorney. Hence it appears that the attention of the court was, in express terms, directed to the matter and the same assigned and designated as misconduct. True, he did not ask the court to admonish the jury, but it was not necessary to do so. The statement of the court in sustaining the objection upon the sole ground that it was leading, by implication at least, was a ruling that it was not objectionable upon other grounds and was not misconduct. It appears, therefore, that the misconduct of the district attorney was accompanied by error of the trial court, resulting in the sustaining of the district attorney in the act constituting the misconduct. When the attention of the court was directed to the act of the district attorney and the same assigned as misconduct, it was the duty of the court to reprimand the district attorney and admonish the jury to disregard the statement of the district attorney and the matters suggested by the question; thus, if possible, destroying the baneful effect thereof. People v. Bradbury, 151 Cal. 678, 91 Pac. 497; People v. Derwae, 155 Cal. 592, 102 Pac. 266.

[6, 7] There was no error in the ruling of the court in refusing to give the requested instructions. The substance of the one based upon a like instruction considered in People v. Howard, 143 Cal. 316, 76 Pac. 1116, had been elsewhere given, and it was unnecessary to repeat it. The other two were properly refused for the reason that they omitted all reference to the element of the offense contained in subdivision 4 of section 261, Penal Code.

In our opinion, the misconduct of the district attorney, coupled with the error of the court, when considered in connection with the character of the evidence, has resulted in a miscarriage of justice.

The judgment is therefore reversed.

I concur: ALLEN, P. J.

I concur in the judgment: JAMES, J.

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17 Cal. App. 534

KLEINSORGE & HEILBRON v. LINESS.

(Civ. 853.)

(District Court of Appeal, Third District, California. Nov. 23, 1911.)

1. Brokers (§ 43*)—Authority of Broker—Sufficiency of Writing.

Under Civ. Code, § 1624, subd. 6, and Code Civ. Proc. § 1973, subd. 6, providing that an agreement authorizing a broker to sell realty for a commission is invalid, unless in writing and subscribed by the party to be charged, or by his agent, a written authority to sell realty must expressly authorize the particular broker to make the sale; and an instrument executed by the owner, which merely recited that the owner agreed to sell his property for the price named, describing it, was insufficient.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. § 43.*]

2. Evidence (§ 417*)—Parol Evidence—Contract.

Where a written instrument given to brokers merely recited that the owner agreed to sell his property for the price named, parol evidence that they were authorized to sell the land was inadmissible.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 417.*]

3. Brokers (§ 43*) — Commissions—Employment.

To recover commissions for selling realty, a broker must show that he was employed by or for the owner to make the sale, and that some memorandum of his authority was in writing and subscribed by the owner or his agent.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. § 43;* Frauds, Statute of, Cent. Dig. § 131.]

Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

Action by Kleinsorge & Heilbron, a copartnership, against William N. Liness. From a judgment for plaintiffs and an order denying a motion for a new trial, defendant appeals. Reversed.

W. A. Gett, for appellant. A. L. Shinn and C. L. Shinn, for respondents.

HART, J. The plaintiffs, constituting a copartnership, are engaged in the business of buying and selling real estate in the city of Sacramento. One O. H. Cope was, in the year 1909, in the employment of plaintiffs; his duties being to negotiate the purchase and sale of real estate for said copartnership. In the month of July, 1909, the defendant delivered to Cope, acting for plaintiffs, the following writing: "I hereby agree to sell my property described as follows, to wit: The east 20 feet of lot 1, in the block or square bounded by L and M, 8th and 9th streets, city of Sacramento, county of Sacramento, state of California, for the sum of eighty-four hundred dollars ($8,400). The payments are to be made as follows: The first payment is to be made on or before August 3rd, 1909, and is to be five hundred dollars. All other payments are to be made once a month, $50.00 per month is to be paid from the date of the first payment, together with interest at the rate of 6 per cent. on the deferred payments. At the end of one year and one-half from the date of this agreement, the sum of $5,000.00 should be paid on the purchase price of the property. Dated July 24th, 1909, at Sacramento, Cal. [Signed] Wm. N. Liness, for Owner." Claiming that the foregoing writing was executed by the defendant for the purpose of conferring upon them the authority to negotiate the sale of the property referred to therein for certain stipulated compensation, the plaintiffs brought this action to recover the commissions to which they claim to be entitled under said alleged agreement. The cause was tried by the court, without a jury, and judgment rendered and entered in favor of the plaintiffs for the sum of $400. This appeal is by the defendant from the judgment and the order denying him a new trial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The complaint is in two counts—the one upon the writing and the other upon a quantum meruit. It is alleged that, in pursuance of said asserted authorization, the plaintiffs procured a party ready, willing, and able to purchase said property on the terms prescribed by said writing, but that defendant refused to sell the same to said party upon the terms so specified.

[1] The assault by the appellant upon the decision of the court below is founded mainly on the contention that the writing referred to, and upon which plaintiffs deemed themselves authorized to negotiate the sale of the property described therein, or to procure a purchaser thereof, is insufficient, under the provisions of the statute of frauds, to vest such authority in plaintiffs. In other words, the contention is that, to satisfy the requirements of the statute as to agreements of the character of the one concerned in this action, the authority to sell real estate for another must be specifically conferred by the writing upon the broker or person in whom the intention of the owner of the property was to vest such authority, and that the plaintiffs, not having been by said writing expressly employed to sell the property or to procure a purchaser thereof, cannot maintain this action.

Section 1624 of the Civil Code, subd. 6, provides that an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission is invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent. Subdivision 6 of section 1973 of the Code of Civil Procedure contains a similar provision.

It will be noted, by an inspection of the instrument under which plaintiffs sought to sell the property, that said writing, while clearly enough disclosing a willingness on the part of the defendant to sell the property to some one upon certain specified terms, does not specifically or by express language authorize plaintiffs or any other particular person to sell or negotiate the sale of said property.

[2] The court, over the objections of the defendant, allowed the plaintiffs to prove by parol testimony that, as a matter of fact, the defendant entered into an oral agreement with them, at the time of the execution and delivery of the writing to them by defendant, by which he authorized them to sell the property upon the terms evidenced by said writing. We think it is very clear that the writing upon which plaintiffs undertook to act in the sale of the property mentioned therein does not meet the requirements of the statute of frauds, and therefore conferred no authority on them to procure a purchaser of said property. It follows, of course, that the court erred to the detriment of the defendant in allowing parol proof of plaintiffs' authorization to sell the property.

[3] It has been repeatedly held in this state that, to entitle a broker to recover commissions for effecting a sale of real property, he must show that he was employed by or on behalf of the owner to make the sale, and that his authority, or some note or memorandum thereof, was in writing, subscribed by the party to be charged, or by his authorized agent. Zeimer v. Antisell, 75 Cal. 511, 17 Pac. 642; McCarthy v. Loupe, 62 Cal. 299; Myres v. Surryhne, 67 Cal. 657, 8 Pac. 523; Toomey v. Dunphy, 86 Cal. 641, 25 Pac. 131.

In Toomey v. Dunphy, supra, the memorandum read: "Henry Toomey can arrange for the sale of my ranch in Nevada, as per within memorandum." The trial court excluded said memorandum as evidence, on the objection that "it neither specified that the employment of plaintiff was for compensation or a commission, nor the amount of any compensation or commission, for his services." The Supreme Court reversed the judgment for that ruling, and, among other things, said: "In each of those cases [referring to the cases cited above], it was held that no recovery by a broker or agent for effecting a sale of real estate could be had, *unless he was employed, by an agreement in writing, for that purpose*. But none of them involved the precise point in dispute. * * * The agreement referred to in the clause (of section 1624, Civ. Code), it is true, is one defining the right of the agent to effect a purchase or sale of realty, and the liability of the principal to recompense him for his services. But it is to be observed that the *chief* *element in it is the employment.* This must necessarily be so, because, as appears by the cases above cited, without proof, *in writing, of the employment, no recovery can be had.* If, then, no recovery can be had without such proof of the employment, it seems to us that the object of the clause will be fully subserved by holding that, in an agreement like the one in question, the expressing of the fact of employment, without stating that it is for compensation, will suffice."

It will readily be observed, from the result reached in the foregoing case, that the provision of the statute as to the mode of evidencing the authority in a broker to purchase or sell real estate would be entirely destroyed if it were true that his employment for that purpose need not be in writing, and may therefore be shown by parol testimony; for, since it is not necessary to specify the compensation in the agreement, or the note or memorandum thereof, which the broker is to receive for his services, there is left no other vital requirement of the statute as to agreements or writings of this character but the one with regard to the employment, or the authority by which the broker may negotiate the purchase or sale of real property for other persons. In other words, if, as is the contention here, the employment of a broker to sell real property for another is not required by the statute to be specifically evidenced by a writing, then the provision as to such agreements would be, in view of the decision in Toomey v. Dunphy, altogether meaningless and purposeless.

The sixth clause of section 1624 was added to that section by the Legislature of 1878, and, as all the authorities declare, the change thus made was to "prevent the assertion of false claims for compensation by brokers and agents against owners of real estate, which could be done with facility under the former rule." This being the object of the amendment or addition, it is obvious that it would signally fail of the accomplishment of such purpose if, after all, the broker could prove his employment by parol, in the absence of a writing evidencing his employment.

In the case at bar, as we have shown, and as is clear from the writing itself upon which plaintiffs rely for a recovery, there is absolutely no language used therein expressly or specifically employing plaintiffs to sell the property described in said writing. Indeed, as before suggested, there is nothing in the writing authorizing any person to sell the property. As already stated, the language of the writing is sufficient to support the inference that the defendant was willing to sell the property upon the terms specified in said writing, but the language falls far short of warranting the inference that the sale, if in point of fact one was contemplated or intended, was to be effected through the intervention of a broker or any other third party. Indeed, so far as the writing itself shows to the contrary, the proposition contained therein might have been directly submitted by the defendant himself to an intending purchaser.

Counsel for respondents have cited no authorities which support their construction of the sixth subdivision of section 1624 of the Civil Code. The case of Sanchez v. Yorba, 8 Cal. App. 490, 97 Pac. 205, cited by respondents, deals with an entirely different proposition from that presented in this case. In that case the memorandum upon which plaintiff recovered consisted of a letter, addressed to plaintiff's assignor by the owner of the land, in which the latter stated the terms upon which he would sell the "Yorba ranch," further saying therein, "we also agree to pay regular commission fees in case of a sale." This letter was held to be sufficient as a memorandum to confer authority on plaintiff's assignor to sell said "Yorba ranch" on the terms specified therein, and there can be no doubt of the correctness of the ruling.

We see no escape from the conclusion that the writing involved here was altogether insufficient to disclose the employment of plaintiffs by the defendant for the purpose of selling or procuring a purchaser of the land referred to in said instrument, and that it was improper and prejudicial for the court to have allowed parol testimony showing such employment under said writing.

The judgment and order are therefore reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

17 Cal. App. 551

NATIONAL BANK OF CALIFORNIA AT LOS ANGELES v. MULFORD et al.

(Civ. 994.)

(District Court of Appeal, Second District, California. Nov. 24, 1911.)

1. New Trial (§ 123*)—Sufficiency of Motion.

Under Code Civ. Proc. § 659, requiring notice of intention to move for a new trial to designate the grounds upon which the motion will be made, and whether it will be made upon the minutes of the court, etc., and subdivision 4, providing that when the motion is upon the minutes, and the ground thereof is the insufficiency of the evidence to justify the decision, the notice must specify the particulars in which it is insufficient, and if the ground is errors in law occurring at trial, and excepted to, the notice must specify the particular errors, a notice made upon the minutes, which merely specifies as grounds thereof "the insufficiency of the evidence to justify the decision," and "errors in law occurring at trial, and excepted to by defendant," was insufficient.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 276-281; Dec. Dig. § 123.*]

2. New Trial (§ 123*)—Notice of Motion—Service upon "Adverse Party"—Who Are.

Where, in an action by an assignee to foreclose mortgages, in which the mortgagor, mortgagees, and transferee of the real estate were parties defendant, the judgment against the mortgagor and mortgagees was for only such deficiency as existed after applying the proceeds of the sale of the realty, the mortgagor and mortgagees were "adverse parties" to the transferee, within Code Civ. Proc. § 659, so as to require such transferee to serve his notice of intention to move for a new trial upon them, since the result of sustaining his contention that the land should not be subject to sale, after payment of a judgment against his codefendants, would increase the deficiency judgment against them.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 123.*

For other definitions, see Words and Phrases, vol. 1, pp. 224–227; vol. 8, pp. 7567–7568.]

3. EXCEPTIONS, BILL OF (§ 58*)—SERVICE.

Failure to serve a copy of the bill of exceptions upon the adverse party, as required by Code Civ. Proc. § 650, depriving him of an opportunity to submit amendments, etc., vitiates the bill of exceptions on appeal.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 100–105; Dec. Dig. § 58.*]

4. APPEAL AND ERROR (§ 671*)—REVIEW—DENIAL OF MOTION.

To authorize a review of error in denying a motion, the record should show that the motion was made, its grounds, and the court's ruling thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867–2872; Dec. Dig. § 671.*]

5. MORTGAGES (§ 581*)—FORECLOSURE—JUDGMENT FOR ATTORNEY'S FEES—PROPRIETY.

Where the mortgage sought to be foreclosed recited that it was given as security for payment of two notes, one of which provided for reasonable attorney's fees, the mortgage could be considered as securing payment of a reasonable attorney's fee, and such fee included in the judgment of foreclosure.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1669–1679; Dec. Dig. § 581.*]

6. APPEAL AND ERROR (§ 725*)—ASSIGNMENTS OF ERROR—SPECIFICATIONS OF ERROR.

Alleged error in overruling a demurrer to the complaint will not be considered, where the assignments of error do not point out wherein the ruling was erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3002–3005; Dec. Dig. § 725.*]

Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by the National Bank of California at Los Angeles against W. L. Mulford, the Los Angeles Paving Brick Company, and others. From a judgment for plaintiff and an order denying a motion for new trial, the last-named defendant appeals. Affirmed.

F. C. Austin, for appellant. Oscar A. Trippet, Schweitzer & Hutton, Force Parker, and Geo. W. Dryer, for respondents.

SHAW, J. Action to foreclose two mortgages. The facts, so far as necessary to the decision of the case, are as follows: For the purpose of securing the payment of his two promissory notes, the defendant W. L. Mulford executed to his codefendants Boggs and Noyes two mortgages, one upon chattels, the other upon certain real estate, after which he transferred all interest in the real estate mortgaged to defendant Los Angeles Paving Brick Company, appellant herein. Boggs and Noyes transferred the mortgages and notes to plaintiff, who, upon default in the payment thereof, instituted this action, joining W. L. Mulford, the Los Angeles Paving Brick Company, F. A. Noyes, and A. W. Boggs as parties defendant, and against each of whom plaintiff asked that a deficiency judgment be docketed in case the proceeds of the sale of the property mortgaged were found insufficient to pay the amount due.

The court made its findings, and, in accordance therewith, rendered judgment for plaintiff, decreeing, first, the sale of the chattels, and, if the proceeds thereof were inadequate to pay the judgment, then the sale of the real property mortgaged, and directing that, if the proceeds thereof were found insufficient to pay the balance of the judgment, costs, and expenses of sale, the sheriff, in his return thereof, should specify the amount of such deficiency, and the clerk should docket a judgment for the same against the defendants Mulford, Noyes, and Boggs; and that plaintiff have execution therefor. Notice of the entry of this judgment was, on December 10, 1909, duly served upon the appellant herein. On December 20, 1909, appellant served upon plaintiff alone notice of its intention to move for a new trial upon the minutes of the court. The motion, when made, was denied. Defendant appeals from that part of the judgment directing a sale of the real estate described in the mortgage, and from the order denying its motion for a new trial.

[1] Section 659, Code of Civil Procedure, provides that the party intending to move for a new trial must serve upon the adverse party a notice of his intention, designating the grounds upon which the motion will be made, and whether the same will be made upon affidavits, or the minutes of the court, or a bill of exceptions, or statement of the case. By subdivision 4 thereof, it is provided that: "When the motion is to be made on the minutes of the court, and the ground of the motion is the insufficiency of the evidence to justify the verdict or other decision, the notice of motion must specify the particulars in which the evidence is alleged to be insufficient; and, if the ground of the motion is errors in law occurring at the trial, and excepted to by the moving party the notice must specify the particular errors upon which the party will rely. If the notice does not contain the specifications here indicated, when the motion is made on the minutes of the court, the motion must be denied." While the notice served upon

plaintiff states that the motion will be made upon the minutes of the court, and in general terms specifies as the grounds thereof "the insufficiency of the evidence to justify the decision," and "errors in law occurring at the trial, and excepted to by defendant," it wholly fails to specify the particulars in which the evidence is alleged to be insufficient, or the particular errors in law relied upon to support the motion. It therefore follows that if the motion for new trial was made, as indicated in the notice, upon the minutes of the court, the ruling of the court could not have been other than a denial of the motion.

[2] It is likewise apparent that the ruling must be sustained, for the reason that the notice was not directed to or served upon Mulford, Noyes, or Boggs, the codefendants of appellant. A notice of motion for a new trial, however made, must, in order to be effectual, be served upon all adverse parties. Section 659, Code Civ. Proc. Appellant, conceding the necessity of such service, insists that neither of such codefendants is an adverse party. This position cannot be maintained. The whole contention of appellant is that its land should not be subjected to a sale, for the purpose of applying the proceeds thereof to the payment of the judgment rendered against its codefendants. Since, under the decision, the judgment rendered against Mulford, Noyes, and Boggs was for such deficiency only as might exist after applying the proceeds of the sale of the mortgaged real estate to the amount found due, it is quite clear that the effect of sustaining appellant's claim would be adverse to their interest. The result would be an increase of the deficiency judgment against them to the extent of the amount which might be derived from a sale of the property. Estate of Pendergast, 143 Cal. 135, 76 Pac. 962; Boob v. Hall, 107 Cal. 160, 40 Pac. 117; Johnson v. Phenix Ins. Co., 152 Cal. 196, 92 Pac. 182; Ford & Sanborn Co. v. Braslan, etc., Co., 10 Cal. App. 762, 103 Pac. 946; Estate of Young, 149 Cal. 173, 85 Pac. 145.

[3] For like reason, namely, a failure to comply with the provisions of section 650, Code of Civil Procedure, thus depriving the adverse parties of all participation in the settling and allowance of the statement and an opportunity to submit amendments thereto, it cannot be considered as a bill of exceptions on the appeal from the judgment. Moreover, the appeal from the judgment was not taken until some five months after service of notice of entry thereof; hence, in no event could the insufficiency of the evidence to justify the findings be considered. Section 939, Code Civ. Proc.

[4] Appellant assigns as error the failure of the court to sustain its motion to strike from the amended complaint filed certain designated portions thereof. The only reference to the question, as shown by the record, is a paper found in the transcript, which appears to be a copy of a notice that appellant would make such motion. It does not appear that such motion was ever made, or any ruling had thereon. To entitle the appellant to a review of an alleged error in denying a motion, the record should disclose that the motion was made, the grounds thereof, and the ruling of the court. None of these facts are made to appear.

[5] The court found that the payment of a reasonable attorney's fee was secured by the mortgage, and so treated it in the decree. Appellant claims that, under the pleadings, this was error. In support of this contention, appellant cites Irvine v. Perry, 119 Cal. 357, 51 Pac. 544, 949; Klokke v. Escailler, 124 Cal. 297, 56 Pac. 1113; and Boob v. Hall, 107 Cal. 160, 40 Pac. 117. An examination of these cases, however, discloses that none of them is in point. In the case at bar, copies of the notes and mortgage were attached to the complaint and made a part thereof. The notes contained a provision to the effect that in case of suit the maker thereof would pay a reasonable attorney's fee in such suit. The mortgage was given "as security for the payment of those two certain promissory notes," etc. It thus clearly appears that the mortgage was given to secure the performance of the covenants contained in the notes, one of which covenants was to pay an attorney's fee. The facts as shown by the complaint and found by the court bring the case within the doctrine announced in Peachy v. Witter, 131 Cal. 316, 63 Pac. 468, County Bank v. Goldtree, 129 Cal. 160, 61 Pac. 785, and Burr v. Cross, 3 Cal. App. 414, 86 Pac. 824, all of which distinguish the case at bar from those cited by appellant.

[6] The only questions left for review on the appeal upon the judgment roll are the sufficiency of the findings to support the judgment, as to which no question is raised, and the ruling of the court in overruling defendant's demurrer to the amended complaint. While this is one of 12 enumerated assignments of error, as to all of which counsel says his argument is intended to apply, he makes no attempt to point out wherein the ruling upon the demurrer was erroneous, or to specify any reason why the same should have been otherwise. "It is due to this court from the members of the bar to point out clearly and concisely the rulings complained of as erroneous, and the reasons why they are so, with reference to authorities, if any. In case counsel will not take the trouble to do so, we shall deem the matter as of not sufficient importance to merit notice in an opinion." People v. McLean, 135 Cal. 309, 67 Pac. 770.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

17 Cal. App. 545

NAPA SAVINGS BANK v. NAPA COUNTY.

(Civ. 877.)

(District Court of Appeal, Third District, California. Nov. 23, 1911. Rehearing Denied by Supreme Court Jan. 22, 1912.)

1. TAXATION (§ 476*) — ASSESSMENT — BOARD OF REVIEW—POWERS.

Under Const. art. 13, §§ 9, 13, making supervisors of the several counties boards of equalization for their respective counties, etc., and Pol. Code, §§ 3672–3705, requiring the supervisors to meet on the first Monday of July in each year to equalize the assessment, and to continue in session not later than the third Monday in July, unless the state board of equalization extends the time, not to exceed 20 days, the supervisors acting as a board of equalization are without authority to act after the third Monday in July, or after the expiration of the time extended by the state board of equalization; and an assessment ordered by the board after such time is void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 845–849; Dec. Dig. § 476.*]

2. TAXATION (§ 218*)—PROPERTY SUBJECT TO —MUNICIPAL BONDS.

Under Const. art. 13, § 1¾, exempting municipal bonds from taxation, municipal bonds purchased by a domestic savings bank by the use of its capital, surplus and deposits, are not taxable against it.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 357; Dec. Dig. § 218.*]

3. TAXATION (§ 47*) — DOUBLE TAXATION — PROPERTY SUBJECT TO TAXATION — MORTGAGE BONDS OF QUASI PUBLIC CORPORATIONS.

Under Pol. Code, § 3617, defining taxable property as bonds, except bonds of quasi public corporations, mortgage bonds of domestic quasi public corporations, acquired by a domestic savings bank, are not taxable against it, since the bonds represent an interest in property, and since the whole of the property has been assessed, and subdivision 6, providing that credits, claims, debts, and demands due on account of moneys deposited with savings corporations, shall be treated as an interest in the property of the corporation, does not authorize the taxing of such bonds against the bank.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 47.*]

Appeal from Superior Court, Napa County; H. C. Gesford, Judge.

Action by the Napa Savings Bank against the County of Napa. From a default judgment for plaintiff, defendant appeals. Affirmed.

Frank M. Silva and Theo. A. Bell, for appellant. A. J. Hull, for respondent.

BURNETT, J. The only question for determination is whether the complaint states facts sufficient to constitute a cause of action; the appeal being from a judgment entered by default against the defendant for failure to answer after its demurrer had been overruled.

After a suitable allegation of the corporate capacity of plaintiff and of defendant, it appears: "That on the first Monday in March, 1909, at 12 o'clock meridian, plaintiff was engaged in the business of a savings and loan corporation, viz., in the savings bank business, at Napa, Cal., and had a capital of $25,000, a surplus of $6,500 and savings deposits in the sum of $279,741.23; and at said time and on said date the plaintiff had and owned the following property, viz.: Real estate, assessed at the sum of $640; money on hand assessed at $1,540; solvent credits, not secured by mortgage or trust deeds, assessed at $40,910.28; promissory notes secured by mortgage or trust deeds on real estate, assessed at $164,426.53; and money (including capital and surplus) and savings deposits invested in quasi public corporation bonds of the state (incorporated and organized under the laws of the state of California, and having their respective places of business in this state) in the sum of $89,825 and money (including capital and surplus) and savings deposits invested in the city of Stockton (California) municipal bonds in the sum of $4,395.50, and at the time aforesaid the plaintiff neither had nor owned any property other than the said property above stated; that the said capital, surplus, and savings deposits were intermingled and used as a whole, and invested in the property and loans above stated, and that all of plaintiff's said property had been assessed for the purpose of taxation for the fiscal year 1909–1910, long prior to the time of the assessment herein complained of and contested; that on the 30th day of July, 1909, the board of equalization made an order directing the assessor of Napa county to assess to plaintiff the money and savings deposits invested in the said bonds aforesaid as credits, and on said day the said assessor did enter said assessment upon the assessment roll and assessed the same, at the sum of $10 and no more; that said board of equalization was in session from the first Monday in July, 1909, and for the term of 20 days thereafter, under an extension of 20 days granted to it by the state board of equalization, and on the 8th day of August, 1909, the said extension of 20 days expired, and that said board of equalization thereupon ceased to exist, and had no right or authority to sit as such board after the said 8th day of August, 1909; that on the 2d day of September, 1909, the said board of supervisors of the county of Napa met as a pretended or assumed board of equalization and raised the said assessment of $10, made by the assessor as aforesaid, from $10 to the sum of $94,184.50, thereby assessing the said money and savings deposits so invested in said bonds, which were so invested on the first Monday in March, 1909, and had been so invested for a long time prior thereto."

Then follows an allegation that the said bonds of the quasi public corporations "are secured by a mortgage or trust deed of all the real and personal property owned by the respective corporations," and that all of said real and personal property, together with the franchises of said corporations in the state, "have each been assessed for the fiscal year

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

1909–1910, at the full cash value, without deduction of the amount so secured by mortgage or trust deed covering the same or any part thereof." The plaintiff paid to the tax collector of the county the sum of $1,864.84, the amount of said tax, under a written protest, and the money was afterwards paid into the county treasury by said tax collector.

There are two grounds upon which respondent seeks to justify the action of the lower court in overruling the demurrer, and we think both are well taken.

[1] 1. There can be no doubt that the board of equalization and the board of supervisors are two distinct constitutional bodies, although composed of the same members. Section 9 of article 13 of the Constitution provides for a state board of equalization, and also for a county board. As to the latter the section is: "The boards of supervisors of the several counties of the state shall constitute boards of equalization for their respective counties, whose duty is shall be to equalize the valuation of the taxable property in the county for the purpose of taxation." Section 13 of the same article provides that "the Legislature shall pass all laws necessary to carry out the provisions of this article." In pursuance of these provisions, suitable laws have been passed by the Legislature prescribing the duties and directing the mode of exercise of the powers of the boards of equalization. They are contained in the Political Code from section 3672 to 3705, inclusive. Said section 3672 is that "the board of supervisors of each county must meet on the first Monday in July of each year, to examine the assessment book and equalize the assessment of property in the county. It must continue in session for that purpose, from time to time, until the business of equalization is disposed of, but not later than the third Monday in July." Section 3705 authorizes the state board of equalization to extend this time, but not to exceed 20 days. It is thus to be seen that the order in question here was made at a time not within the period during which the statute provides that all the acts of the board of equalization must be performed. We think it necessarily follows that the said board was entirely without authority to raise said assessment and that the order purporting to do so was in excess of jurisdiction and void. The case of Buswell v. Supervisors, etc., 116 Cal. 351, 48 Pac. 226, is quite distinct from this. There the order complained of was made within the time during which the board of equalization could exercise its function as such, although it was later than the third Monday in July, and the order of the state board attempting to extend this period was nugatory. The learned justice who wrote the opinion recognized the distinction between that case and this in the declaration that "the sittings of the county board did not exceed the time contemplated by law to which they might have extended."

2. But, whether the foregoing position be sound or not, it cannot be disputed that plaintiff could not be legally assessed upon property to which it had no title, and in which it had no interest. All the moneys owned by plaintiff and due to plaintiff from others were assessed to it, and it could certainly be only by virtue of some peculiar provision of the law that money which had been paid to another for other property should be assessed to plaintiff.

[2, 3] Of course, there is no contention that the bonds which were purchased by plaintiff were assessable. The city of Stockton bonds are exempt, in accordance with section 1¾ of the state Constitution, and the quasi public bonds are not taxable to plaintiff as that would be double taxation. Section 3617, Pol. Code; Germania Trust Co. v. San Francisco, 128 Cal. 589, 61 Pac. 178; Estate of Fair, 128 Cal. 607, 61 Pac. 184; Estate of Pichoir, 128 Cal. 615, 61 Pac. 1130. The principle obviously is that these bonds represent an interest in the property, and, since the whole of the property has already been assessed for its full value, the bond interest has been included in that assessment. As stated in the Germania Trust Co. Case, supra: "Double taxation does not necessarily consist in assessing the same property twice to the same person, but may consist in requiring a double contribution to the same tax on account of the same property, though the assessments are to different persons." If plaintiff had purchased a certain tract of land for $94,184.50, and had paid the purchase price before it was taxable, it could hardly be contended that thereafter it should be assessed on both the money and the land. The situation here is no different in principle, and it is identical as far as the assessment of the purchase price is concerned.

Appellant seems to think the tax was justified by subdivision 6 of section 3617 of the Political Code, providing that "credits, claims, debts, and demands due, owing or accruing for or on account of moneys deposited with savings and loan corporations or with building and loan associations, shall, for the purpose of taxation, be deemed and treated as an interest in the property of such corporation, and shall not be assessed to the creditor or owner thereof." Of course, this simply means that these moneys shall be considered as a part of the assets of the corporation and taxable as such, and it necessarily implies that the corporation shall be subject to this burden only while the deposits remain a part of its assets. In other words, the money shall be taxed to the owner of it, and not to the depositor, who is the creditor of the corporation. The proposition appears so simple as hardly to need elaboration. The position of appellant amounts to this: The plaintiff receives certain deposits, and thereby becomes the debtor of the depositors. These deposits become the property of a third person and are assessed to him, but, notwithstanding this, plaintiff is required to pay a tax upon its debt to the depositors for money which it no longer owns. A savings bank, like any other corporation or a natural person, in the contemplation of the law, should be assessed but once on all of its property and not upon its property and also the money invested therein. Burke v. Badlam, 57 Cal. 594; Germania Trust Co. v. San Francisco, supra.

In Cooley on Taxation (3d Ed.) p. 395, it is said: "We do not see, for instance, how a tax on a merchant's stock distinctly by value could be supported, when by the same authority and for the same purpose the same stock was taxed by value as a part of his whole property. This is a very different thing from one tax upon property and another upon the business, though the latter may indirectly reach the property. Here is no circumlocution, no question of ultimate effects; but a tax levied twice on the same subject, only under different names. The same may be said of a tax on the property of a corporation and also on the capital which is invested in the property. If the latter is taxed as property, this also is duplicate taxation, and as much unequal as would be the taxation of a farmer's stock by value when on the same basis it is taxed as a part of his general property." It may be said that in some of the states it has been held that double taxation is not necessarily illegal. Cooley, supra, p. 405, and notes. But the rule here is as stated in People v. Parks, 58 Cal. 624, that "duplicate or triplicate taxation, at the same time, for the same purpose, and upon the same property, is void by whatever standard levied, as being neither equal nor uniform." It is hardly necessary to add that this view does not contemplate the remission of the tax on the deposits, but simply demands that the bank shall pay taxes only on all of its property which is not exempt from taxation by virtue of the Constitution itself.

We have not deemed it necessary to follow counsel in their interesting discussion of the peculiar characteristics of the various kinds of banks that operate in this state. The question for determination, as we view it, involves a simple principle of law that is well settled, and in the application of that principle we are confronted with a simple problem in mathematics rather than any complicated proposition of logic.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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17 Cal. App. 557

PEOPLE v. DAVENPORT. (Cr. 358.)

(District Court of Appeal, First District, California. Nov. 29, 1911.)

1. Larceny (§ 55*) — Sufficiency of Evidence.

Evidence *held* to sustain a conviction of larceny from the person.

[Ed. Note.—For other cases, see Larceny, Dec. Dig. § 55.*]

2. Criminal Law (§ 798*)—Instructions—Deliberations of Jury.

The court gave accused's requested charge, as modified by inserting the quoted part, to the effect that, "if any one, or any member, of you," should believe that accused has not been proven guilty by the evidence, to a moral certainty and beyond every reasonable doubt, those holding that opinion should vote for acquittal, and should so adhere to their opinion until convinced, beyond all reasonable doubt, that they are wrong; "but it is the duty of every juror to reason with his fellow jurors, to the end that he may join in a lawful verdict, and to discard any opinion he may have formed, when convinced that such opinion is not justified by the evidence," but that a mere probability or a preponderance of the evidence is not sufficient to convict; nor is it sufficient that upon the doctrine of chances guilt be more probable than innocence. *Held*, that the modification could not have led the jury to believe that any juror should vote to convict, unless satisfied of guilt beyond a reasonable doubt, and was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1940; Dec. Dig. § 798.*]

3. Criminal Law (§ 829*)—Instructions—Requests—Charges Already Given.

A requested charge that any juror having a reasonable doubt of guilt should not be influenced to vote for conviction, because a majority of the jury happen to favor a conviction, was sufficiently covered by a charge that, if any member of the jury, after deliberating on all the evidence, should believe that accused has not been proven guilty, to a moral certainty and beyond a reasonable doubt, such jurors should vote for acquittal, and should adhere to their opinion until convinced, beyond all reasonable doubt, that they are wrong.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

4. Criminal Law (§ 1171*)—Appeal—Harmless Error—Improper Argument.

Accused's counsel stated that he excepted to the statements by the district attorney in argument that accused was a member of the rogues' gallery, whereupon the district attorney stated that the doctor identified the picture of accused in the rogues' gallery, when accused's attorney stated that there was no such evidence in the case, which the district attorney well knew, and also knew that it was the grossest possible error to make such statement. The district attorney then stated that his best recollection was "that in the cross-examination—and if I am mistaken I stand subject to correction"—when the court interrupted that it had no recollection of the doctor making such statement, and that the jury would disregard the district attorney's statement, whereupon he stated that he had no desire to prejudice accused's rights, and that it was sufficient to say that the circumstances of identification were complete. The court in the instructions directed the jury to carefully distinguish between the facts testified to and statements by counsel in argument as to what facts were proved, and to only consider the facts testified to by witnesses. *Held* that, though the evidence did not show that accused's picture was in the rogues' gallery, the impropriety of the district attorney's statement to that effect was not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1171.*]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Harry Davenport was convicted of grand

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

larceny. From the judgment of conviction and an order denying a motion for new trial, he appeals. Affirmed.

Harry L. Price, for appellant. Attorney General Webb, for the People.

HALL, J. Defendant was charged with the crime of grand larceny, for stealing from the person of one B. H. Baumeister, on the 12th day of March of this year, one diamond stud of the value of $500. He was found guilty as charged, and upon judgment being rendered against him he took an appeal to this court from the judgment and order denying his motion for a new trial.

[1] The first contention made by appellant is that the evidence is insufficient to support the verdict.

The prosecution introduced at the trial the testimony of two witnesses, Dr. B. H. Baumeister and Dr. G. N. Torello, who are physicians. The testimony of these witnesses, as set forth in the transcript, shows the following state of facts:

On the 12th day of March of this year, Dr. B. H. Baumeister and Dr. G. N. Torello visited a patient at a house on the Mission road. Just before leaving the house, Dr. Baumeister stood in front of a mirror to brush his clothes, and then observed that a large diamond stud that he was then wearing was in its place in his shirt front. It was fastened to the shirt by a screw inserted in a round hole or eyelet, worked in the shirt front for that purpose. The shirt was new, having been worn but three or four times. The witnesses left the house and walked about three blocks to Mission and Geneva streets, for the purpose of taking an inbound Mission street car. This was at about 5 o'clock p. m. When they arrived at Mission and Geneva streets, which was a transfer point, the car was not there, and they were obliged to wait a few minutes until it arrived. While waiting they stood conversing, and at this point Dr. Torello saw and particularly observed the diamond stud in its proper place in the shirt front of Dr. Baumeister. The car having arrived, Dr. Baumeister started toward the front end of the car, for the purpose of boarding it at that end, but was called to the rear by Dr. Torello, and turned back to the rear end, as likewise did three men, who had been advancing with Dr. Baumeister toward the front end. (The car was of the type having an inclosed center for passengers, and an open space at each end, also fitted with seats for passengers.) As Dr. Baumeister approached the rear entrance to the car, he was followed by the three men just mentioned. As he reached the platform, one of these men mounted to the first step, grasped with his hands the two stanchions, and crowded against Dr. Baumeister from the rear, while the other two men crowded against the doctor from either side, and a little in front of him. These men jostled and pushed against him, and one at least jammed an elbow into the doctor's chest, with sufficient force to hurt. He was then hemmed in, so that he could neither advance nor retreat for a period of time, estimated by the witness as the time that it would take to count five, counting slowly, when he was released, and passed into the car, as did also one of the said men, identified by the witness (Dr. Baumeister) as the defendant. These men (the two at his sides?) removed their hats, but at what particular point of time is not made clear by the testimony. The car had proceeded but about half a block from the point where the witness had boarded it when the defendant, who in the meantime had passed out of the inclosed portion, pulled the bell cord, and as the car slowed up, but before it had stopped, the three men mentioned got off the car, and ran towards the point where they had got on. Dr. Baumeister thereupon immediately felt for his diamond stud, and found that it was gone. His shirt front bore finger prints, and the hole in which the stud had been fastened was elongated as from pulling on it. The car was not crowded, although all the seats were occupied, and Dr. Baumeister came into close contact, from the time he left the sidewalk until he found his stud gone, only with the three men mentioned as having hemmed him in on the platform of the car.

Defendant was not apprehended until 3½ months after the occurrence in question, but Dr. Baumeister was positive in his identification of him as one of the three men—as the one who pressed against and jostled the witness from the right. In this connection, the witness testified that the man who jostled him from the right had a pimply face, which caused the witness, as a medical man, to especially notice him. The record does not disclose whether or not the defendant, at the time of his trial, had such characteristic or not, but the purpose and pertinency of some questions asked the witness by defendant's counsel upon cross-examination are most readily explainable on the theory that he had.

The only witness for the defense was the defendant, and he was asked but one question, and in reply to that testified that he was not on a Mission street car on either the 11th, 12th, or 13th of March of the present year.

We do not think that it can be doubted but that the evidence, of which we have just given a résumé, amply justifies the verdict of the jury. In our opinion, it strongly supports the conclusion that the three men were acting in concert throughout the transaction, that they jostled and hemmed in the prosecuting witness for the purpose of enabling one of their number to steal the stud, and that such purpose was accomplished.

In addition to the probative effect of the circumstances affirmatively testified to by the witnesses for the people, the defendant, as a witness, denied that he was present when the offense was committed. The jury by their verdict have stamped this testimony as false. His false statement that he was not present but adds probative force to the incriminating circumstances in evidence against him.

The fact that Dr. Baumeister could not swear that defendant took the stud is of little consequence. The evidence most cogently tends to prove that one of the three stole the stud, and that all three were acting in concert to accomplish the larceny of the article. The witness did in fact testify upon cross-examination that one of the two who hemmed him in from the sides and front took the stud. This, of course, was but his opinion, and was a fact to be determined by the jury. They have determined the fact, as we think, very justly against the defendant.

If any authority be needed to fortify our conviction as to the sufficiency of the evidence in this case to support the verdict of guilty, it may be found in People v. Appleton, 120 Cal. 250, 52 Pac. 582, where a verdict of larceny was sustained upon evidence, as we think, less convincing, and certainly not stronger, than in the case at bar. Similar cases may be found in Commonwealth v. Cronan, 155 Mass. 393, 29 N. E. 639; Burns v. State (Tex. Cr. App.) 71 S. W. 965; and People v. Williams, 242 Ill. 197, 89 N. E. 1030.

People v. Williams was cited by appellant, and we think is a most unfortunate citation for him; for, while a conviction was reversed as to Williams upon evidence vastly weaker than such as is presented in the case at bar, the conviction was sustained against Jackson, the codefendant of Williams, on evidence no stronger and in its essential features similar to the evidence against appellant in the case at bar.

[2] Appellant complains of the action of the court in modifying an instruction requested by him. The instruction as given is as follows; the portion added by the court being inclosed in brackets: "If any one, or any number, of you, after deliberating on all the evidence, should be of the opinion that defendant has not been proven to be guilty by the evidence in this case, to a moral certainty and beyond every reasonable doubt, those entertaining that opinion should vote in favor of a verdict of not guilty, and should so adhere to their opinion until convinced beyond all reasonable doubt that they are wrong. [But it is the duty of every juror to reason with his fellow jurors, to the end that he may join in a lawful verdict, and to discard any opinion he may have formed, when convinced that such opinion is not justified by the evidence in the case.] You are instructed that mere probabilities are not sufficient to warrant a conviction; nor is it sufficient that the greater weight or preponderance of the evidence supports the allegations of the information; nor is it sufficient that, upon the doctrine of chances, it is more probable that the defendant is guilty than that he is innocent to warrant a conviction."

The modification was doubtless intended to admonish the jury against the fault of adhering, out of pride of opinion, or the like, to an opinion once formed, though subsequently convinced of the erroneousness of such opinion. Its purpose was manifestly to direct the jurors' attention to their duty to reason fairly and honestly with one another upon the evidence; and while it probably was quite unnecessary to so admonish them it could not, when read in connection with what precedes and follows it, give the jurors the idea, as claimed by appellant, that any juror should vote for conviction, unless satisfied of the guilt of the defendant beyond all reasonable doubt. Not only in this instruction, but in others, the jury was repeatedly and pointedly charged that the defendant should not be convicted, unless the jurors were convinced, beyond all reasonable doubt and to a moral certainty, of his guilt. The court did not err in modifying the instruction.

[3] Appellant also complains of the refusal of the court to give the following instruction: "If, after consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror so entertaining such doubt to vote for a verdict of not guilty. In such case he should not be influenced to vote guilty, for the reason that a majority of the jury should happen to be in favor of a verdict of guilty." But the principle of law involved in the first part of this proposed instruction was repeatedly stated to the jury in the charge of the court, and the latter part was substantially and sufficiently covered by the instruction first discussed herein. Again the court, at the request of the defendant, instructed the jury: "That the people must establish every fact necessary to prove the defendant guilty of the crime charged to a moral certainty and beyond a reasonable doubt and that you and *each of you* must be satisfied of his guilt under these tests before you can, under the law, convict him." (The italics are ours.) From the whole charge, we are satisfied that no juror could have possibly supposed that he should either vote for, or be influenced to vote for, a verdict of guilty because a majority of the jurors were in favor of such a verdict.

Appellant, in a somewhat general way, complains of the refusal of the court to give several other instructions asked by defendant. It is sufficient to say that some were clearly erroneous, and for that reason were properly refused; and the others were fully covered by instructions that were given.

[4] The only remaining point to be considered is the contention made that the district

attorney was guilty of misconduct in his argument to the jury, requiring a reversal of the judgment. Upon this point, the record before us is as follows: "During the argument to the jury by Mr. Berry, assistant district attorney, the following proceedings occurred: Mr. Price: We take an exception to the statement of the district attorney. The Court: What was the statement? Mr. Price: That the defendant was a member of the rogues' gallery. Mr. Berry: I said that the doctor identified the picture of the defendant in the rogues' gallery. Mr. Price: There is no such evidence in this case, and the district attorney knows that very well, and he knows that it is the grossest error possible to state such a thing when it is not in the evidence. Mr. Berry: My best recollection is this, that in the cross-examination—and if I am mistaken I stand subject to correction— The Court: I have no recollection of the doctor making such a statement. The jury will disregard the statement of the district attorney in that particular. Mr. Berry: Yes. I have no desire to prejudice the defendant's rights. It is sufficient to say that the circumstances of the identification were quite complete." It is fair to assume from the foregoing statement that the district attorney was in good faith attempting to state what he believed the evidence to be, and was not, as in many of the cases reported in the books, baldly stating an injurious matter as of his own knowledge. The district attorney was mistaken as to what the evidence showed, and the court, besides throwing against him the weight of its recollection, promptly directed the jury to disregard the statement of the district attorney. In this the district attorney at once acquiesced, and in effect withdrew the remark. The court again, in its instructions, admonished the jury to carefully distinguish between facts testified to by witnesses, and statements made by counsel, or contained in their arguments, as to what facts had been proved, and if there was a variance to consider only the facts testified to by the witnesses. Under these circumstances, we do not think the matter of such importance as to require a reversal of the judgment.

In People v. Bradbury, 151 Cal. 675, 91 Pac. 497, where defendant was on trial upon a charge with assault to commit rape, after showing that an employé of the defendant had told the witness upon the stand that he had knocked defendant down, and after having obtained an answer to the effect that the employé did not tell the witness the reason why he had knocked the defendant down, the district attorney asked the question, "Did he say he knocked him down for insulting his wife?" This referred to a matter in no way connected with the charge for which Bradbury was being tried. As the witness had just stated that the hired man did not say why he had knocked the defendant down, there is much better reason to believe that the district attorney was prompted to ask the last question solely for the purpose of getting before the jury *by innuendo* a damaging matter as against the defendant—especially damaging in view of the charges against Bradbury then being tried—than there is to believe that in the case at bar the district attorney sought to prejudice the rights of the defendant. And certain it is that the action of the court to safeguard the rights of the defendant was prompt, and readily acquiesced in by the district attorney.

The case of People v. Bradbury, supra, amply supports the conclusion that the judgment in the case at bar should not be reversed for the action of the district attorney above discussed, and we so hold.

We find nothing in the record to support the claim of defendant that the district attorney frequently or at all referred to the defendant as a thief.

The judgment and order are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

161 Cal. 659

CONLIN v. OSBORN. (S. F. 5,567.)

(Supreme Court of California. Dec. 27, 1911. Rehearing Denied Jan. 22, 1912.)

1. VENDOR AND PURCHASER (§ 116*)—CONTRACT—RESCISSION—STATUTES.

Under Civ. Code, § 1691, subd. 2, providing that a party can rescind only upon restoring to the other party everything of value which he has received under the contract, one who contracted to purchase land need not, as a condition precedent to rescission, restore to the vendor the abstract of title, which was lost during an earthquake, where the contract did not require the vendor to furnish an abstract, nor need he offer to pay the commissions which the vendor expended in securing a purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 205–209; Dec. Dig. § 116.*]

2. CONTRACTS (§ 260*) — RESCISSION — CONSTRUCTION.

Civ. Code, § 1689, subd. 4, providing that a party may rescind if the consideration before it is rendered him fails in any material respect from any cause, a partial failure of consideration authorizes a rescission, despite subdivision 2 providing that a party may rescind, if, through the fault of the opposite party, the consideration fails in whole or in part.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1173; Dec. Dig. § 260.*]

3. APPEAL AND ERROR (§ 1002*)—VERDICT—CONCLUSIVENESS.

The verdict of the jury upon conflicting evidence is conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. § 1002.*]

4. VENDOR AND PURCHASER (§ 109*)—RESCISSION—STATUTE.

Under Civ. Code, § 1689, subd. 4, providing that a party may rescind if the consideration before it is rendered him fails in any material respect, one who contracted to purchase lands with buildings thereon, and who was not in possession, may rescind upon the destruction of the buildings before the consummation of the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 193–195; Dec. Dig. § 109.*]

5. WITNESSES (§ 248*)—EXAMINATION—IRRESPONSIVE ANSWERS.

Answers that a cottage was of trifling value, and that the plumbing was of poor quality, are irresponsive to questions as to the depth of the cottage and the nature of the plumbing, and so are properly stricken out.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 861-863; Dec. Dig. § 248.*]

6. EVIDENCE (§ 113*)—VALUE.

Where the vendor of land with a factory building thereon sought to enforce the contract for its purchase after the destruction of the building upon the theory that the building was of no value, evidence that the building could carry machinery requiring 15 horse power to operate was material.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 259-296; Dec. Dig. § 113.*]

7. EVIDENCE (§§ 483, 488*) — OPINION EVIDENCE—SUBJECT-MATTER OF OPINION EVIDENCE.

While a nonexpert witness may testify that a building was in good condition, he is not competent to testify as to the value of the building.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2256-2266, 2273; Dec. Dig. §§ 483, 488.*]

8. EVIDENCE (§ 113*)—RELEVANCY.

Where the vendor of land with a building thereon sought to enforce the contract after the destruction of the building, upon the theory that the building was of no value, it was proper to show that the rent paid for the building was a net rent; the lessee paying taxes and insurance.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 259-296; Dec. Dig. § 113.*]

9. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR.

Where a vendor sought to enforce a contract for the purchase of land with a building thereon, after the destruction of the building, admission of evidence as to the amount paid by the lessee for insurance on the building was harmless, if erroneous; the purchaser being entitled to show that the rent paid the owner was a net rent, in addition to paying taxes and insurance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.*]

10. VENDOR AND PURCHASER (§ 341*)—RESCISSION—RECOVERY OF PAYMENTS BY PURCHASER—EVIDENCE.

In an action by a purchaser to recover a deposit paid under a rescinded contract for the purchase of land, evidence that the vendor had never offered him possession was admissible to show that there was no basis for the presumption that the parties considered the contract as substantially completed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1008-1017; Dec. Dig. § 341.*]

11. VENDOR AND PURCHASER (§ 118*)—CONTRACT—RESCISSION—MOTIVE.

The motive of one entitled to rescind a contract for the purchase of land is immaterial.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 210, 211; Dec. Dig. § 118.*]

12. TRIAL (§ 62*)—ADMISSIONS—REBUTTAL.

Where defendant testified to a statement of plaintiff which was in the nature of an admission, plaintiff could, without any attempt to impeach defendant, deny the making of the statement; that being simply rebuttal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 148-150; Dec. Dig. § 62.*]

13. PLEADING (§ 36*)—ADMISSIONS.

The pleading by plaintiff of defendant's ratification of his agent's contract is not an admission by plaintiff that he was aware of the contents of a written ratification given by defendant to the agent in which defendant agreed to pay the agent's commissions.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 81-86; Dec. Dig. § 36.*]

14. EVIDENCE (§ 471*)—OPINION EVIDENCE—CONCLUSION.

Testimony by a witness that he was the person interested in the fire insurance policies upon a building taken out in the name of a third person is not a conclusion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

15. EVIDENCE (§ 219*)—ADMISSIONS—ADMISSION BY CONDUCT.

Where a vendor of land with a building thereon sought to enforce a contract of purchase after the destruction of the building, on the ground that the building was of no value, evidence that he filed proofs of loss for and collected a large amount of fire insurance was admissible, as an admission that his contention that the building was valueless was untrue.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 762-770; Dec. Dig. § 219.*]

16. EVIDENCE (§ 113*)—COMPETENCY OF EVIDENCE.

Where a vendor, upon the theory that a building was valueless, sought to enforce a contract for the purchase of land and the building, which was destroyed by fire before the consummation of the contract, evidence that the land was worth $81,000 was admissible to contradict the vendor's contention that the building was worth only a few hundred dollars by showing that he would not probably have allowed such valuable property to have remained in a condition where it would produce no income.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 259-296; Dec. Dig. § 113.*]

17. EVIDENCE (§§ 474½, 488*)—OPINION EVIDENCE—NONEXPERT.

One not an expert on matters of interest or property values is not competent to testify whether the rent reserved by a lease was greater or less than the usual rate of interest on investments, or as to the increase in the value of the land after purchase.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2220-2233, 2273; Dec. Dig. §§ 474½, 488.*]

18. VENDOR AND PURCHASER (§ 341*) — RESCISSION—EVIDENCE.

In an action by the purchaser of land to recover a deposit made under a contract which he had rescinded, evidence that the vendor had been compelled to pay the interest on a mortgage because the purchaser had not carried out his contract was immaterial; the purchaser not being concerned with the vendor's relations to third persons.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1008-1017; Dec. Dig. § 341.*]

19. EVIDENCE (§ 143*)—MATERIALITY.

Evidence of matters admitted because not denied in the pleadings is immaterial, and properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 426-428; Dec. Dig. § 143.*]

20. EVIDENCE (§ 266*)—DECLARATIONS.

Where the purchaser of land with a building thereon rescinded the contract after the destruction of the building, evidence that the vendor told a third person that the purchaser might have insurance money, and that he would get the purchaser a new tenant, was inadmissible in an action by the purchaser for his deposit under the contract; the purchaser not being bound by the vendor's statements to a third party.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1051–1060; Dec. Dig. § 266.*]

21. Appeal and Error (§ 1058*)—Review—Harmless Error.

The erroneous exclusion of evidence later admitted without objection is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4200–4206; Dec. Dig. § 1058.*]

22. Evidence (§ 543*)—Opinion Evidence—Expert Testimony.

Where the purchaser of land with a building thereon rescinded a contract upon the destruction of the building, evidence by an expert as to the cost of replacing the building, based upon the cost of constructing a certain building, was excluded because the purchaser could not be bound by testimony relating to the cost of a single building.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2356½–2358; Dec. Dig. § 543.*]

23. Evidence (§ 145*) — Competency — Remoteness.

Where a contract for the purchase of land with a building thereon was rescinded upon the destruction of the building, evidence as to the cost of replacing it, based upon the cost of constructing buildings at the time of the trial, which was several years after the rescission of the contract, is inadmissible, being too remote.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 434; Dec. Dig. § 145.*]

24. Appeal and Error (§ 882*)—Review—Errors of Which Party May Complain.

A party cannot complain on appeal of the court's refusal to direct the jury to disregard evidence which he himself has introduced.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591–3610; Dec. Dig. § 882.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by James Conlin against E. T. Osborn. From a judgment for plaintiff, and an order denying his motion to set aside the verdict, and an order denying his motion for a new trial, defendant appeals. Affirmed.

Robert H. Countryman, for appellant. Frohman & Jacobs, for respondent.

MELVIN, J. Defendant appeals from a judgment against him, from the order denying his motion to set aside the verdict before entry of judgment, and from an order denying his motion for a new trial.

The action was one for the recovery of $10,000 paid as a deposit on account of a contract of sale of real property situate in the city and county of San Francisco. Plaintiff negotiated with Sage, Dealey & Co., a corporation, which was defendant's agent, for the purchase of a piece of land and the improvements thereon located on Hayes street near Van Ness avenue. On April 16, 1906, a written contract was signed by the proper officers of the said corporation. This writing acknowledged the receipt from James Conlin of $10,000 to secure the sale to him of the real property and improvements in question for $110,000. The sale was made subject to the owner's approval, and the seller was to pay his proportion of the taxes accruing from June 30, 1905, up to the date of the "close of sale." Thirty-five days from the date of acceptance by the seller were allowed for search of title, and, if title was not found good, the vendor was to have 90 days in which to remove any defects, but, failing in that, was to return the deposit immediately. The writing also provided that if the title was found good, and the sale not closed in accordance with the terms of the agreement, the deposit was to be forfeited as fixed and settled damages. The contract as set forth in this receipt was accepted on the day of its date by James Conlin, who in writing bound himself to buy the property at the price and upon the terms named. It was alleged in the complaint that on April 16, 1906, there stood on the property improvements consisting of several buildings which "were of great value as and constituted a material part of the consideration for defendant's entering into said agreement and a material inducement to him to enter into said agreement to purchase said property." It was also alleged and proved that on April 17, 1906, an abstract of title belonging to defendant was delivered to plaintiff for use by him in having the title searched; that on the same day he delivered it to his attorneys; and that on the following day, without fault on his or their part, it was destroyed in the great conflagration, which also swept out of existence the improvements on the real property, the subject of the contract of sale. There is an allegation in the complaint on information and belief that the lien of a mortgage stood against the property at the time of the contract, and that it had not been removed before this suit was commenced. There is a further averment that on May 8, 1906, plaintiff rescinded the contract by notice in writing to the defendant and to Sage, Dealey & Co., his agent. These, omitting the purely formal matters, are the essential contents of plaintiff's pleading.

After his demurrer to the complaint had been overruled, defendant answered, admitting the existence of a mortgage, but averring an agreement with plaintiff that enough money might be retained by the latter from the purchase price of the property to satisfy said mortgage. There are also allegations that the improvements were of no material value and did not constitute any part of the consideration for the execution of the contract of April 16, 1906, and that the action was brought because the real property had decreased in value after April 18, 1906, plaintiff seeking to be excused from a contract upon which he might lose money. The verdict on general and special issues was in favor of the plaintiff, and the judgment entered was for $8,000, plaintiff having agreed at the trial to allow $2,000 to be applied to the recoupment of defendant for that amount paid by the latter to his agent, Sage, Dealey & Co., for negotiating the sale. The jury found the value of the land alone on the 16th of April, 1906, to have been $97,000, and that of the improvements $13,000.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] Appellant's counsel take the position that his demurrer was good, and that his motion to set aside the verdict should have been granted because it is neither averred nor proven that, before the attempted rescission, plaintiff restored or offered to restore everything received by him under the contract in accordance with subdivision 2 of section 1691 of the Civil Code. He insists that, before being in a position to rescind, plaintiff should have paid for the destroyed abstract of title, and should have offered to defendant the $2,000 which the latter had paid to his agent. The answer to this is that the abstract of title was not received "under the contract," and it was not shown by the pleading or otherwise that plaintiff was a party to the payment of the commission, or that he knew anything about such payment prior to the serving of his notice of rescission. Neither the abstract nor the commission formed any of the subject-matter of the contract which is set out in full in the complaint. The abstract was doubtless loaned to plaintiff as a matter of convenience to assist his attorneys in an examination of the records, and it was no more a part of the consideration or of something received "under the contract" than defendant's carriage would have been if he had loaned it to plaintiff for the latter's convenience in going to inspect the property. If the vehicle had been destroyed by some unavoidable accident during its use by the plaintiff, no one would claim that its restoration would have been a prerequisite to a rescission of the contract for the purchase of the realty. Defendant testified that he never told plaintiff prior to the date of rescission what commission he had paid to the corporation that acted as his real estate agent; and, as contracts for the sale of property on commission are frequently contingent upon the completion of the transaction, there could have been no presumption that any amount had been paid prior to that time.

[2] Appellant's counsel in a long and able discussion ask us to hold, first, that the burning of the improvements was not a failure of consideration in "any material respect"; and, second, that, where without fault on the part of the vendor such improvements are destroyed, the loss must fall upon the vendee under the theory that he is the equitable owner of the property because equity will presume that to have been done which should have been done. Subdivision 4 of section 1689 of the Civil Code provides that "a party to a contract may rescind the same * * * if such consideration before it is rendered to him fails in a material respect from any cause."

Upon the first point, appellant's counsel assert that this section must be construed not as authorizing rescission of a contract because of partial failure of consideration, but must be interpreted in such manner that the words "material respect" be held to refer to something going to the root of the contract—something which is of its essence, and the absence of which would destroy for a party wishing to rescind the whole purpose of the agreement. We do not think that subdivision 4 of the section requires such modification to be implied, nor do we think its literal interpretation makes it inconsistent with subdivision 2 of the same section which provides that a party may rescind "if through the fault of the party from whom he rescinds the consideration for his obligation fails in whole or in part." The effect of subdivision 4 is somewhat broader than subdivision 2 when applied to executory contracts, but the former subdivision might by its terms operate upon a consideration already paid under a partially executed contract if the consideration should fail in whole or in part by the fault of the party through whom rescission is sought. The words, "before it is rendered to him," contained in subdivision 4, indicate the difference in the scope of the two subdivisions; the latter being strictly limited to executory contracts. Of course, the failure of consideration must be in a "material respect."

[3] We will not follow counsel in his discussion of the evidence in which he seeks to demonstrate that the buildings were old; that the income derived from them was less than the interest on the purchase price would have been if it had been deposited in a savings bank; that not the income, but the speculative value of the realty, induced plaintiff to enter into the transaction for its purchase; and that, therefore, the improvements formed no material portion of the consideration to be rendered by the defendant. The jury found the value upon conflicting evidence, some of which was sufficient to justify the conclusion reached; and there was also evidence which supported the finding that the improvements constituted a material consideration for the execution by plaintiff of the contract of sale.

[4] Appellant's counsel cites numerous authorities to the proposition that loss due to the destruction of buildings by fire in a case like this falls upon the vendee. Undoubtedly there is authority in some jurisdictions for such doctrine, most of the cases depending upon Paine v. Meller, 6 Ves. Jr. 349. Typical American cases upon the matter are Brewer v. Herbert, 30 Md. 301, 96 Am. Dec. 582, and Snyder v. Murdock, 51 Mo. 175. In California, however, this rule has not been followed, at least not in recent years. Smith v. Phœnix Ins. Co., 91 Cal. 330, 27 Pac. 738, 13 L. R. A. 475, 25 Am. St. Rep.

191, cited by appellant, does not support his theory. While it was there stated that a vendee in possession of land may sometimes maintain an equitable title to it under his executory contract as against the vendor's legal title, the Chief Justice delivering the opinion of the court in that case said: "There is a wide distinction between the proposition that the vendee in possession under an executory contract of sale may maintain the possession against the vendor as long as he performs his part of the agreement, and upon full compliance may enforce specific performance of the vendor's contract to convey the legal title, and the proposition here contended for, viz., that the vendor in such a contract, notwithstanding the destruction of the subject of the contract, in whole or in part, before the date stipulated for payment and conveyance, and his consequent inability to make a conveyance of that for which the vendee has bargained, may nevertheless compel the vendee to pay the whole contract price in exchange for a fraction of the property sold." This language is followed by an analysis of the apparently conflicting decisions on this subject, and the adoption of the rule announced in Wells v. Calnan, 107 Mass. 514, 9 Am. Rep. 65, that the destruction by fire of buildings on property in the vendor's possession prior to the date fixed for the payment of the purchase price and the conveyance of the title, defeats the vendor's right to compel performance on the part of the intending purchaser under the contract. This rule has been followed ever since in this state. In Potts Drug Co. v. Benedict, 156 Cal. 334, 104 Pac. 423, 25 L. R. A. (N. S.) 609, after a discussion of the rule that, where there has been a present, unconditional, fully consummated sale, the risk accompanies the title and any loss falls upon the purchaser, this language was used: "Where there is a mere agreement to sell, and therefore title has not passed, the loss falls on the vendor for the same reason. In such a case the vendor is excused from the performance of his contract under the rule we have discussed by reason of the destruction of the thing, but he cannot retain money already paid on account of the proposed purchase, or recover moneys remaining unpaid"—citing Wells v. Calnan and Smith v. Phœnix Ins. Co., supra, and Gould v. Murch, 70 Me. 288, 35 Am. Rep. 325. We conclude, therefore, that plaintiff had the right to rescind under subdivision 4 of section 1689 of the Civil Code for failure of consideration in a "material respect," before it was "rendered to him," as the rule in California does not regard the vendee under a contract like the one before us as being the person by whom the destruction of the tenements must be borne.

[5] Mr. Cahn, one of plaintiff's witnesses, was asked with reference to a cottage on the land in question, "How deep was it?" He answered, "I think it was about two rooms in depth," and then proceeded to give his opinion that it was of trifling value. The latter part of the answer was properly stricken out as not being responsive to the question, and the court correctly struck out an irresponsive answer to a question relating to the plumbing whereby, instead of telling of what said plumbing consisted, witness volunteered the statement that it was of very poor quality.

[6] The court permitted evidence regarding the condition of the factory building which formerly stood on the premises. Defendant sought to show that it was of a very flimsy character. Over his objection plaintiff's counsel was permitted to ask a witness, "How much power was required to operate the machinery?" The fact that the building (as shown by the answer to this question) could carry machinery requiring 15 horse power for its operation was relevant as bearing on the condition of the structure.

[7] Mr. Cahn testified on direct examination that the building was in good condition. On cross-examination defendant's counsel put this question to him: "None of the improvements on the land were of any material value were they?" Objection that the question called for a conclusion was properly sustained for the reason that Mr. Cahn was not shown to be an expert on values. Whether a building is in good condition or not may properly be a subject of testimony from one who knows nothing of values. There was no error in sustaining objections to the questions propounded to Mr. Cahn on cross-examination by which he was asked to testify whether the cottage was a cheap or an expensive building. He was not an expert on such matters. He was also asked certain questions with reference to the amount of insurance carried in Mr. Osborn's favor by Cahn, Nickelsburg & Co., tenants occupying the property. All of these questions were allowed over defendant's objections.

[8, 9] Respondent contends that evidence of the amount of insurance which, as the lease provided, should be carried at the expense of the tenants was pertinent as showing Mr. Osborn's opinion touching the value of his own property; and that the fact of the payment by the tenants of the expenses of insurance and the taxes was in point as showing the income produced by the buildings which were destroyed. We hardly think the inquiry about the insurance was proper on the first theory, but, under the pleadings and defendant's contention that the buildings were of trifling value, it was proper to show that the rent paid was net. Perhaps the scope of investigation of this subject was somewhat too extended, but we do not see how defendant could have been injured by proof of the amount of insurance carried and the premium paid for it. Appellant complains because plaintiff was allowed to testify to the value of the buildings. This was

perfectly proper, because plaintiff had qualified as an expert.

[10] Mr. Conlin, against objection of defendant's counsel, stated, while on the witness stand, that possession of the property had not been given or offered to him by the defendant. Appellant insists that, as the time for search and perfecting of title had not passed, this was improper evidence. The questions relating to possession were proper, however, because possession by a vendee is sometimes evidence that the parties consider the contract substantially completed and plaintiff was seeking to show that there was no basis for any such presumption in this case.

[11] Mr. Conlin was interrogated with reference to his real motive in wishing to withdraw from the contract. If he had a right to rescission, his motive was an immaterial matter. Crim v. Umbsen, 155 Cal. 702, 103 Pac. 178, 132 Am. St. Rep. 127; Boyson v. Thorn, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233. He was also asked on cross-examination if he had ever requested Mr. Osborn to give him the property without the improvements. A general objection to this question was sustained. He had, as we have seen, the right to rescind. It was therefore immaterial whether or not he had asked for delivery of the property minus the improvements. Whether or not there had been an offer of possession to him by defendant was at issue in the pleadings, and it was proper to interrogate him about that matter, but there was no issue on the subject of any request from him for delivery of the denuded property after the fire. Plaintiff was not allowed to answer the question by the cross-examiner regarding the depreciation of the property after the fire. Objection was sustained on the ground that he was not shown to be an expert on values after the fire. We see no error in that ruling. Objection was sustained to a question whether or not certain pieces of property bought since the fire had been purchased for speculative reasons and to be added to plaintiff's holdings. The purpose of this question, according to counsel, was to show that plaintiff had been buying land in that vicinity irrespective of improvements. This only bears on Mr. Conlin's motive in rescinding, which, as we have seen, is immaterial.

[12] Mr. Osborn, testifying in his own behalf, had said that he had had a conversation with plaintiff in which the latter declared that he would have to tear down the buildings, and put up something from which to get revenue after the expiration of the lease of Cahn, Nickelsburg & Co. Afterwards Mr. Conlin took the stand, and denied such statement. Appellant assigns this as error because no impeaching questions had been addressed to the defendant when he was a witness in his own behalf—citing Fagan v. Lentz, 156 Cal. 689, 105 Pac. 951. Obviously it was proper for Mr. Conlin to deny that he had made the statement attributed to him. It was simply rebuttal. Fagan v. Lentz has no application to the situation shown here. That was a case where alleged statements of witness showing her hostility to one of the litigants were sought to be introduced in evidence. As she had not been interrogated about these purported declarations while she was on the stand, no proper foundation for their introduction had been laid.

[13] Appellant complains of certain rulings whereby he was prevented from showing that Sage, Dealey & Co. had retained as a commission $2,000 out of the $10,000 deposit with that corporation. As we have seen there was no showing that respondent ever knew of this transaction until during the course of the trial. But appellant insists that Mr. Conlin must have known of it at the time of filing the complaint because he there pleaded the approval of the contract by Mr. Osborn and the written ratification did show an agreement to pay the commission to the agent. The pleading of the ratification does not necessarily show, however, that respondent had actually read this written approval of the contract by defendant. He might have depended upon the fact that Osborn's conduct on the day following the date of the contract indicated his ratification of it. The court correctly admitted evidence tending to show that the improvements on the property were burned before plaintiff had a chance to examine the title. The contract of lease between defendant's grantor and Cahn, Nickelsburg & Co. was correctly admitted in evidence as tending to throw light on the value of the improvements by showing the income which they were producing.

[14] Counsel for plaintiff asked Mr. Osborn the following question: "Any insurance that was collected was for your benefit, was it not?" The objection that it called for a conclusion of the witness was overruled and the interrogatory was given an affirmative answer. Here was no error. It was not a mere conclusion on his part that he was the person interested in the policies which had been obtained in Mrs. Shotwell's name.

[15] A number of questions were propounded to Mr. Osborn relating to the collection of the insurance money after the fire. By his answers he showed that he had filed proof of loss whereby the value of the improvements was placed at more than $13,000. He presented these proofs of loss, and collected the money paid by the company. This evidence was pertinent as an admission contrary to his pleading and testimony that the improvements were practically valueless.

[16] Respondent's counsel asked Mr. Osborn what he had paid for the land, and, after fruitless objections, he replied that he had paid over $81,000. This testimony was not proper as showing what his profit would have been if the sale had been consummated, but was admitted correctly to show the improbability of his estimate of the value of

the buildings at $500, since he allowed them to continue to incumber a piece of property which, as he testified, would be more valuable without them.

[17] Objection was sustained to a question by his own counsel whether or not the amount paid Mr. Osborn by Cahn, Nickelsburg & Co. under this lease was greater or less than the usual rate of interest on the investment in property rented, and there was a similar ruling when he was asked regarding increase in the value of the land after he bought it. He had not at that time qualified as an expert on matters of interest or property values.

[18] Defendant sought to show that by reason of the nonpayment of the purchase price of the land by plaintiff he had been compelled to pay interest on a mortgage. Questions directed to this purpose were rightly disallowed. Plaintiff was not concerned with defendant's relations with third parties, or with his intentions regarding the spending of the money expected from the sale. A Mr. Cohn was called as an expert to prove that the property without the improvements was worth $110,000 on April 16, 1906. He failed, in the opinion of the court, to qualify as an expert on the value of the property without the improvements, and we see no error in the sustaining of the various objections to questions asked of him. Defendant sought to prove by Mr. Buckbee (but was prevented by timely objections from doing so) that the results of the earthquake and fire diminished the value of the property. This, if proven, could only have been relevant as showing Conlin's motive for rescinding and that was immaterial.

[19] While Mr. Sullivan, who was connected with Sage, Dealey & Co., was being examined, the following question was asked: "In this matter did you go to Mr. Osborn on behalf of plaintiff, or did Mr. Osborn come to you to sell the property?" Counsel objected on the ground that "the only purpose would be an attempt to prove that the witness was the agent of the plaintiff, while the pleadings themselves allege, and it is not denied, that Sage, Dealey & Co. were the agents of defendant, and that they had the contract in evidence signed by the defendant authorizing them to sell." This objection was properly sustained for the reasons given by counsel.

[20] Mr. Sullivan was asked if defendant had told him that plaintiff might have the insurance money paid for the buildings destroyed by the fire, and if defendant had offered through him to get a new tenant for the property who would pay $400 a month. The court sustained objections on the ground that plaintiff was not bound by statements made to a third party. The mere recital of this ruling shows its propriety. Mr. Buckbee testified that the fire and earthquake destroyed the market value of the property. This was stricken out as not responsive to the question, which was, "Do you know what effect, if any, the earthquake and fire of April, 1906, had upon the market value of this property?"

[21] Witness Kern had made for presentation to an insurance company an estimate of the loss occasioned by the burning of the buildings on the property in question. This estimate showed a deduction for depreciation. Witness testified that he did not figure the depreciation in any of the statements of loss which he prepared—he thought that was "for the owner or the insurance people to do themselves." This answer was stricken out and appellant assigns this ruling as error in spite of the fact that on the very next page of the transcript to that on which the court's action on this matter is shown substantially the same answer appears as having been made without objection.

[22] For the purpose of showing what it would cost to replace the burned structures with a brick building of approximately the same capacity, defendant called Mr. Lamb, an architect, who was asked certain questions with reference to the cost of a building known as the "Silvesta building." Objections to these questions were properly sustained as plaintiff could not be bound by testimony relating to the cost of a particular building.

[23] Witness was then asked what would be the actual cost of a four-story building 60 feet by 120 feet constructed within three or four months of the trial, said building to be within the fire limits. The court sustained defendant's objection to this question upon the ground that the time fixed was too remote. The objection as phrased by counsel was: "The plaintiff rescinded the contract on May 8th, and the price within three or four months cannot bind the plaintiff. This was after suit was brought." A mere statement of the ruling demonstrates its correctness.

[24] We will not consider in detail appellant's criticisms of the instructions given and the court's refusal to give certain others. The jury was fully and fairly instructed upon all of the matters properly involved in the case, and no substantial error appears. Appellant calls our attention particularly to the court's refusal to instruct the jury that they must disregard all evidence concerning the lease of the property by Mr. Osborn to Neustadter Bros., without Mr. Conlin's knowledge, after the fire. Evidence of the existence of such a lease was introduced by appellant, who cannot with good grace complain of the court's refusal to direct the jury to disregard a part of his own case.

No other alleged errors require discussion. The judgment and orders are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

162 Cal. 4

In re KILBORN'S ESTATE. (L. A. 2,889.)

(Supreme Court of California. Jan. 8, 1912. Rehearing Denied Feb. 5, 1912.)

1. WILLS (§ 399*)—CONTEST—APPEAL—JUDGMENT ROLL.

Code Civ. Proc. § 670, providing what shall constitute the judgment roll for purposes of the record on appeal, is applicable to proceedings to revoke probate of will.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 399.*]

2. WILLS (§ 399*)—CONTEST—APPEAL—RECORD.

Code Civ. Proc. § 661, providing that the judgment roll and affidavits, bill of exceptions or statement, shall constitute the record on appeal from an order on a motion for a new trial. Section 952, provides that on an appeal from an order on a motion for new trial the appellant must furnish the court with a copy of the notice of appeal and of the order appealed from, and of the papers designated in section 661. Section 953 provides that such notice must be certified to be correct by the clerk or by the attorneys. *Held* that, on appeal from an order denying a motion for a new trial in a will contest, a portion of the transcript containing copies of pleadings, the verdict, and the decree revoking probate need not be authenticated by a bill of exceptions, but is sufficient where the clerk's certificate, attesting the correctness of such copies, is attached.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 399.*]

3. WILLS (§ 399*)—CONTEST—APPEAL—RECORD.

As, under Code Civ. Proc. § 953, the record on appeal from an order denying a motion for a new trial may be certified by the clerk or attorneys, rule 29 of the California Supreme Court (78 Pac. xii), which requires a bill of exceptions for authentication, "except where another mode of authentication is provided," is inapplicable to prescribe the mode.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 399.*]

4. APPEAL AND ERROR (§ 417*)—NOTICE OF APPEAL—SUFFICIENCY.

Though an executor of a will styled himself executor "of the estate," in a notice of appeal from an order denying a motion for a new trial of a contest, it is a mere inadvertent mistake, and, as it could not have misled, will not invalidate the notice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2140–2143; Dec. Dig. § 417.*]

5. APPEAL AND ERROR (§ 502*)—RECORD.

Where the transcript of record on an appeal from an order denying a motion for new trial contains a duly certified copy of a minute entry showing that a motion for new trial was denied, and the statement discloses that it was prepared and settled to be used on a proposed motion for a new trial, the record sufficiently shows that a motion for a new trial was made.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 502.*]

6. WILLS (§ 55*)—TESTAMENTARY CAPACITY—EVIDENCE.

In an action for the revocation of probate of a will, evidence *held* insufficient to justify a finding that the testatrix was not in full possession of her faculties, and did not understand the provisions of the instrument, purporting to be her will, at the time of its execution.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137–161; Dec. Dig. § 55.*]

7. WILLS (§ 166*)—CONTEST—UNDUE INFLUENCE—EVIDENCE.

Evidence, in an action for the revocation of probate of a will, *held* to show no pressure or suggestion, operating on the testamentary act, amounting to undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421–437; Dec. Dig. § 166.*]

8. WILLS (§ 155*)—UNDUE INFLUENCE.

The undue influence which will justify the setting aside of a will must have operated on the mind of the testator at the time of the making of the will, and must have related to the will itself, so that proof of opportunity to influence a testator's mind, even when coupled with an interest or motive to do so, will not in itself sustain a finding of undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 375–381; Dec. Dig. § 155.*]

9. WILLS (§ 163*)—UNDUE INFLUENCE—PRESUMPTIONS.

That an attorney of the testatrix who drew a will, and was present at the time it was signed and witnessed, was named therein as executor and trustee will not raise a presumption of undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 388–402; Dec. Dig. § 163.*]

10. WILLS (§ 165*)—UNDUE INFLUENCE—EVIDENCE.

Declarations of the testatrix that she intended to leave her property to her daughter are admissible, in an action to revoke probate, only to show the relation between the two, and are entitled to little or no weight in establishing undue influence.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 165.*]

11. WILLS (§ 166*)—UNDUE INFLUENCE—EVIDENCE NECESSARY TO ESTABLISH.

Under influence in the making of a will may be shown by circumstantial evidence, but such evidence must amount to proof, and is insufficient when circumstances are not proven which are inconsistent with the claim that the will was a spontaneous act of the alleged testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421–437; Dec. Dig. § 166.*]

12. WILLS (§ 163*)—UNDUE INFLUENCE—BURDEN OF PROOF.

Upon the contest of a will, the burden of proving undue influence is upon the contestant.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 388–402; Dec. Dig. § 163.*]

13. WILLS (§ 166*)—UNDUE INFLUENCE—EVIDENCE.

Evidence of the inequitable character of a will is insufficient, in the absence of other testimony of undue influence, to justify setting it aside.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 429; Dec. Dig. § 166.*]

Department 1. Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Petition by Mary Woodman Kilborn for the revocation of probate of the will of Julia Ann Kilborn, deceased. From an order denying a motion for a new trial of a contest after probate, Will D. Gould, as executor and personally, appeals. Reversed.

James H. Blanchard and Will D. Gould, for appellant. James G. Maguire and D. Joseph Coyne, for respondent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

SLOSS, J. This is an appeal from an order denying a motion for new trial of a contest of a will after probate. The appeal from the judgment revoking the probate of the will has heretofore been disposed of; such judgment having been affirmed in this court. Estate of Kilborn, 158 Cal. 593, 112 Pac. 52.

Some preliminary points urged by the respondent may be noticed before we proceed to a discussion of the merits. It is claimed that the portions of the transcript containing copies of the pleadings, the verdict of the jury, and the decree revoking probate are not to be considered, because not authenticated by means of a bill of exceptions; and that the appeal should be dismissed for failure of the appellant to furnish a proper record. But no such authentication of any of the papers named was required. The transcript contains the clerk's certificate in proper form, certifying that the papers in question are correct copies of the original papers in said action.

[1, 2] This was sufficient under the requirements of the Code of Civil Procedure. Section 661 provides that "the judgment roll and the affidavits, or bill of exceptions, or statement, as the case may be, used on the hearing, with a copy of the order made, shall constitute the record to be used on appeal from the order granting or refusing a new trial." The papers constituting the judgment roll are defined in section 670 of the same Code, and this section is undoubtedly applicable to such proceedings in probate as the one before us. Miller v. Lux, 100 Cal. 609, 35 Pac. 345, 639; Estate of Ryer, 110 Cal. 556, 560, 42 Pac. 1082. In a will contest, the judgment roll must include at least the petition for revocation of the probate, the answer thereto, the verdict of the jury, and the judgment. Under section 952 the appellant, on an appeal from an order granting or refusing a new trial, must furnish the court with a copy of the notice of appeal, of the order appealed from, and of the papers designated in section 661, and these copies, by the provision of section 953, must be certified to be correct by the clerk or the attorneys. There is no occasion, therefore, for incorporating in a bill of exceptions the papers constituting the judgment roll or the order denying the motion for a new trial. Mendocino Co. v. Peters, 2 Cal. App. 24, 82 Pac. 1122; Power v. Fairbanks, 146 Cal. 611, 80 Pac. 1075.

[3] The authentication by clerk's certificate is expressly authorized by the statute, and rule 29 (78 Pac. xii) of this court, requiring a bill of exceptions, "except where another mode of authentication is provided by law," has no application.

[4] The further objection is made that the parties appealing, i. e., Will D. Gould, personally, and Will D. Gould, executor of the estate of Julia Ann Kilborn, deceased, were not parties to the proceeding in the court below, and therefore have no right of appeal. We need not take time to discuss the question of the right of Mr. Gould to appeal in his individual capacity. That the executor and proponent of the will of a decedent has a right of appeal is not questioned. The point is, however, that he should, in his notice of appeal, have described himself as "executor of the last will and testament of Julia Ann Kilborn," instead of as "executor of the estate of Julia Ann Kilborn." We think this objection hypercritical and altogether too technical to be worthy of favorable consideration. If the notice of appeal was inaccurate in describing the appellant as executor of the estate, rather than as executor of the will, this error, consisting merely in the inadvertent use of the wrong word, was apparent upon the face of the notice, and could not have misled any one.

[5] The respondent contends, also, that the record does not show that a motion for new trial was made. But the transcript contains a duly certified copy of a minute entry showing that a motion for new trial was denied, and the statement discloses that it was prepared and settled to be used on the executor's proposed motion for new trial. In this state of the record, we think it is sufficiently made to appear that the executor did move for a new trial.

On the merits of the appeal, the only point that need be considered is the claim of the appellant that the evidence was insufficient to sustain the verdict.

Julia Ann Kilborn died on the 20th day of September, 1907, leaving a will executed upon the 3d day of September, 1907. She was survived by her daughter, Mary Woodman Kilborn, the contestant. Mrs. Kilborn provided in her will, which appears in full in the statement, that her estate (subject to a small pecuniary legacy) should go to Will D. Gould in trust for her daughter, the contestant, during her life, such daughter to receive the sum of $100 per month out of the income of the estate, or, if the income should be insufficient, out of the principal, and that upon her death the rest, residue, and remainder of the estate should go in equal shares to the brothers and sisters of herself and her deceased husband. It was further provided that, if the estate of Mrs. Kilborn's deceased husband should not be distributed to her, then the provision for the daughter should be cut down to $50 per month, and that upon her death no part of the remainder should be distributed to the brothers and sisters of such deceased husband. Gould was named as executor of the will, which was witnessed by Mrs. O. T. Sawyer and Mrs. Ann F. Chappell. The will was admitted to probate and letters testamentary issued to Gould on the 4th day of October, 1907. On September 17, 1908, the daughter, Mary Woodman Kilborn, filed her petition, asking for revocation of the probate, and alleging that the testatrix was incompetent to make a will; and that the alleged will was obtained through the undue influence of Gould and Mrs. Sawyer. The executor having answered, denying all of the allegations of the petition, a trial was had before a jury. The court, having concluded that there was no evidence to support the allegation that the testatrix was incompetent to make a will, submitted to the jury three interrogatories bearing on the question of undue influence. The first, dealing with undue influence on the part of Will D. Gould, was not answered. Interrogatory No. 2 was as follows: "Was the execution of the alleged will of Julia Ann Kilborn obtained by the exercise of undue influence by Will D. Gould and Mrs. O. T. Sawyer acting jointly?" To this the jury answered, "Yes." Interrogatory No. 3 was: "Did Julia Ann Kilborn, deceased, fully understand the provisions of the instrument of date of September 3, 1907, purporting to be her last will and testament, at the time of the signing and witnessing of the instrument?" To this the answer was, "No." The insufficiency of the evidence to sustain each of these findings was specified with sufficient particularity by the proponent in the statement on motion for new trial.

[6] It is unnecessary to enter into any extended discussion of the evidence with reference to interrogatory No. 3. The record is totally devoid of any showing to support the verdict in this respect. Mrs. Kilborn, at the time of executing her will, was of the age of 63 years, or thereabouts. She was, as all the witnesses agree, a woman of clear mind and fully capable of transacting business. While she had been subject, for a considerable time, to a disease which finally ended her life, and was, on the 3d of September, 1907, somewhat weakened, there is nothing at all to justify the inference that she was not then in the full possession of her mental faculties, or that she did not fully comprehend the nature and effect of what she was doing.

[7] And we think the record is equally bare of substantial evidence to support the finding that the will was obtained by the undue influence of Will D. Gould and Mrs. Sawyer, or either of them. It appeared in the evidence that Mrs. Kilborn's husband had died in 1904. He had left a will, whereby he undertook to give his property to trustees for the benefit of his wife and daughter. The estate was community property, and its value, including the portion to which the widow was entitled as survivor of the community, was in the neighborhood of $30,000. Both Mrs. Kilborn and her daughter were dissatisfied with the trust provisions of the will. They employed Mr. Gould, the appellant here, an attorney at law, to represent them in the matter. Proceedings were undertaken with a view to preventing the probate of Kilborn's will, but these efforts were resisted, and successfully resisted, by a corporation which was named as executor of Kilborn's will jointly with Mrs. Kilborn.

At the death of her husband, and for some time thereafter, Mrs. Kilborn was living in South Pasadena. Her daughter, the contestant here, had associated herself with a religious and benevolent organization, known as the "Forward Movement," and in the performance of her duties in this connection had taken up her residence at San Francisco. Some months before her death, Mrs. Kilborn moved from South Pasadena to Dolgeville in Los Angeles county, and, after spending some little time in a hotel there became a boarder at the home of Mrs. Sawyer. It was at this home that the will was made and the testatrix died. The record, which is extremely voluminous, contains a mass of testimony bearing upon the relations of Mrs. Kilborn with her daughter, with Mrs. Sawyer, and with Mr. Gould, but a careful search fails to reveal any substantial evidence tending to support the finding that the will was in any degree the product of undue influence, exercised either by Mrs. Sawyer or by Gould. Many witnesses testified on behalf of the contestant that she and her mother had always been bound by the warmest ties of affection. This, indeed, is not open to doubt. There was also testimony that the mother had stated to a number of friends that she intended to leave all of her property to her daughter. During the last few weeks of Mrs. Kilborn's life, she was suffering greatly, and was becoming weaker in consequence of her disease, which was known to be incurable. It was testified that, notwithstanding repeated requests from the daughter for information regarding her mother's condition, Mrs. Sawyer did not notify Miss Kilborn of the seriousness of the situation, but, on the contrary, sent messages indicating that Mrs. Kilborn's health was about as it had been. A telegram informing the contestant that her mother was "very low" reached her only on the day of the latter's death. Mrs. Kilborn's body was sent to her old home in New England for burial. There was testimony to the effect that Mrs. Sawyer, with the approval of Gould, who had been named as executor in the will, assumed the entire responsibility for the arrangements in this regard, and declined to permit the daughter, who had arrived shortly after her mother's death, to control or direct these dispositions. The will was filed for probate by Gould upon the day following the death of the testatrix. The record also contains a great deal of evidence offered for the purpose of showing that Gould had misled the respondent in matters connected with the administration of her father's estate, and that, following the death of the mother, he had assumed an attitude of hostility toward the daughter.

[8, 9] These circumstances, together with

the facts that Gould drew the will, and that it was witnessed by Mrs. Sawyer, furnish the sole support for the finding of undue influence. But it is obvious, under the rulings of this court in prior cases, that this evidence is entirely insufficient to warrant the verdict. It amounted to nothing more than a showing that Mrs. Sawyer and Gould were so placed as to have had an opportunity to unduly influence the mind of the testatrix, and that they acted in a manner that might be described as suspicious. But this is not sufficient to upset a will. Mere proof of opportunity to influence a testator's mind, even when coupled with an interest or motive to do so, will not sustain a finding of undue influence, in the absence of testimony showing that there was pressure operating directly on the testamentary act. Estate of Langford, 108 Cal. 608, 41 Pac. 701; Estate of Carithers, 156 Cal. 422, 105 Pac. 127. The evidence regarding the conduct of Gould and Mrs. Sawyer had no tendency to establish the exercise of such pressure. There is not a particle of evidence tending to show that either of them ever made any suggestion to Mrs. Kilborn regarding the dispositions to be made by her will. It should be observed, in this connection, that Mrs. Sawyer received nothing under the will; nor did Gould take beneficially thereunder. The fact that he was named as executor and trustee is not sufficient to raise a presumption of undue influence. Livingston's Appeal, 63 Conn. 78, 26 Atl. 470.

[10] The declarations of the testatrix that she intended to leave her property to the contestant were admissible only to show the relations between the two, and the state of Mrs. Kilborn's mind, with reference to the daughter. Estate of McDevitt, 95 Cal. 17, 30 Pac. 101; Estate of Arnold, 147 Cal. 583, 82 Pac. 252. Where unsoundness of mind is not shown, such declarations, not a part of the res gestæ, are entitled to little or no weight, "in the absence of proof of influence as to the very testamentary act." Estate of McDevitt, supra; Estate of Langford, supra.

[11] "Undue influence," says this court in Estate of Ricks, 117 Pac. 539, "consists in the exercise of acts or conduct by which the mind of the testator is subjugated to the will of the person operating on it; some means taken or employed which have the effect of overcoming the free agency of the testator, and constraining him to make a disposition of his property contrary to and different from what he would have done, had he been permitted to follow his own inclination or judgment." And, as has frequently been pointed out, "the undue influence which will avoid a will must be such as operates upon the mind of the testator at the time of making the will, and must be an influence relating to the will itself." In re Kaufman, 117 Cal. 288, 49 Pac. 192, 59 Am. St. Rep. 179; Estate of McDevitt, 95 Cal. 17, 30 Pac. 101; Estate of Langford, 108 Cal. 608, 41 Pac. 701; Estate of Calkins, 112 Cal. 296, 44 Pac. 577; In re Wilson, 117 Cal. 262, 49 Pac. 172, 711; Estate of Donovan, 140 Cal. 390, 73 Pac. 1081; Estate of Higgins, 156 Cal. 257, 104 Pac. 6.

The existence of undue influence may, no doubt, be shown by circumstantial evidence, but such evidence must "do more than raise a suspicion. It must amount to proof, and such evidence has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator." McDevitt's Estate, supra; Estate of Calkins, supra; Estate of Langford, supra.

[12] The only testimony in this case bearing upon the making of the will itself tended to show that Mrs. Kilborn sent for Mr. Gould and directed him to draw a will for her; that she had theretofore prepared memoranda, and from these memoranda instructed Mr. Gould as to her wishes; that Gould then returned to his office, where he dictated the will; that, after the will was written, he brought it back and read it to Mrs. Kilborn, who then executed it in the presence of the two witnesses. As against this positive testimony, the mere suspicions raised by what may be termed peculiar conduct on the part of Mrs. Sawyer and Gould, together with evidence of declarations by the testatrix that she intended to leave all her property to her daughter, cannot be sufficient to overthrow the testamentary act. It is urged by the respondent that Gould, as a witness, was impeached to such an extent as to authorize the jury to disregard his testimony altogether. But the result of this was, at most, to leave the jury without any evidence, one way or the other, on the question of influence or pressure exerted on the testatrix at the time of the making of the will. The burden of proving undue influence is on the contestant, and this burden was not sustained in the case at bar.

[13] It is, perhaps, hardly necessary to say, as this court has said before, that "the right to dispose of one's property by will is most solemnly assured by law, and is a most valuable incident to ownership, and does not depend upon its judicious use." Estate of McDevitt, supra. While the inequitable character of a will may be considered, if linked with other evidence tending to show undue influence, the court should not permit a jury to set aside a will "merely upon suspicion, or because it does not conform to their ideas of what was just and proper." Id.; Estate of Langford, supra. But if the justice and propriety of Mrs. Kilborn's will were a question for consideration here, the record as a whole furnishes strong support to the contention of appellant that the trust provision, which was the feature of the will most objectionable to the contestant, was based upon

reasons which were sound and substantial, or may well have appeared so to the mind of the testatrix. There is considerable evidence in the record tending to show that Mrs. Kilborn and her husband had both been strongly opposed to the connection of the contestant with the "Forward Movement"; that they distrusted certain people in active control of that movement, and feared that the daughter, if given the absolute control of the estate, would be induced to part with it in the interest of these persons. A very reasonable inference is that the will was framed as it was with the design of protecting, rather than injuring, the contestant. It was shown that in November, 1905, Mrs. Kilborn had executed a prior will, in which a trust provision very similar to that here found was incorporated. A codicil, executed in February, 1907, reaffirmed this will in these particulars. There is not the slightest suggestion that either the prior will or the codicil thereto was induced or procured to be made by the influence of Gould, or that Mrs. Sawyer had any connection whatever with the execution of these instruments. Under these circumstances, the finding that the will of September, 1907, containing virtually the same provisions, was procured by undue influence is so contrary to the inherent probabilities of the case that, in order to sustain it, the respondent should be able to point, either to direct proof of the exercise of such influence, or to evidence of circumstances pointing strongly and persuasively in that direction. But, as we have already said, the record contains no such proof or evidence.

In view of our conclusions on the main question discussed by us, the appellant's further assignments of error do not require consideration.

The order denying a new trial is reversed.

We concur: ANGELLOTTI, J.; SHAW, J.

(162 Cal. 1)

McDOUGALD v. SOUTHERN PAC. R. CO.

(Sac. 1,910.)

(Supreme Court of California. Jan. 8, 1912.)

1. EMINENT DOMAIN (§ 303*)—INJURIES TO LAND—DAMAGES.

Where, in an action for injury to land, caused by the building of a railroad and drawbridge, the injury to the plaintiff is of a permanent character, she may recover in one action, not only the damages which have accrued up to the time of the action, but also all reasonably certain to accrue in the future.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 815–817; Dec. Dig. § 303.*]

2. EMINENT DOMAIN (§ 303*)—INJURY TO LAND—DAMAGES.

In an action for the recovery of damages to land from the building of a railroad and drawbridge thereon, the measure of damages is the difference between the value of the entire parcel as it was before the defendant took possession and its value immediately after the works of the defendant were completed, taking into consideration all the probable injurious consequences to the land not taken, so that findings of value, based upon evidence of the value of the land, at the time of the trial, as it would be without the structures, and as it really was, were insufficient to support a judgment.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 815–817; Dec. Dig. § 303.*]

3. DEEDS (§ 38*) — FORM AND REQUISITES — DESCRIPTION OF LAND.

Where, in an action for injury to land, the description of the land in the muniments of title is so explained by the evidence that the location of the land can be easily ascertained by a proper survey, the description is sufficient.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 65–79; Dec. Dig. § 38.*]

Department 1. Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Action by Carrie B. McDougald against the Southern Pacific Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

See, also, 9 Cal. App. 236, 98 Pac. 685.

George F. Buck, for appellant. Budd & Van Vranken, for respondent.

SHAW, J. The defendant appealed from the judgment within 60 days after it was rendered, and presents the evidence by a bill of exceptions.

The plaintiff is the owner of a block of land 303 feet square, situated just outside of the city of Stockton and bordering upon Mormon channel. In April, 1903, the defendant constructed its railway and a drawbridge across Mormon channel, and ever since that time it has operated and maintained the same. The embankment and approach to the bridge occupies a space about 14 feet wide and 22 feet long of the plaintiff's land. Defendant took possession of the land and made said improvements without the plaintiff's permission, against her will, and without compensating her therefor. As a basis for damages, plaintiff alleges that, prior to the defendant's entry, said block of land was worth $10,000; that by reason of the railway and drawbridge thereon the value of the land has depreciated to the amount of $9,000, for which she asked judgment.

The trial took place on November 30, 1909, more than six years after the construction of the railway and drawbridge complained of. The court found that at the time of the trial the plaintiff's land would have been worth $3,000 but for the said railway and drawbridge, and that by reason thereof the value at that time was only $1,800. Upon this basis, judgment was given for plaintiff for $1,200 as damages. There is no finding as to the value of the land at any other period than the time of the trial, and no evidence was introduced relating to any other period. The evidence all referred to the values at the time of the trial, and it was all introduced over the objection of defendant, that the value at that time was irrelevant and immaterial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1, 2] These findings are insufficient to support the judgment. The land was taken by the defendant for the public use of operating thereon a public railway. It was permanently appropriated to that use. The injury to the plaintiff is of a permanent character. This suit for compensation ratifies the taking for that use. See Jeffersonville, M. & I. R. Co. v. Esterle, 13 Bush (Ky.) 667. For such injuries, the plaintiff may recover in one action, not only the damages occasioned up to the time the action was begun, but also all that she can then show with reasonable certainty that she will suffer in the future. But all this is necessarily given to her if she receives as damages the difference between the value of the entire parcel as it was just before the defendant took permanent possession, and its value immediately after the works of the defendant were completed and put in operation, taking into consideration all the injurious consequences to the part of the land not taken reasonably probable from such works and the operation thereof and from the severance of the land taken. This is the rule laid down in Muller v. Southern Pacific R. R. Co., 83 Cal. 243, 23 Pac. 266, a case in all respects similar to the present one. The court said: "We are inclined to think in this case the difference between the value of the lot when the defendant entered to construct its road and the value when the road was completed will show what the plaintiff is entitled to recover." See, also, 4 Suth. on Dam. § 1047; Jeffersonville, etc., Co. v. Esterle, 13 Bush (Ky.) 676. The rule followed by the court below would allow plaintiff the benefit of the general advance in value from all causes. There is some evidence indicating that the value at the time of the trial had been enhanced by independent causes arising long after the taking by the defendant. This cause had been previously tried, and from the judgment the defendant appealed. The appeal was heard in the District Court of Appeal for the Third District. 9 Cal. App. 236, 98 Pac. 685. In that case it was held that the value of the property at the first trial, four years after the injury, was not sufficient to show its value at the time of the injury. Much more is this true at a period nearly seven years after the injury. The evidence should have been confined to the damage, present and prospective, based upon the values existing immediately before and immediately after the construction of the railway and drawbridge. Because of this error, the judgment must be reversed.

[3] The defendant claims that the description of plaintiff's land in her muniments of title is so uncertain that they are void; and hence that no title was proven. The description is as follows: "One city block between Main and Market streets produced, being the second block west of Tule street in the city of Stockton." The evidence showed that Stockton is laid out on a regular plan, in blocks 303 feet square, between which are streets running north and south 80.8 feet wide, and streets running east and west 60.6 feet wide. Main and Market streets run east and west one block apart. Tule street, now Edison street, runs north and south. From this evidence of explanatory facts, it is plain that the land in question is a block 303 feet square, situated between the produced lines of Main and Market streets; the east line of said block being 383.8 feet west of the west line of Tule street aforesaid. Its location could therefore be easily ascertained by a proper survey.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

162 Cal. 36

BARBOZA v. PACIFIC PORTLAND CEMENT CO., Consolidated.

(Sac. 1,906.)

(Supreme Court of California. Jan. 11, 1912.)

1. Railroads (§ 400*)—Persons Liable for Injuries—Companies Using Track of Another—Question for Jury—Signals and Lookouts.

On the evidence, in an action by the administrator of a laborer, who, while employed by a railroad company, was killed by defendant's train while running on the railroad company's track to reach its own spur track, *held*, that whether regard for the safety of laborers on the track required the defendant to give warning by ringing a bell or blowing a whistle or keeping a lookout was a question for the jury.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 400.*]

2. Railroads (§ 370*)—Injuries to Persons on Track—Companies Using Tracks of Others—Switching Yards—Signals.

The rules as to the necessity of giving warning of an approaching train by whistles or otherwise do not always apply to engines and cars which are being moved about the tracks of railroad yards while switching.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1263; Dec. Dig. § 370.*]

3. Railroads (§ 400*) — Injuries — Companies Using Tracks of Others—Question for Jury—Contributory Negligence.

On the evidence, in an action by the administrator of a laborer, who, while employed by a railroad company, was killed by defendant's train while running on the railroad company's track to reach its own spur track, *held*, that the question of the decedent's contributory negligence was for the jury.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1377–1380; Dec. Dig. § 400.*]

4. EXECUTORS AND ADMINISTRATORS (§ 23*)—APPOINTMENT—POWER OF COURT—REMOVAL OR RESIGNATION OF FORMER ADMINISTRATOR.

The court has no power to appoint an administrator until a former administrator has been removed or his resignation accepted, so that the office has become vacant.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 128–131; Dec. Dig. § 23.*]

5. EXECUTORS AND ADMINISTRATORS (§ 23*)—APPOINTMENT—REMOVAL OR RESIGNATION OF FORMER ADMINISTRATOR—STATUTORY PROVISIONS.

Under Code Civ. Proc. § 1427, which allows an administrator to resign, having first settled his accounts and delivered all the estate to the person appointed to receive it, and authorizing the court before final settlement to appoint an administrator in his stead, it is not necessary that the resignation of the former administrator must have been accepted before the filing of a petition for appointment of a successor, but it is only required that the accounts of the prior administrator shall have been settled and his resignation accepted at the time the second appointment is made.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 128–131; Dec. Dig. § 23.*]

6. TRIAL (§ 96*)—EVIDENCE—MOTION TO STRIKE OUT—EVIDENCE ADMISSIBLE IN PART.

Where a witness in an action by a personal representative of a person alleged to have been killed through defendant's negligence gave competent testimony of his own knowledge that deceased had been married, and that at one time there were a wife and children, and afterwards testified to information as to the same matter, a motion to strike out all of his testimony on the ground that it was hearsay was properly denied.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 248; Dec. Dig. § 96.*]

7. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE—FACTS OTHERWISE ESTABLISHED.

On appeal the Supreme Court will not consider an objection to the exclusion of evidence which is admitted later in the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200–4206; Dec. Dig. § 1058.*]

8. RAILROADS (§ 397*)—INJURIES TO PERSON ON TRACK—EVIDENCE—CUSTOM.

In an action for damages by the personal representative of a person alleged to have been killed by being struck by a car alleged to have been negligently operated by defendant, evidence as to whether it was customary to have air brakes on all the cars was properly excluded.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1344–1355; Dec. Dig. § 397.*]

9. DEATH (§ 68*)—ACTION—EVIDENCE—HABITS OF DECEASED.

In an action for the death of plaintiff's decedent alleged to have been caused by defendant's negligence in operating a train, evidence that the deceased was not addicted to drink and that he did not gamble was admissible, as bearing upon the value of his life to his wife and children.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 86, 87; Dec. Dig. § 68.*]

10. APPEAL AND ERROR (§ 1046*)—HARMLESS ERROR—CONDUCT AND REMARKS OF JUDGE—LIABILITY OF DEFENDANT.

In an action to recover for defendant's alleged negligence in causing the death of plaintiff's decedent while at work upon a railroad, in which the engineer of the train was asked by defendant why he had not rung a bell, and answered that it was not customary, to which plaintiff objected, and the trial judge said, "It seems to me without authority that it would be proper to ring a bell, and, if the bell was not rung passing through that gang of workmen, it would be negligence. If the court held differently, all right. I am with the court if it does"—but the court later altered its view and permitted the engineer to testify that a bell signal was not customary. *Held*, that the remarks of the trial judge were not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4134; Dec. Dig. § 1046.*]

Department 1. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by Joseph Barboza, administrator of the estate of Caesar Augustus, deceased, against the Pacific Portland Cement Company, Consolidated. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank R. Devlin, for appellant. Harvey & Goodman and Ambrose Gherini, for respondent.

SLOSS, J. The plaintiff, suing as administrator of the estate of Cæsar Augustus, brought this action to recover damages for the alleged negligent killing of his intestate. The trial resulted in a verdict and judgment in favor of the plaintiff for $2,500. The defendant appeals from the judgment, and from an order denying its motion for a new trial.

The defendant corporation was engaged in the manufacture of cement. Its plant, which was located at a point called Cement, was connected by a spur line or track with the main railroad line of the Southern Pacific Company, the point of junction being at the station of Tolenas, in Solano county. The defendant operated a train of cars between Cement and Tolenas. The deceased, Augustus, was a laborer employed by the Southern Pacific Company. He was engaged in repairing the track near Tolenas station, when he was struck and killed by defendant's train, which was made up of a number of cars propelled from the rear by a locomotive.

The complaint was in five counts, each of which set up a separate charge of negligence. Among these were averments that the defendant negligently backed its train over Augustus at a high rate of speed without giving him any warning; that it negligently failed to ring a bell or blow a whistle; and that it negligently failed to maintain air brakes on the train of cars.

There was evidence tending to show this state of facts. Augustus, who was one of a gang of several men working under the direction of a foreman, was engaged in driving spikes. He was standing midway between the two rails with his back to the defendant's train. So far as the evidence shows, the position thus occupied by him was proper for the accomplishment of the work being done. The defendant's train, which was not running on schedule time, had come from Cement, passing, on the way, the men at work on the spur track near the station. This spur turned into the direct line of the Southern Pacific at a point some 200 feet west of the station building and freight platform at Tolenas. Beyond the station there were various switches and tracks running some hundreds of feet to the east of the freight platform. The train passed through to the easterly end of the yard, and after switching from track to track, picking up empty cars, came back to the station and stopped there. The engineer then started his train westward, propelling the train of cars ahead of his engine onto the track leading to Cement. When he had proceeded some 50 or 60 feet beyond the switch leading to that track and some 250 feet from the station, the car at the head of the train and farthest from the engine struck Augustus. No bell was rung nor was the whistle blown. There was a brakeman on a car next the engine and another on the third car from the forward end of the train. From this position the second brakeman saw that the deceased and the others were in danger and signaled the engineer to stop, but it was then too late to bring the train to a complete standstill in time to prevent the injury. There was evidence that the train, at the time it was bearing down on the deceased, was running at the rate of eight miles an hour. A through train of the Southern Pacific Company was at the same time passing upon the main line track and the noise produced by this through train was, as the jury may have well inferred, sufficient to prevent the men working on the track from hearing the approach of defendant's train. The engineer in charge of the latter had seen the men at work when he had brought his train into Tolenas and knew, or might have known, that they were still at work when he started to return. The point where plaintiff was working was within the limits of the Southern Pacific yard at Tolenas, but it was not at the end of the yard equipped for switching work, or in which the switching was usually done.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] In this state of the evidence we cannot assent to appellant's contention that as matter of law it should be held that the defendant was not guilty of negligence. Whether or not, under all the circumstances, a due regard for the safety of the men on the track required the defendant to give warning of the approach of its train by ringing a bell or blowing a whistle, or by having upon the front car of its train a man who could see persons or objects on the track, were questions of fact to be determined by the jury.

[2] It is no doubt true that the rules with reference to the necessity of giving warning of an approaching train by means of whistles or bells or otherwise are not always applicable to engines and cars which are being moved about the tracks of railroad yards while switching. Aerkfetz v. Humphrey, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758; Crowe v. N. Y. C. R. R., 70 Hun, 37, 23 N. Y. Supp. 1100. But, as we have seen, the point where the train struck Augustus was not within that part of the yard devoted to switching, and the train had completed its switching and had started on its return run to Cement. Furthermore, the noise produced by the passing train was a factor which the jury might well have considered as requiring greater effort to warn persons on the track than would have been required if the conditions had been such that the approach of defendant's train itself might have been more readily heard.

[3] Nor can it be said as matter of law that the deceased was guilty of contributory negligence. A man working upon a railroad track is, of course, bound to take reasonable precautions for his own safety. Knowing that trains are likely to pass, he must use the care which an ordinarily prudent man would exercise to avoid being struck by such train. But what is reasonable care under the circumstances is, like the question of defendant's negligence, primarily to be determined by the jury. The work in which Augustus was employed required that he be in the middle of the track and in a stooping position. Obviously he could not perform his work properly if he were constantly looking to see whether a train was approaching. In view of the further fact that the noise of the passing train interfered with his opportunity of hearing defendant's train, the question whether he was guilty of negligence in not becoming aware of the cars bearing down upon him was properly submitted to the jury.

On the facts bearing upon both these questions—i. e., the negligence of the defendant and the contributory negligence of the plaintiff—the case is very similar to Egan v. Southern Pac. Co., 15 Cal. App. 766, 115 Pac. 939, where the District Court of Appeal held adversely to the contentions of the defendant.

[4] In order to establish his right to sue as administrator, the plaintiff offered in evidence all the papers, records, and files in the matter of the estate of Cæsar Augustus. From these papers it appeared that B. J. Klotz, public administrator of Solano county, was appointed administrator of the estate on October 14, 1909. On February 4, 1910, Klotz filed his final account and tendered his resignation as administrator. On the same day the plaintiff Barboza filed his petition for letters. On February 14, 1910, the court made its order settling the account of Klotz as administrator and accepting his resignation and revoking the letters which had been issued to him. Thereafter, and on the same day, the court heard the petition of

Barboza and made its order appointing him administrator. It is contended by appellant that the appointment of Barboza was void for the reason that at the time his petition was filed there was another administrator duly appointed. It has long been settled in this state that the court has no power to appoint an administrator until a former administrator has been removed or his resignation accepted. Haynes v. Meeks, 20 Cal. 288; Estate of Hamilton, 34 Cal. 464. "The office must first become vacant before a second appointment can be made." Haynes v. Meeks, supra.

[5] But we find no warrant in the statute (Code Civ. Proc. § 1427), or in the decisions for the proposition urged by the appellant, that the resignation of a former administrator must have been accepted before the filing of the petition for appointment of a successor. Indeed, the contrary is at least implied, if not expressly held, in Jennings v. Le Breton, 80 Cal. 8, 21 Pac. 1127. We think all that is required is that the accounts of the prior administrator shall have been settled and his resignation accepted at the time the second appointment is made. These conditions existed here. If it is necessary, under section 1427, that the estate be delivered up by the first administrator before a second can be appointed, it must be presumed, on the record before us, that such delivery was made. Jennings v. Le Breton, supra.

[6] Lewis Roderigues testified that the deceased was married, and had left a widow and two minor children. The witness had not seen the widow or the children for 2½ years. He further testified that he knew that they were alive because the widow had written to him. His cross-examination developed that the widow was unable to write, and that the witness could not read. A motion to strike out all his testimony "in regard to the marriage of the deceased and having children" on the ground that it was hearsay was denied. The ruling was proper. The motion might have been well taken if it had been limited to that part of the testimony relative to the receipt of letters. But the witness had also testified, of his own knowledge, to the fact of marriage and the existence at one time of the wife and children. This testimony was competent, and, as it was included in the general motion to strike out, the court did not err in denying the motion.

[7] The foreman in charge of the section gang was asked, "What is your practice with regard to getting your men off the track when you are working with them? How close do the trains generally come?" The plaintiff's objection to this question was sustained. We need not consider whether this ruling was erroneous, as a reading of the record shows that at a later point the witness gave testimony covering substantially the subject-matter of these questions.

The same observation applies to the ruling sustaining an objection to the following question asked of the same witness: "Isn't it a fact that one of the officials of Cement on the morning of this accident hollered to you, and told you to get your men off the track quicker, or they would get hurt?"

[8] It was not error to refuse to permit the witness White to answer the defendant's question whether it was customary to have air brakes on all the cars. Redfield v. Oakland C. S. R. R. Co., 112 Cal. 224, 43 Pac. 1117.

[9] The plaintiff was permitted to introduce evidence to the effect that the deceased was not addicted to drink, and that he did not gamble. The evidence was competent and pertinent. Taylor v. Western Pac. R. R. Co., 45 Cal. 223. It had some bearing upon the value of the life of Augustus to his wife and children as showing "the extent of his probable usefulness to his beneficiaries." 8 Am. & Eng. Ency. of Law (2d Ed.) 944.

[10] The defendant took exception to certain remarks made by the trial court in the course of a discussion upon the admissibility of testimony. The defendant's counsel had asked the engineer of the train why he had not rung a bell. The answer was: "It was not customary." At this point the plaintiff objected, whereupon the defendant argued to the court that the authorities permitted proof of what was customary. Thereupon the court said: "If you have authorities to that extent, you had better produce them. It seems to me without authority that it would be proper to ring a bell, and, if the bell was not rung passing through that gang of workmen, it would be negligence. If the court held differently, all right. I am with the court if it does." The defendant excepted to the statement "that we are guilty of negligence." Plaintiff's counsel said, "The court did not say that"; and the court added, "It would be taken to be negligence itself." Counsel for appellant then remarked that he felt that such statement might be prejudicial, and the court answered: "Well, I am perfectly willing to take the law, but you are entitled to have your exception." It is argued that in this colloquy the court declared its opinion that the failure to ring a bell constituted negligence, and that this expression was necessarily prejudicial to the appellant. If the record showed nothing further, there might be considerable force in the point. But it appears that, after further argument, the court altered its view and concluded to permit the line of testimony to which objection had been made. The witness was allowed to state that it was not customary to ring a bell or blow the whistle under the conditions existing.

It is apparent from a review of the incident as a whole that, if the court did express any opinion upon the facts, this opinion was merely tentative, and incidental to a discussion upon a question of law presented to it. The court stated what it believed the law to be. At the same time, it showed its readiness to have the authorities presented and to rule in accordance with them. After a fuller discussion, it accepted defendant's views and ruled in its favor. This was a complete withdrawal of any possible intimation that the failure to ring the bell or blow the whistle was negligence. Furthermore, the instructions, which were quite as favorable to the defendant as it had a right to demand, left to the jury the determination of the ultimate question of negligence. Under these circumstances, we do not think the appellant could have been prejudiced by the remarks of the court addressed to counsel and drawn out by the argument upon the admissibility of offered evidence.

No other errors are assigned.

The judgment and the order denying a new trial are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

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161 Cal. 689

LIGHTNER MINING CO. v. LANE et al.

(Sac. 1,657.)

(Supreme Court of California. Dec. 27, 1911. On Rehearing, Jan. 22, 1912.)

1. APPEAL AND ERROR (§ 1002*)—FINDINGS —CONCLUSIVENESS—CONFLICTING EVIDENCE.

The jury's finding of facts upon conflicting evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

2. MINES AND MINERALS (§ 51*)—CONVERSION OF ORE—TITLE TO SUSTAIN ACTION—POSSESSION—VENDEE UNDER ESCROW DEED.

Plaintiff agreed to purchase a mine from the owner under an agreement providing that payment should be made out of the proceeds of the mine and sale of plaintiff's capital stock, and that it should take possession and work the mine for that purpose, and the deed was deposited in escrow to be delivered to plaintiff when the price was paid, but the agreement was subject to cancellation upon plaintiff's failure for three months to perform any covenant in the contract. *Held*, that plaintiff could, before delivery of the escrow deed to it, maintain an action for the value of ore wrongfully taken from the mine.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 51.*]

3. TRESPASS (§ 20*)—TRESPASS TO REALTY—TITLE TO SUSTAIN ACTION—POSSESSION.

One in actual possession may maintain an action for trespass to realty as against one not claiming title in himself or claiming under the real owner.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 32-47; Dec. Dig. § 20.*]

4. VENDOR AND PURCHASER (§ 218*)—TRESPASS BY THIRD PERSON — ACTION BY VENDEE.

One in possession of realty under an agreement to convey to him may maintain an action against a stranger for a trespass which removes the substance of the land.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 456; Dec. Dig. § 218;* Trespass, Cent. Dig. § 24.]

5. LIMITATION OF ACTIONS (§ 100*)—DISCOVERY OF CAUSE OF ACTION—FRAUD.

In every case, irrespective of any exceptions in the statute, the fraudulent concealment of the facts on which the cause of action depends stays the running of the statute until the discovery of such facts, and trespassing in an underground mine upon another's land and secretly extracting ore therefrom necessarily constituted a fraud, making the statute of limitations run from the actual discovery of the fraudulent trespass, and not from the taking of the ore.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480-493; Dec. Dig. § 100.*]

6. STATUTES (§ 225¾*)—CONSTRUCTION—RE-ENACTED STATUTE.

Where a statute is re-enacted in the same language after it has been construed by the courts, the re-enacted statute is presumed to have the same effect as the former statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 306; Dec. Dig. § 225¾.*]

7. LIMITATION OF ACTIONS (§ 197*)—FRAUDULENT CONCEALMENT OF CAUSE OF ACTION—EVIDENCE.

Evidence in an action to recover the value of ore extracted by defendant from plaintiff's mine by trespassing underground across the boundary line *held* to show that both the taking and concealment thereof were fraudulent, so that plaintiff was not put upon inquiry as to the trespasses as affecting the running of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 197.*]

8. LIMITATION OF ACTIONS (§ 100*) — RUNNING OF LIMITATIONS—ACCRUAL OF ACTION —FRAUD—DISCOVERY.

Code Civ. Proc. § 338, subd. 4, providing that the cause of action where relief is sought on the ground of fraud shall not be deemed to have accrued until the discovery of the fraud by the aggrieved party, applies to all actions for relief against fraud, whether legal or equitable, so that an action for the value of ore extracted from plaintiff's mine would not accrue until after the discovery of the fraudulent taking of the ore.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480-493; Dec. Dig. § 100.*]

9. LIMITATION OF ACTIONS (§ 187*)—PLEADING LIMITATIONS—FRAUD.

In an action for the value of ore fraudulently extracted from plaintiff's mine, the fraudulent concealment of the conversion of the ore could be proven without being pleaded for the purpose of staying the running of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 696; Dec. Dig. § 187.*]

10. LIMITATION OF ACTIONS (§ 100*)—STAYING OF LIMITATIONS—FRAUD—FRAUD BY AGENT.

The fraud of an agent will be imputed to his principal for the purpose of preventing the running of limitations in favor of the principal, irrespective of whether he knew thereof.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 487; Dec. Dig. § 100.*]

11. MINES AND MINERALS (§ 51*)—CONVERSION OF ORE — MEASURE OF DAMAGES — "HIGHEST MARKET VALUE."

Civ. Code, § 3333, provides that the measure of damages for breach of an obligation not arising from contract is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not, and section 3336 provides that the detriment caused by the wrongful conversion of personalty is presumed to be the value of the property at the time of the conversion with interest, or, where the action has been prosecuted with reasonable diligence, its highest market value at any time between the conversion and the verdict without interest at plaintiff's option. *Held*, that the "highest market value" allowed by the statute meant its subsequent value in the condition it was at the time of the conversion, so that, in an action for damages for the conversion of ore by underground trespassing on plaintiff's land, plaintiff could not recover the value of the ore after the cost of milling it had been added, but only its value when mined and commingled with defendant's ore, though the conversion was intentional by defendant's agents; the circumstances not authorizing punitive damages.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 51.*]

12. Damages (§ 92*)—Exemplary Damages—Acts of Agent.

Exemplary damages cannot be awarded against a principal for his agent's fraud, unless he authorized it or ratified it with knowledge.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 208; Dec. Dig. § 92.*]

13. Master and Servant (§ 330*)—Wrongful Acts of Employés—Ratification—Evidence.

Evidence, in an action for the value of ore fraudulently extracted from plaintiff's mine by underground trespasses *held* not to show that defendant knew of the trespasses by his employés, or subsequently ratified them.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 330.*]

14. Master and Servant (§ 308*)—Wrongful Acts of Employé—Ratification by Master—Defending in Litigation.

Mineowners did not ratify the wrongful acts of their employés in trespassing and converting plaintiff's ore by denying in good faith the allegations of the complaint alleging the conversion and failure to investigate the question after service of the complaint upon them.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1234; Dec. Dig. § 308.*]

15. Appeal and Error (§ 1068*)—Review—Harmless Error—Instructions.

While an instruction in an action for the value of ore extracted from plaintiff's mine by underground trespasses that limitations did not begin to run when the trespass was committed, but from the discovery thereof, or from the time when the injured party might have discovered it by exercising ordinary care, was erroneous for omitting the elements of secrecy and fraud in the trespass and the fraudulent concealment thereof, the error was not prejudicial to defendant, where the jury found that the trespass was fraudulent, and was fraudulently concealed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225–4230; Dec. Dig. § 1068.*]

16. Confusion of Goods (§ 13*)—Application of Doctrine—Evidence.

Where defendants made secret underground trespasses across the boundary into plaintiff's mines and secretly extracted ore from plaintiff's mine, and indistinguishably commingled it with ore from their own mine, the doctrine of confusion of goods would apply, though the ore was commingled by defendants' employés without their actual knowledge, so that the burden was upon defendant, in an action for the value of the ore converted to show how much thereof was extracted before plaintiff purchased and took possession of its mine, and how much was taken thereafter.

[Ed. Note.—For other cases, see Confusion of Goods, Dec. Dig. § 13.*]

17. Confusion of Goods (§ 13*)—Evidence as to Ownership—Burden of Proof.

The burden is upon the person wrongfully causing a confusion of goods to distinguish his own property.

[Ed. Note.—For other cases, see Confusion of Goods, Dec. Dig. § 13.*]

18. Trespass (§ 47*)—Compensatory Damages—Willful Trespass.

The right to recover compensatory damages for a trespass is not affected by the fact that it was not willful.

[Ed. Note.—For other cases, see Trespass, Dec. Dig. § 47.*]

19. Appeal and Error (§ 1068*)—Review—Harmless Error—Instructions.

In an action for the value of ore extracted by underground trespasses, error in an instruction that plaintiff's right to recover was not affected by the fact that the trespass was not willful is rendered harmless by reducing the judgment so as to allow actual compensation, as the instruction was prejudicial only in the event that punitive damages were allowed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4228; Dec. Dig. § 1068.*]

20. Appeal and Error (§ 1151*)—Modification—Curing Excessive Recovery.

Error in instructions, in an action for the value of ore extracted by underground trespasses, that every entry by a mineowner upon an adjoining mine is presumed to be willful because one is presumed to know his own boundaries, and an instruction that, in case of willful trespass, defendants were not entitled to deduct the cost of mining and milling, was rendered harmless by reducing on appeal the damages allowed to actual damages for the value of the gold after deducting the cost of mining and milling.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498–4506; Dec. Dig. § 1151.*]

21. Appeal and Error (§ 1140*)—Disposition—Reversal—Necessity.

Where the errors found on appeal require that plaintiff's recovery of punitive damages be disallowed, plaintiff should be given an opportunity to accept the reduced verdict without reversal on account of errors in instructions on the question of punitive damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4462–4478; Dec. Dig. § 1140.*]

In Bank. Appeal from Superior Court, Calaveras County; A. I. McSorley, Judge.

Action by the Lightner Mining Company against C. D. Lane and others. From a judgment for plaintiff and an order denying a motion for a new trial, defendants appeal. Affirmed as modified, if plaintiff accepts a reduced amount; otherwise reversed.

Solinsky & Wehe and Page, McCutchen & Knight, for appellants. Lindley & Eickhoff and Frank D. Nichol, for respondent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

SHAW, J. This is an action by the owner of a mine against the owners of an adjoining mine to recover the value of certain ore alleged to have been extracted by the defendants from the mine of the plaintiff.

The plaintiff claims the ownership of a mine known as the "Lightner mine." The defendants are the owners of the Utica mine, which adjoins the end line of the Lightner mine, and lies southeasterly of it. The vein is about 80 feet thick and extends from the southeast to the northwest through both claims. The ore was taken by the defendants at the depth of 525 feet below the surface by means of a shaft sunk on the Utica mine. From that shaft two crosscuts were made to the vein, one at a depth of 425 feet and the other at 525 feet, striking the vein about 288 feet from the division line between the two mines. Drifts were then run along the vein from each of these crosscuts to the division line. The upper drift is called the "No. 2 level"; the lower drift the "No. 3 level." The No. 3 level was extended some 42 feet over the line into the Lightner mine, and the No. 2 level some 13 feet over the line. More than 12,000 tons of the ore of the Lightner mine were then taken by the defendants and converted to their own use. The object of the action was to recover the value of this ore.

[1] 1. The plaintiff did not obtain possession of the Lightner mine, nor any right or interest therein, until November 21, 1896. The defendants claim that there is no evidence that any of the ore in question was extracted by the defendants after that date, and hence that no damage accrued to the plaintiff. This claim is without support. The fact that the body of ore above mentioned was taken at some time by the defendants from the Lightner mine through the drift extending into it from the underground workings of the Utica mine was established beyond all reasonable doubt. V. W. Miller, who was the foreman in charge of the work in the Utica mine from October, 1893, to October 24, 1897, testified that the ore between levels 2 and 3 in the Utica mine was stoped out during that period; that the north wall, next to the Lightner mine, was carried up perpendicular from No. 3 level; and that "the north line of that stope was entirely within the Utica boundary line given to us." He was a witness for the defendant. Other witnesses for the defendant gave similar testimony. It was shown also that the boundary line had been correctly given to them and was marked on the wall of level No. 2. If the jurors believed this testimony, as they had the right to do, they could come to no other conclusion than that the extension of the excavation into the Lightner mine was made after the completion of the stopes described by Miller, that is after October, 1897. Many other circumstances which we need not here rehearse, corroborated this conclusion. It is true there was other testimony tending to prove that this ore was taken out as long ago as 1893 or 1894, but it was for the jury to determine the fact from the conflicting evidence, and their decision, in such cases, is conclusive on appeal.

[2] 2. It is next contended that the plaintiff had no interest in the Lightner mine sufficient to give it the right to sue for the value of ore extracted therefrom. Prior to November 21, 1896, and on that date, Alice L. Eastland was the owner in fee of the mine. On that day a written agreement between her and the plaintiff was executed by them. Thereby she agreed to sell said mine to the plaintiff at the price of $100,000, of which $50,000 was to be paid by the plaintiff out of half of the gross proceeds of the mine after the year 1897, and the other $50,000 out of sales of plaintiff's capital stock. It further provided that plaintiff should diligently proceed to sink a shaft thereon to the depth of five hundred feet and erect hoisting works thereat, that it should have the right to take and hold possession of the mining claim and to mine ore therefrom, and that it should work the mine diligently until the price was fully paid. It also stated that a deed of conveyance of the mine from Mrs. Eastland to the Lightner Mining Company was on the same day signed and acknowledged by her and deposited in escrow with a third person, and that the same was to be delivered to the company upon payment of the purchase price. The deed was signed and delivered in escrow, as stated, and the plaintiff immediately took complete possession of the mine under the agreement. It has been in exclusive possession thereof ever since, and has proceeded to develop and work it. The deed was not delivered out of escrow until September 2, 1902, which was after this action was begun. A clause of the agreement provided that, if the vendee at any time failed for three months to perform any covenant therein, the vendor, after 10 days notice, might cancel the contract and take possession of the mine. No such default occurred.

[3] It is a well-settled proposition that the proper party plaintiff in an action for trespass to real property is the person in actual possession. No averment of title in plaintiff is necessary. 1 Chitty, Pl. 63; Heilbron v. Heinlen, 72 Cal. 371, 14 Pac. 22; Strohlburg v. Jones, 78 Cal. 383, 20 Pac. 705; Pollock v. Cummings, 38 Cal. 685; Uttendorfer v. Saegers, 50 Cal. 497; Raffeto v. Fiori, 50 Cal. 363; McDonald v. Bear River, etc., Co., 13 Cal. 230. The person in possession can recover no damages for injuries, "except such as affect his own right, unless he holds in such relation to other parties interested that his recovery will bar their claim." 4 Suth. Dam. § 1012. A defendant who is a mere stranger to the title will not be allowed to question the title of a plaintiff in possession of the land. It is only where the

trespasser claims title himself, or claims under the real owner, that he is allowed to attack the title of the plaintiff whose peaceable possession he has disturbed. 21 Ency. of Pl. & Pr. 834.

[4] One who is in possession under an agreement to convey giving him the right of possession may maintain an action against a stranger to the title for a trespass which consists of the removal and conversion of the substance of the estate. Hunt v. Taylor, 22 Vt. 556; Miller v. Zufall, 113 Pa. 325, 6 Atl. 350; Interlied v. Whaley, 65 Hun, 407, 20 N. Y. Supp. 183; McFeters v. Pierson, 15 Colo. 201, 24 Pac. 1076, 22 Am. St. Rep. 388; Irvin v. Patchen, 164 Pa. 51, 30 Atl. 436. He may even recover of his vendor for injuries amounting to waste, committed upon the premises after such delivery of possession. Worrall v. Munn, 53 N. Y. 185.

The plaintiff in this case was rightfully in possession under the agreement of sale from Mrs. Eastland. The defendants do not claim title, possession, or right of possession. Under the contract, the plaintiff had the right at any time to take this ore. It follows that, since the defendants have taken it, the plaintiff may recover its value, and payment therefor to the plaintiff would protect defendants against any claims of the vendor. Furthermore, after the action was begun and before the trial, the equitable title of the plaintiff became a perfect title in fee by the final delivery of the deed. Consequently the defect of title at the time the action was begun could not possibly have worked any injury to the defendants.

[5] 3. The defendants next claim that the action is barred by the statute of limitations, particularly by section 338 of the Code of Civil Procedure. The action was commenced on July 10, 1902. The jury found specially that the ore for which the recovery was allowed was removed from the plaintiff's mine by defendants prior to July 1, 1899. By subdivision 2 of section 338, in connection with section 312, it is provided that "an action for trespass upon real property" is barred unless it is commenced within three years after the cause of action shall have accrued.

The plaintiff insists that an exception exists in cases where the trespass is fraudulently concealed by the perpetrator from the knowledge of the owner of the land, and that in such cases the period of limitation does not begin to run until the aggrieved party discovers the trespass, or with reasonable diligence might have discovered it. It is also contended that the case, as made by the pleadings and the findings of the jury, does not fall strictly within the class described in subdivision 2 of section 338, but that it is governed by subdivision 4, which reads as follows: "(4) An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." The plaintiff did not discover the trespass, nor did it have any reasonable means of making such discovery until June 1, 1901, when its own workings encountered the wrongful excavation of the defendants. It was the settled rule in actions at law that the plaintiff's mere ignorance of the existence of the injury complained of, or of the facts constituting such injury, or of the identity of the person liable therefor, until the period of limitation had passed, will not prevent the running of the statute. This rule has been followed in this state in several cases in which the point that there was fraud involved in the cause of action itself, or a fraudulent concealment thereof, was not raised or considered. Gale v. McDaniel, 72 Cal. 334, 13 Pac. 871; People v. Melone, 73 Cal. 574, 15 Pac. 294; Paige v. Carroll, 61 Cal. 211; Lattin v. Gillette, 95 Cal. 317, 30 Pac. 545, 29 Am. St. Rep. 115; Lambert v. McKenzie, 135 Cal. 100, 67 Pac. 6. In the last-mentioned case the court said: "It is not true that, where damages result from negligence, the cause of action arises upon the date of the discovery of the negligence, or of the negligent person. It is the date of the act and fact which fixes the time for the running of the statute. * * * And so throughout the law, *except in cases of fraud*, it is the time of the act, and not the time of the discovery, which sets the statute in motion." Italics ours.

But in actions at law, where the party liable had fraudulently concealed the injury, or the essential facts thereof, from the party injured, there has been a great diversity of opinion on this question in the courts of this country and of England. The following cases hold that the period of limitation runs from the date of the commission of the injury, or of the acts from which it flows, notwithstanding such fraudulent concealment thereof: Somerset Co. v. Veghte, 44 N. J. Law, 511; Troup v. Smith, 20 Johns. (N. Y.) 43; Leonard v. Pitney, 5 Wend. (N. Y.) 30; Allen v. Mille, 17 Wend. (N. Y.) 202; Fee v. Fee, 10 Ohio, 469, 36 Am. Dec. 103; Howk v. Minnick, 19 Ohio St. 462, 2 Am. Rep. 413; Atchison, etc., Ry. Co. v. Atchison Grain Co., 68 Kan. 585, 75 Pac. 1051; Cocke v. McGinnis, 8 Tenn. 361, 17 Am. Dec. 809; Callis v. Waddy, 16 Va. 511; Clarke v. Reeder, 1 Speer (S. C.) 398; Franklin v. Waters, 8 Gill (Md.) 322; Barnes v. Williams, 25 N. C. 481; Imperial G. Co. v. London G. Co., 10 Exch. 39; Hunter v. Gibbons, 1 Hurl. & Nor. 459; Brown v. Howard, 2 Brod. & Bing. 23.

The following declare that such fraudulent concealment delays the running of the statute until the injured party discovers, or with reasonable diligence might have discovered, the facts constituting the injury and cause of action: Porter v. Smith, 65 Ala. 169; Snodgrass v. Bank, 25 Ala. 161, 60 Am.

Dec. 505; Tillson v. Ewing, 87 Ala. 350, 6 South. 276; Moses v. Taylor, 6 Mackey (D. C.) 281; Traer v. Clews, 115 U. S. 537, 6 Sup. Ct. 155, 29 L. Ed. 467; Rosenthal v. Walker, 111 U. S. 185, 4 Sup. Ct. 382, 28 L. Ed. 395; Bailey v. Glover, 88 U. S. 346, 22 L. Ed. 636; Sherwood v. Sutton, 5 Mason, 143, Fed. Cas. No. 12,782; Campbell v. Vining, 23 Ill. 525 (Reprint Ed. 473); Cook v. Chicago, etc., Co., 81 Iowa, 551, 46 N. W. 1080, 9 L. R. A. 764, 25 Am. St. Rep. 512; Carrier v. Chicago, etc., Co., 79 Iowa, 86, 44 N. W. 203, 6 L. R. A. 799; District v. French, 40 Iowa, 601; First Mass. T. Ass'n v. Field, 3 Mass. 201, 3 Am. Dec. 124; Homer v. Fish, 1 Pick. (Mass.) 438, 11 Am. Dec. 218; Welles v. Fish, 3 Pick. (Mass.) 75; Shelby Co. v. Bragg, 135 Mo. 298, 36 S. W. 600; State v. Hawkins, 103 Mo. App. 255, 77 S. W. 98; Bowman v. Sanborn, 18 N. H. 206; Way v. Cutting, 20 N. H. 190; Quimby v. Blackey, 63 N. H. 77; McDowell v. Potter, 8 Pa. 190, 49 Am. Dec. 503; Campbell v. Boggs, 48 Pa. 524; Morgan v. Tener, 83 Pa. 305; Lewey v. Frick Co., 166 Pa. 536, 31 Atl. 261, 28 L. R. A. 283, 45 Am. St. Rep. 684; Reynolds v. Hennessy, 17 R. I. 177, 20 Atl. 307, 23 Atl. 639; Munson v. Hollowell, 26 Tex. 478, 84 Am. Dec. 582; Ripley v. Withee, 27 Tex. 17; Anding v. Perkins, 29 Tex. 348; Texas, etc., Ry. Co. v. Gay, 86 Tex. 608, 26 S. W. 599, 25 L. R. A. 52; Texas, etc., Ry. Co. v. Gay, 88 Tex. 115, 30 S. W. 543; Bulli G. M. Co. v. Osborne (1899) L. R. App. Cas. 351.

The leading cases in favor of the running of the statute in the foregoing list are Troup v. Smith, Somerset Co. v. Veghte, and Clarke v. Reeder. The argument is simple, and is the same in all of them. It is most forcibly and elaborately stated in Clarke v. Reeder. It is, in brief, that the statute of limitations makes no exception in actions at law in regard to fraud or fraudulent concealment, and that the courts are bound by the terms of the statute and cannot add to it or declare an exception which would nullify it in its application to cases properly embraced in its terms.

The leading cases declaring that a fraudulent concealment stays the operation of the statute are Bailey v. Glover, Sherwood v. Sutton, Lewey v. Frick Co., and Bulli C. M. Co. v. Osborne. In Bailey v. Glover the Supreme Court of the United States, by Justice Miller, says: "We are of the opinion that the weight of judicial authority, both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity. And we are also of opinion that this is founded in a sound and philosophical view of the principles of the statutes of limitation. They were enacted to prevent frauds, to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in such a manner that it concealed itself until such a time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. And we see no reason why this principle should not be as applicable to suits tried on the common-law side of the court's calendar as to those on the equity side. * * * We hold that when there has been no negligence or laches on the part of the plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such a character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him." There is perhaps no better statement of the rule and the reasons for it than the above. The precise question was decided in this state in the early case of Kane v. Cook, 8 Cal. 449. It was an action by a consignor against the consignee to recover the price of goods sold by direction of the consignor. It was held to be an action at law. The consignee had not reported the sale. Field, J., delivering the opinion, reviews at considerable length the conflicting decisions then existing on the question and concludes as follows: "In this diversity of opinion on the question, we are free to adopt that rule which will best tend to advance justice, and prevent the perpetration of fraud; and we therefore hold that in all cases a fraudulent concealment of the fact, upon the existence of which the cause of action accrues, is a good answer to the plea of the statute of limitations. By the system of practice adopted in this state there is no replication to the answer. The fraudulent concealment cannot, therefore, be replied to by pleading, but it may be established by proof on the trial, and will then just as effectually avoid the plea of the statute. In the present case the plaintiffs are residents of New York. They looked to their consignee in California to acquaint them of the sale of their goods. His delay of three years to impart any information cannot be reconciled with honest intentions, but necessarily leads to the conclusion that the sale was concealed for a fraudulent purpose."

This decision has never been questioned. It was rendered in 1857. Although it has not been cited, it has been followed in principle in subsequent cases. See Christensen v. Jessen, and other cases hereinafter cited. The statute then in force contained the provision now found in subdivision 4 of section 338 concerning actions for relief against fraud, but the decision was not based upon that provision, nor was it referred to. It was put upon the general ground that the rule was applicable to any statute of limitations, although not containing any express exception in relation to fraudulent concealment. The statutes of limitation have been re-enacted without change since the decision was made.

[6] The familiar rule is that when there is a re-enactment of a statute in the same language, after a construction by the courts, the new statute is presumed to be intended to have the same effect as that previously given to its predecessor. From this review of the authorities, in this and other jurisdictions, and for the reasons given, we hold that the rule stated in Bailey v. Glover, supra, and Kane v. Cook, supra, is applicable in all cases where fraud enters into the cause of action, and there has been a fraudulent concealment of the injury. Further than this, we need not go in the present case. Under the decisions particularly applicable to underground trespasses in mines, there was here both fraud in the taking and a fraudulent concealment of the fact thereafter. "It is, indeed, part of the equity doctrine of fraud not to define it, not to lay down any rule as to the nature of it, lest the craft of man should find ways of committing fraud which might escape the limits of such a rule or definition." 1 Bouv. Dic. (Rawles Ed.) 844. It has been defined as "the unlawful appropriation of another's property by design." Oldham v. Stephens, 45 Kan. 369, 25 Pac. 863. Also as, "what is done in secret, and where there is concealment from a party in a matter which concerns his interest." Dale v. Smith, 1 Del. Ch. 1. In Bulli C. M. Co. v. Osborne, supra, "the appellants, proceeding secretly with their workings," took coal from under respondent's land, with knowledge, and intentionally. The court said: "In the present case the coal was taken furtively. No one can deny that it is a fraud to rob your neighbor furtively of his property." The court also declared that, to constitute a fraudulent concealment of such a trespass, it was not necessary to show that the wrongdoer had taken active measures to prevent detection. It is one of the cases where the fraud "conceals itself," as stated by Miller, J., in Bailey v. Glover, supra. In Livingstone v. Rawyards, L. R. 5 App. Cas. 34, Lord Hatherly also treats of an underground trespass as a species of fraud. In the English decisions the willful and secret taking of coal from a neighbor's mine is usually characterized as fraudulent. Hilton v. Woods, L. R. 4 Eq. Cas. 440; Dean v. Thwaite, 21 Beav. 623; Ecclesiastical Coms. v. North E. Ry. Co., L. R. 4, Ch. Div. 860; Trotter v. McLean, L. R. 13, Ch. Div. 586. Such an act, so committed, has all the substantial elements of fraud. Where one by misrepresentation induces another knowingly to part with his property, because his mind is so beclouded by the falsehood that he is unaware of the wrong done him, it is called a fraud. It is a taking of another's property without his knowledge of the fact that it is really taken from him. The ignorance in that case is produced by artifice. Where one betrays a trust and appropriates trust property to his own use, it is called a fraud. The injured party allows the other to have the possession and the opportunity to convert the property secretly, because of faith and confidence in the wrongdoer. In the case of underground mining of a neighbor's ore, nature has supplied the situation which gives the opportunity to the trespasser to take it secretly and causes the ignorance of the owner. Relying upon this ignorance, he takes an unfair advantage of his natural opportunities, and thereby clandestinely appropriates another's property while appearing to be making only a lawful use of his own. The act in its very nature constitutes the deceit which makes it a fraud. It is a daily false representation that the ore he is taking is his own, with full knowledge that it belongs to another, and that that other is deceived by the artifice.

[7] The evidence is sufficient to show a fraudulent taking and fraudulent concealment of this character. The mine of the plaintiff adjoined that of the defendants on the end lines. Defendants sunk a shaft in their own mine to a depth of 530 feet about 290 feet from plaintiff's line, and by means of crosscuts therefrom to the vein and drifts therein beneath the surface to plaintiff's boundaries they secretly, knowingly, and willfully took from plaintiff's mine ore of the value found by the jury. The plaintiff had no knowledge or means of knowledge of this. The circumstances justified the inference that the defendants concealed it from plaintiff, and prevented it from becoming generally known. The limit of their mine was plainly marked by their own engineer in the first drift which reached plaintiff's bounds, known as No. 2 level. Defendants inadvertently took several hundred tons of ore from plaintiff's mine through this drift, and, upon discovering that fact, explained the matter to plaintiff, stating that it was a mistake, and promised to pay its value, which, it seems, they afterwards did. While thus appearing and professing to act in good faith, they proceeded secretly with other workings beyond their line, and below level No. 2, and took the ore in controversy. It was not distinguishable in any way from the ore taken at the same time from their own mine and it was mingled therewith. Although there were many workmen engaged in the mine, the fact of the trespass did not become known to plaintiff, whose men were at work also in its mine adjoining. There is no real dispute about these facts. They bring the case clearly within the rule we have stated, and prevent the running of the statute until the trespass was discovered.

[8] It may be added that they also make a case coming within subdivision 4 of section 338, Code of Civil Procedure, relating to

actions for relief against fraud. It was directly decided by this court in Christensen v. Jessen, 40 Pac. 747, that this subdivision applies to all actions for relief against fraud, whether such actions and the relief asked be legal or equitable according to the ancient classification. This case was decided in department, and a rehearing was refused by the court in bank. It is not reported in full in the official volume. See 107 Cal. xvii. This rule has been applied in Lataillade v. Orena, 91 Cal. 577, 27 Pac. 924, 25 Am. St. Rep. 219, Hayes v. Los Angeles Co., 99 Cal. 74, 33 Pac. 766, Gregory v. Spicker, 110 Cal. 150, 42 Pac. 576, 52 Am. St. Rep. 70, Archer v. Freeman, 124 Cal. 528, 57 Pac. 474, Simpson v. Dalziel, 135 Cal. 600, 67 Pac. 1080, and Marston v. Kuhland, 151 Cal. 102, 90 Pac. 188, each of which would have been classed as an action at law, when there were separate counts for law and equity cases. It appears to be settled in this state that, if fraud enters into a cause of action, the latter clause of this subdivision will apply and the cause of action will not be deemed to have accrued until the facts are discovered, regardless of the form or character of the action. This is not at all inconsistent with the rule followed in Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820, and other similar cases holding that, where the action is one for which the statute of limitations prescribes a longer period than three years, section 338 will not control, and the period specially provided will be given. Here the discovery was made but 13 months before the action was begun, the plaintiff was not put on inquiry, and the trespass could not reasonably have been discovered sooner. Therefore, under the doctrines we have stated, the action is not barred.

[9] The rule of practice stated in Kane v. Cook, supra, still prevails. Under it, the fraudulent concealment could be proven without being pleaded. The secret and fraudulent taking was sufficiently alleged.

[10] Upon this branch of the case, the question whether the ore was taken by the defendants themselves, or by their agents without their knowledge or consent, is immaterial, provided it was taken willfully, intentionally, and secretly. The fraud of the agents will be imputed to the principal for the purpose of preventing the running of the statute of limitations, whether the principal was aware of it or not. The injustice of allowing such fraud to become successful by reason of lapse of time and concealment is an injustice to the owner, and it is precisely the same in effect and extent whether the fraud is that of the principal or his agent. The principal, having received the benefit of his agents' fraud, has no equity in his favor.

The defendants contend that the evidence shows that plaintiff was put on inquiry as to the existence of other trespasses than that on level No. 2, which defendants had admitted, and that with reasonable diligence it could have discovered, at least as early as 1897, the trespasses now complained of. But, as we have shown, some of the defendants' own agents in charge of the mine declared that these trespasses had not occurred at that time. After the trespass on level No. 2 was admitted in 1897, the officers of plaintiff visited defendants' mine, and were conducted through it by defendants' superintendent. They saw the admitted trespass and were shown into level No. 2, where the trespasses complained of here were made, but they were not shown or informed of those trespasses, if, indeed, they then existed, and they did not see them. The only information they had after that visit consisted merely of vague rumors. Under the circumstances, we are of opinion that the finding of the jury on this point cannot be disturbed.

[11] 4. The next question presented is that of the measure of damages. Twelve thousand tons of ore were taken from plaintiff's mine by the defendants. From this, after milling it at their own expense, defendants obtained gold of the value of $54,000. The cost of mining and milling it was $27,000. The verdict and judgment was for $54,000. Defendants claim that the cost of mining and milling should have been deducted from the value of the gold obtained. Plaintiff's counsel concede the rule to be that, if the invasion of the mine by defendants was the result of honest mistake and inadvertence, the measure of damages would be the value of the gold less the cost of mining and milling, but they say that, if it was intentional and with knowledge of plaintiff's rights, the defendants are chargeable with the value of the gold after reduction, without any deduction for expenses of mining and milling. The authorities sustain the latter proposition. 4 Suth. on Dam. §§ 1126, 1127, 1128; 2 Sedg. on Dam. §§ 500–504. The objection of the defendants is that to allow damages in excess of the value of the ore as it lay in the mine is to give plaintiff the benefit of defendants' labor without any equivalent in return, and is, in effect, punitive damages, allowable only where there is oppression, fraud, or malice, and which will not be given against principals for the fraud of their agent, unless such fraud was known to the principals, or was authorized or ratified by them. The authorities last cited assume that such enhanced damages are punitive in character.

Under the rules laid down in the Civil Code, it must be conceded that the plaintiff can be allowed the benefit of defendants' work in mining and milling the ore only upon the theory that it is given as a punishment of the defendants. The general rule of damages in tort is declared to be "the amount which will compensate the injured party for all the detriment proximately caused thereby, whether it could have been anticipated or not." Section 3333. For the wrongful conversion of personal property, the damage allowed is its value "at the time of the conversion," with interest, or, if "the action has been prosecuted with reasonable diligence," the highest market value at any time between the conversion and the verdict, without interest, at plaintiff's option. Section 3336. Treating the case as one for the conversion of chattels, the conversion was complete when the defendants had mined the ore and mingled it with ore from their own mine. Its value at that time would not include the cost of milling. No evidence was given as to the cost of mining alone. The subsequent "highest market value," referred to in the second clause of section 3336, ordinarily means the subsequent value of the thing in the condition it was in at the time of the conversion. It would not include a value added to it by reason of an improved condition given to it by the defendant after conversion. Of course, if the property taken can be identified in its changed condition, the rightful owner may retake it as it is, since the title remains in him, and he may thus in that case obtain the benefit of the improved condition. But in this case identification is impossible. It is not claimed that the unmilled ore was, or would have been, ever of any higher value than it was when it was mined. The giving to the plaintiff of the value added to it by the milling, as damages, is therefore not authorized by section 3336. It can be allowed only as exemplary damages, authorized by section 3294, as a punishment, where the defendants have been guilty of oppression, fraud or malice.

[12] It is the settled law of this state that exemplary damages cannot be given against a principal for the fraud of the agent, unless the principal either had knowledge of the fraud at the time, or authorized it, directly or by implication, or ratified it after it came to his knowledge. In the recent case of Davis v. Hearst, 116 Pac. 530, under the subtitle "Imputed malice in fact," the rule is thus stated: "It follows of necessity that no principal can be held in punitive damages for the act of his agent, unless the particular act comes within the principal's specific directions or general suggestions, or unless the principal has subsequently ratified it, such ratification presupposing, it is said, original authorization." We also refer to the authorities there cited on this point.

[13] We do not find in the evidence any substantial proof that the defendants had any knowledge of the trespass complained of, or of its fraudulent character, at the time of its occurrence, or that they either specifically or by general directions or suggestions authorized it. The management and supervision of the defendants' mining operations appear to have been committed to the defendant, C. D. Lane. Defendant Hayward was consulted, but he seldom visited the mine. Lane was in the mine in 1897 after the admitted trespass on level No. 2 occurred, and he immediately noticed it and condemned it. He gave instructions to those in subordinate control that they must mark the boundaries in the levels, so that the men would know when they came to it, and that they must take care not to trespass again on the Lightner mine. There is no evidence that either of the defendants were ever informed of the trespass here in issue until this suit was begun against them. The defendant Hobart Estate Company owned a one-third interest in the Utica mine, but it took no part in the management and none of its officers ever visited the mine. Its only participation in the enterprise was the receipt of dividends from the other partners and the payment of expenses when called on to do so.

[14] Plaintiff argues that the defendants ratified the wrongful and fraudulent acts of their agents by the denials thereof in their answer to the complaint, and their failure to investigate the matter or make restitution, after they were informed of the facts by the service upon them of a copy of the complaint. Where a party is sued, he has the legal right to make such defenses as he believes he can establish by proof. It is true, as we have said, that there is sufficient evidence to sustain the verdict of the jury holding that the ore in question was taken after November 21, 1896, when plaintiff first acquired an interest in the Lightner mine. But it must also be admitted that, although sufficient to raise a conflict, this evidence is not particularly strong or convincing, and that the defendants produced ample evidence to show their good faith in denying the trespass in issue and pleading the statute of limitations. The jury gave credit to the opposing testimony, but there is nothing in the case that would authorize the conclusion that the defendants alleged these defenses in bad faith, or that the pleading thereof should be taken as evidence of ratification of a fraudulent act which they obviously expected to prove had not been committed against the plaintiff at all. There may be some circumstances that would arouse a suspicion of knowledge on their part prior to the filing of their answer, but there was no substantial proof thereof. The service of the complaint in the former action in 1897, for the admitted trespass cannot serve as such proof, for the plaintiff's case rests entirely upon the theory that the ore in question here was taken subsequent to that date, and after the defendant Lane had given positive instructions to the men at the mine not to trespass again. There is no proof of knowledge, authorization, or ratification.

The result is that the verdict for $54,000 is excessive. It should have been for only $27,000, which the jury found to be the value of the ore before mining and milling.

5. Some of the instructions given by the court are contrary to the conclusions above stated, and are, as we conceive, erroneous. But, in view of the special findings of fact by the jury, we do not think any of them can be considered as affecting the right of

the plaintiff to recover the $27,000 found to be the actual compensatory damages.

[15] Instruction 22 was to the effect that the statute of limitations for an underground trespass did not begin to run when the trespass was committed, but from the time of the discovery thereof by the injured party, or from the time when with ordinary diligence he might have discovered it. It omits the elements of secrecy and of fraud in the trespass and fraudulent concealment thereof by the trespasser, and for that reason it is erroneous. But the jury, in answer to interrogations, expressly found that the trespass was made by defendants, secretly, knowingly, willfully, and intentionally, and that the defendants, with knowledge thereof, concealed the trespass from the plaintiff. As we have before stated, for the purpose of staying the statute of limitations, the defendants are chargeable with the fraud and fraudulent concealment of their agents, although it may never have been brought to their personal knowledge. The finding of the jury, therefore, establishes, for the purposes of our review of the case, the fact that the trespass was fraudulently made and fraudulently concealed, and hence that the statute did not begin to run until the discovery was or should have been made, as stated in the instruction. Under these circumstances, the giving of the instruction was not prejudicial, since the jury have found the additional facts which should have been contained in it to make the instruction correct. This was held in Lowe v. San Francisco, etc., Co., 154 Cal. 578, 98 Pac. 678. There were other instructions suggesting the same view, and, upon the same ground, they must be considered as immaterial and harmless.

[16] One of the instructions objected to was to the effect that, if the jury should find that the ore taken by defendants from the Lightner mine was partly extracted before the Lightner Company entered into possession under its purchase and partly afterward, the burden rested upon the defendants to show how much was taken before the entry and how much was taken afterward, and that, if defendants failed to do so, then the plaintiff was entitled to recover for the entire amount taken. In view of the facts found, this was not error. As we have seen, the plaintiff's ore was taken by the defendant's employés in charge of the mine secretly and knowingly. It was wrongfully carried to defendants' mill, along with their own ore, and indistinguishably mingled with that ore. The doctrine of confusion of goods applies. "It has long been settled as the common law that where personal chattels, solid or fluid, are so mingled as to have become undistinguishable by the wrongful act of one owner, he cannot recover for his own proportion, nor for any part of the intermixture, but the entire property rests in him whose right was so invaded." 2 Schouler on Pers. Prop. § 47.

[17] Under some circumstances, he can obtain the benefit of that proportion of the mass which was originally his own. But it rests with him to show the proportion which belongs to him. "All the inconveniences of the confusion is thrown on the party who produces it, and generally it is for him to distinguish his own property or lose it." 6 Am. & Eng. Ency. of Law, 596, citing First N. B. v. Schween, 127 Ill. 580, 20 N. E. 681, 11 Am. St. Rep. 174; Lehman v. Kelly, 68 Ala. 204; Mayer v. Wilkins, 37 Fla. 254, 19 South. 632; Diversey v. Johnson, 93 Ill. 547; Stuart v. Phelps, 39 Iowa, 20; Weil v. Silverstein, 69 Ky. 702; Loomis v. Green, 7 Me. 393; Kreuzer v. Cooney, 45 Md. 591; Robinson v. Holt, 39 N. H. 563, 75 Am. Dec. 233; James v. Burnet, 20 N. J. Law, 642; Hart v. Ten Eyck, 2 Johns. Ch. (N. Y.) 108; Starr v. Winegar, 3 Hun, 494. The cases support the text. It matters not that the defendants' employés knowingly mingled the ore without the actual knowledge of the defendants themselves. Dillingham v. Smith, 30 Me. 383.

[18] Instruction 9 was to the effect that "the right of the plaintiff to recover is not at all affected by the fact that the trespass was not willful." This would be technically correct if it meant only that the plaintiff could recover compensatory damages for a trespass not willfully made. The right to recover exemplary damages would be affected by the fact that the trespass was willful, if by a willful trespass is meant a fraudulent or malicious trespass. But the right to recover compensatory damages is not affected by the fact that the trespass was not willful. Maye v. Yappen, 23 Cal. 306.

[19] Hence the giving of the instruction could be prejudicial only with regard to punitive damages included in the verdict, and the error can be sufficiently cured by reducing the judgment to the amount of damages allowed as compensation.

[20] This applies, also, to instructions 10 and 20, to the effect that every entry by the owner of one mine upon an adjoining mine is presumed to be willful, because a man is presumed, in the absence of evidence to the contrary, to know his own boundaries, and to instruction 21, that for a willful trespass the defendants were not entitled to deduct the cost of mining and milling. If the damages are reduced to the value of the gold after deducting that cost, all of these instructions are rendered harmless.

The case appears to have been fully and carefully tried, and we do not find any error which substantially affects the right of the plaintiff to recover the $27,000, found to be the value of the ore taken, as it lay in the ground before it was mined.

[21] Substantial justice demands that, instead of reversing the cause for a new trial, the plaintiff be at least given an opportunity to accept the part of the damages as to which the verdict is not vitiated by the errors aforesaid. See Salstrom v. Orleans, etc., Co., 153 Cal. 558, 96 Pac. 292.

It is therefore ordered that in the event that plaintiff, within 30 days from the date of the filing of this opinion, file with the clerk of this court its written consent to a modification of the judgment by the deduction of $27,000 therefrom, leaving the same to stand for the remaining $27,000 and costs of suit, said judgment be modified accordingly, and the order denying a new trial shall be affirmed, such modified judgment to bear interest at the legal rate from the date of the entry of the original judgment of the superior court; but that, if such consent is not so filed within said time, the judgment and the order denying a new trial shall be reversed.

We concur: SLOSS, J.; ANGELLOTTI, J.; HENSHAW, J.; MELVIN, J.; LORIGAN, J.

On Rehearing.

Emil Pohli, for plaintiff.

PER CURIAM. The plaintiff having consented thereto in open court, it is ordered that the judgment appealed from be modified by the deduction of $27,000 therefrom, leaving the same to stand for the remaining $27,000 and costs of suit, such modified judgment to bear interest at the legal rate from the date of entry of said judgment, and the order denying a new trial be affirmed.

(162 Cal. 14)

IMPERIAL WATER CO. NO. 1 v. BOARD OF SUP'RS OF IMPERIAL COUNTY et al. (S. F. 5,932.)

(Supreme Court of California. Jan. 8, 1912.) Rehearing Denied Feb. 7, 1912.)

1. CERTIORARI (§ 4*)—PROCEEDINGS REVIEWABLE—JUDICIAL PROCEEDINGS.

A writ of review under Code Civ. Proc. § 1068, authorizing the writ where an inferior board exercising judicial functions, exceeds its jurisdiction, lies only where the board when exercising judicial functions has exceeded its jurisdiction, and there is no appeal or other adequate remedy.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 4; Dec. Dig. § 4.*]

2. WATERS AND WATER COURSES (§ 224*)—IRRIGATION DISTRICTS — CREATION — STATUTES.

The Legislature may by statute passed without notice or hearing create an irrigation district, or it may delegate the power to do so to a local board to be exercised on specified conditions, and on the ascertainment of specified facts by such board after notice and hearing to the parties interested.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 315, 316; Dec. Dig. § 224.*]

3. CERTIORARI (§ 21*) — PROCEEDINGS REVIEWABLE—"JUDICIAL PROCEEDING."

Where, in a proceeding before a local board not having the character of an ordinary court, public notice is required, and a hearing of objections to the contemplated action is provided for, and the order to be made affects the property or rights of the citizens, the proceeding is judicial in character, and reviewable on certiorari within Code Civ. Proc. § 1068, authorizing writ of review.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 33, 34; Dec. Dig. § 21.*

For other definitions, see Words and Phrases, vol. 4, pp. 3864-3866.]

4. CERTIORARI (§ 21*) — ESTABLISHMENT OF IRRIGATION DISTRICTS—JUDICIAL REVIEW.

A proceeding before the board of supervisors of a county for the organization of an irrigation district under St. 1897, p. 254, as amended by St. 1911, p. 509, providing for the organization of irrigation districts on petition presented to the board after hearing on notice, etc., is judicial in character, and the act of the board in organizing a district is reviewable on writ of review.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 33, 34; Dec. Dig. § 21.*]

5. CERTIORARI (§ 4*)—ADEQUACY OF OTHER REMEDY—REVIEW OF ESTABLISHMENT OF IRRIGATION DISTRICTS.

St, 1897, pp. 276, 277, §§ 68-72, authorizing an action by the board of directors of an irrigation district created under the act or by a person whose property is assessable by the district to determine the validity of district bonds or assessments, and declaring that no contest shall be made other than within the time and manner specified, do not authorize an action to determine the validity of the organization of an irrigation district, and do not furnish a remedy to review proceedings resulting in the organization of a district, but such proceedings are reviewable on certiorari.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 4; Dec. Dig. § 4.*]

6. STATUTES (§ 64*)—VALIDITY—INVALIDITY IN PART—EFFECT.

The invalidity of a section of St. 1897, p. 254, as amended by St. 1911, p. 509, which provides for an appeal to the superior court from an order of the board of supervisors in proceedings for the establishment of an irrigation district, does not render the other separable provisions of the act invalid.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66; Dec. Dig. § 64.*]

7. STATUTES (§ 64*)—VALIDITY—INVALIDITY IN PART—EFFECT.

The rule that, where the invalidity of a provision of a statute is so important that it will be presumed that the Legislature would not have enacted the valid part alone, the entire statute must fall, is a mere rule of construction, and under the rule the invalidity of a section of St. 1897, p. 254, as amended by St. 1911, p. 509, which provides for appeals from an order of the county board of supervisors in proceedings for the establishment of an irrigation district, does not render the other provisions of the act invalid.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66; Dec. Dig. § 64.*]

8. STATUTES (§ 64*)—VALIDITY—INVALIDITY IN PART—EFFECT.

Where the Legislature amends the valid parts of a statute after a provision thereof has been declared invalid, the invalidity of the provision does not render the balance of the act invalid because the amendment shows that the Legislature deemed that the invalidity of such provision was so vital that the act would not have been passed without it.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66; Dec. Dig. § 64.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

9. CERTIORARI (§ 60*)—PLEADINGS—RETURN —REVIEW.

Where a return in pursuance of a writ of review issued on a complaint has been filed, the court will not consider the demurrer to the complaint or the motion to quash the writ, unless the return fails to show jurisdiction in the inferior board to make the order attacked or is otherwise insufficient.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 153–167; Dec. Dig. § 60.*]

10. WATERS AND WATER COURSES (§ 225*)—ORGANIZATION OF IRRIGATION DISTRICTS—NOTICE—REQUISITES.

A notice of the time of the presentation of a petition for the organization of an irrigation district under St. 1897, p. 254, as amended by St. 1911, p. 509, need not be signed by all the petitioners, and a notice signed by some of them on behalf of all is sufficient, especially in view of the provision of the act that no defect in the form of the notice or signatures shall vitiate any proceeding thereon.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 317; Dec. Dig. § 225.*]

11. WATERS AND WATER COURSES (§ 225*)—ORGANIZATION OF IRRIGATION DISTRICTS—NOTICE—REQUISITES.

A notice of the presentation of a petition to the county supervisors for the organization of an irrigation district under St. 1897, p. 254, as amended by St. 1911, p. 509, which states that the petition will be presented to the board at the courthouse on a designated day and hour, which day is a day for the regular meeting of the board, sufficiently complies with the statute providing that the petition shall be presented to the board at a regular meeting, and that the notice shall state the time of the meeting at which the petition will be presented.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 317; Dec. Dig. § 225.*]

12. WATERS AND WATER COURSES (§ 225*)—ORGANIZATION OF IRRIGATION DISTRICTS—NOTICE—REQUISITES.

Under St. 1897, p. 254, as amended by St. 1911, p. 509, providing for the organization of irrigation districts, a notice of the presentation of a petition for the organization of the district which is authorized by the petitioners and which purports to be signed by some of them for all, and which is regularly published, is valid, whether the purported signatures are actually written by the petitioners or some other person by their authority.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 317; Dec. Dig. § 225.*]

13. CONSTITUTIONAL LAW (§ 309*) — WATERS AND WATER COURSES (§ 216*)—DUE PROCESS OF LAW—CONSTRUCTIVE SERVICE OF PROCESS.

A notice by publication in proceedings for the establishment of an irrigation district under St. 1897, p. 254, as amended by St. 1911, p. 509, which consists of the petition for the organization of the district with all the names of the petitioners followed by the notice of the time of the presentation of the petition, purporting to be signed by a large number of the petitioners, is sufficient to inform all persons of the nature of the proceeding, the time and the place of hearing, the property affected, and the persons who are the actors, and the due process of law clause of the Constitution does not render invalid the provision of the act that a lack of signatures to the notice shall not vitiate any proceeding thereon.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Dec. Dig. § 309;* Waters and Water Courses, Dec. Dig. § 216.*]

14. WATERS AND WATER COURSES (§ 225*)—IRRIGATION DISTRICTS — ESTABLISHMENT — NOTICE—PUBLICATION—PROOF.

Under Code Civ. Proc. § 2010, providing that evidence of the publication of a notice may be given by the affidavit of the publisher of the newspaper in which the notice was published, the proof of the publication of notice in proceedings under St. 1897, p. 254, as amended by St. 1911, p. 509, for the establishment of irrigation districts, may be made by the affidavit of the publisher of the newspaper in which the notice was published.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 317; Dec. Dig. § 225.*]

15. CERTIORARI (§ 66*) — PROCEEDINGS FOR THE ESTABLISHMENT OF IRRIGATION DISTRICTS—REVIEW.

Where, on certiorari to review proceedings for the establishment of an irrigation district, there was no charge that the signatures to the petition for the organization of the district were not genuine, that the evidence on which the court found their authenticity was not made a part of the return, and was not incorporated into the record, did not justify a determination that the proceedings were invalid for want of genuineness of the signatures to the petition.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 178; Dec. Dig. § 66.*]

16. WATERS AND WATER COURSES (§ 224*)—IRRIGATION DISTRICTS — STATUTES — PETITION.

The Legislature is the sole judge of the propriety of the formation of irrigation districts, and the question of procedure is a mere matter of legislative policy, and the Legislature may authorize that the initiatory proposal for the organization of a district may be made by such persons as it sees fit, and it may make owners of possessory rights eligible petitioners.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 315, 316; Dec. Dig. § 224.*]

17. WATERS AND WATER COURSES (§ 225*)—IRRIGATION DISTRICTS—JUDICIAL REVIEW.

One not interested in land lying outside of the original boundaries of a proposed irrigation district, but included by the board of supervisors in the district, may not attack the validity of the district because it includes such land, especially where the land is so insignificant a part of the district that the exclusion thereof will not nullify the creation of the district.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 317; Dec. Dig. § 225.*]

18. CERTIORARI (§ 68*)—QUESTIONS REVIEWABLE—WEIGHT OF EVIDENCE.

The court on certiorari will not review the conflicting evidence as to jurisdictional facts given before the tribunal whose action is sought to be reviewed.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 180–182; Dec. Dig. § 68.*]

In Bank. Application for writ of review by the Imperial Water Company No. 1 against the Board of Supervisors of Imperial County and others to review the action of the board in organizing an irrigation district. Proceedings affirmed, and writ discharged.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Rehearing denied in bank; Beatty, C. J., dissenting.

E. W. Britt, R. D. McPherrin, and Hunsaker & Britt, for plaintiff. Phil D. Swing, Dist. Atty., Eshleman & Swing, Conkling & Brown, and John M. Eshleman, for respondents.

SHAW, J. A writ was issued by this court to review the acts of the board of supervisors of Imperial county in the organization of an irrigation district under the act of March 31, 1897, and the amendatory act of 1911. Stats. 1897, p. 254; Stats. 1911, p. 509. A return having been filed, the cause was argued and submitted upon a demurrer to the complaint, a motion to quash the writ, and the return.

1. The defendants claim that the writ of review will not lie, for the alleged reason that the board of supervisors in organizing the district under the statute was not exercising judicial functions.

[1] Such writ cannot be issued to review the proceedings of the board except when it is exercising judicial functions, and has exceeded its jurisdiction in that respect, and there is no appeal, or, in the judgment of the court, any other plain, speedy, or adequate remedy. Code Civ. Proc. § 1068. The argument is that the act of creating such a public corporation or taxing district is a legislative act, and not a judicial proceeding.

It is not disputed that the mere creation of a district of this character is a legislative act. See Glide v. Superior Court, 147 Cal. 21, 81 Pac. 225; In re Madera Irr. Dist., 92 Cal. 308, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106; Potter v. Santa Barbara Co., 116 Pac. 1101. [2] The Legislature may either create such corporations itself by a statute passed without any formal notice or hearing, or it may delegate the power to some local board. People v. Sacramento Drainage Dist., 155 Cal. 386, 103 Pac. 207; Fallbrook Irr. Dist. v. Bradley, 164 U. S. 174, 17 Sup. Ct. 56, 41 L. Ed. 369. It does not follow, however, that where the Legislature delegates such power to a local board, and provides that it can be exercised only upon certain conditions and upon the ascertainment of certain facts by such board, after a notice and hearing to parties interested, that the proceeding thus authorized is not of a judicial character. Although such boards do not have the character of an ordinary court of law or equity, they frequently are required to exercise judicial functions in the course of the duties enjoined upon them. In Robinson v. Board, 16 Cal. 208, the court says: "It is sufficient if they are invested by the Legislature with power to decide on the property or rights of the citizen. In making their decision they act judicially whatever may be their public character." There are many decisions to the same effect. People v. Supervisors, 8 Cal. 61; People v. Supervisors, 10 Cal. 344; El Dorado v. Elstner, 18 Cal. 149; Murray v. Board, 23 Cal. 494; Miller v. Board, 25 Cal. 97; Keys v. Marin Co., 42 Cal. 254; Smith v. Strother, 68 Cal. 196, 8 Pac. 852; Wulzen v. Board, 101 Cal. 24, 35 Pac. 353, 40 Am. St. Rep. 17.

[3] Where in a proceeding before such a board a public notice is required to be given, and a hearing of objections or protests to the contemplated action is provided for, and the order to be made thereon is one which affects the property or rights of the citizen, the proceeding is usually held to be judicial and subject to be reviewed on certiorari. It is sufficient to come within the purview of the writ if such proceedings are of a judicial nature and are exercised by a quasi judicial body. 6 Cyc. 752; 4 Ency. of Pl. & Prac. 74.

[4] The proceeding provided for by the act comes clearly within these definitions. Section 1 designates the persons who may initiate the proceeding before the board. Stats. 1911, p. 509. Section 2 provides that such proceeding shall be begun by a petition presented to the board, signed by the required number of persons, representing the majority in value of the land, and setting forth the boundaries of the proposed district and the source of the water supply. Stats. 1911, p. 509. The petition, together with a notice of the time of the meeting at which it will be presented to the board, must then be published for two weeks. At that time the supervisors must hear the same. They may change the boundaries as deemed advisable by including or excluding territory therefrom but they must not exclude land irrigable from the proposed source, or include land which will not be benefited by irrigation therefrom. Any person whose lands may be irrigated from the proposed source may, in the discretion of the board, have such lands included within the district. The board must hear all relevant and competent evidence offered, and thereupon determine whether or not the petition is signed by a majority in number of the holders of lands within the proposed district susceptible of irrigation from the same source or system, and whether or not the lands held by such signers represent a majority in value of such lands within the district. Section 3. They must also determine the genuineness of the signatures to the petition and the sufficiency of the publication made. If all these facts are determined in favor of the petitioners, the board may then make an order fixing the boundaries of the district and calling an election to submit to the voters within the territory thus fixed the question whether the same shall be organized as a district under the law. Section 6. If the election is favorable, the board shall then make an order declaring the territory organized as an irrigation district.

This scheme presents all the usual elements of a judicial proceeding, the notice, the hearing, the taking of evidence, and the judgment. The privilege of using a portion of the water from a common source upon a particular tract of land is one which directly and materially affects the value of the land, and is clearly a property right of great value. The right to be excluded from the burdens which the construction and operation of the water works will impose upon property within such a district is also a property right. By this act the Legislature has committed to the board of supervisors the power to determine and dispose of these rights. The decision of such a matter, after notice and a hearing, is clearly the exercise of a judicial function. The circumstance that the facts are to be established as a foundation upon which the subsequent legislative act of creating a public corporation is to be based does not destroy the judicial character of the determination, nor take away the fact that it does affect private property injuriously or beneficially as the case may be. It is, therefore, a proceeding subject to be reviewed in certiorari.

[5] Sections 68 to 72 of the act authorize an action by the board of directors of the district, or by any person whose property is assessable by the district, to determine the validity of any district bonds or assessment. It is suggested that in this action the validity of the organization of the district would be in issue, and that the action is a plain, speedy, and adequate remedy to accomplish the end here sought. The board cannot bring such action until after the election is held and the district is organized. The property owner cannot do so until 30 days after the bonds are issued or the assessment levied, and then only when the board has not brought such action. These sections do not purport to authorize any inquiry into the proceedings for the organization of the district. The action is authorized solely for the purpose of inquiry into the validity of the bonds or assessment of the district. Section 72 provides that "no contest of anything or matter herein provided shall be made other than within the time and manner herein specified." If the validity of the organization of the district could be questioned at all in such an action, it would clearly be a collateral attack and the only point of inquiry would be the sufficiency of the notice and petition. The provisions of this act are not similar to those of the so-called "Wright act of 1887" (St. 1887, p. 29) and the act supplementary thereto (St. 1889, p. 212), providing for a proceeding to test the validity of bonds. This supplementary act expressly provided that in such action the court should have power to determine the validity of all the proceedings for the organization of the district. No such provision is contained in the act here under consideration. The action provided for cannot be deemed a plain, speedy, or adequate remedy. Section 4 of the act was intended to give a remedy upon these questions by appeal to the superior court of the county from the order of the board calling the election. This section, however, has been declared unconstitutional. Chinn v. Superior Court, 156 Cal. 479, 105 Pac. 580. No adequate remedy for an attempt to exercise this power remains except the writ of certiorari.

[6] It is claimed that the invalidity of section 4 providing an appeal to the superior court of the county to review the initiatory order renders the entire act void. Petitioner here invokes the rule that where valid and void provisions of an act are so dependent on each other that one cannot stand and have the effect intended, without the other, or where the invalidity of the provision is so important that it will be presumed that the Legislature would not have enacted the valid part alone, the entire act must fall. The first reason for this rule does not here exist. The two parts of the act are easily separable and the provision for an appeal was not essential to the validity of the other parts of the act. The Legislature, as we have seen, had power to create such districts, or authorize their creation by the board of supervisors, without providing for a review of the preliminary determination as to the facts.

[7] The second reason for the rule, namely, that the Legislature would not have enacted the valid part of the act alone, does not have its foundation in any restriction or limitation of the Constitution. It is a mere rule of construction applied for the purpose of ascertaining the true intent of the Legislature with respect to the valid portions of the act.

[8] Whatever force this consideration may have had when the act was passed, we think it is entirely removed by a legislative construction evidenced by subsequent legislation. At every session of the Legislature since its original enactment, the act has been amended or supplemented. The decision holding section 4, providing for an appeal, unconstitutional, was made and published on November 19, 1909. It is well known that a number of districts had been organized under the act upon the supposition that it was valid. The Legislature is, of course, presumed to have knowledge of the decision holding section 4 unconstitutional. With that knowledge the Legislature of 1911 again amended and supplemented the act. The act of March 9, 1911, provides that all bonds theretofore regularly issued by any such district and duly registered as therein prescribed shall be legal investments for public funds, private trust funds, and certain corporate funds. Stats. 1911, p. 322. The act of March 26, 1911, amends sections 1, 2, 15, 15½, 17, 30, 32, 34, 39, 55, and 61, and adds thereto a new section. Stats. 1911, p. 509. It shows a legislative revision of the entire act, and it clearly implies that the Legislature deemed the remaining portions of the act valid, and

did not consider section 4 so vital to the scheme that the law would not have been enacted without it. It is not to be construed as having the effect of a re-enactment of the entire act. In that case the act, if void before, would be in force only after such revision. It is, in effect, a declaration of the legislative department of the state government that section 4 was not considered a vital or necessary part of the plan of the original act, and that, notwithstanding the invalidity of that section, the remainder of the act was deemed to have been valid from the beginning. In view of this legislative declaration and construction and the further consideration that the provisions of section 4 were not necessary to make the remainder of the act constitutional, we are of the opinion that the invalidity of that section does not affect the remainder of the act. It has been so decided by this court in bank in Re Bonds of South San Joaquin Dist., 119 Pac. 198.

[9] 3. The complaint in this proceeding having served its purpose by virtue of the issuance of the writ of review and the return having been filed in this court, it becomes unnecessary to consider the demurrer to the complaint or the motion to quash the writ, unless we shall conclude that the return fails to show jurisdiction in the board of supervisors to make the order, or is otherwise insufficient. We will now proceed to consider the sufficiency of the return.

Section 1 of the act provides that the organization of such irrigation districts may be proposed by persons holding title, or evidence of title, to lands within such proposed district, provided such lands are susceptible of irrigation from a common source by the same system of works. A holder of possessory rights by entry under the United States or this state is declared to be a qualified person to propose such district. Lands not irrigable as above stated are not to be considered. A sufficient number of persons must join in the proposition to constitute a majority, in number, of the total number of persons holding title to such irrigable lands situated within the proposed boundaries, and the lands of that character owned by such proposers must comprise a majority, in value, of such lands within the district, according to the valuations shown by the last preceding equalized assessment roll. Section 2, as before stated, provides that such proposal shall be by petition to the board of supervisors of the county. The return includes all the papers on file and the minutes of the board, together with the documentary evidence taken by the board at the hearing. It is supplemented by a statement of the subjects to which the oral testimony taken at the hearing related, and avers that such testimony was not taken down in shorthand, and that no record thereof was preserved.

[10] Objection is made to the notice of the time of the presentation of the petition. The first objection is that it was not signed by all the petitioners. The answer is that the statute does not so require. Furthermore, a clause of section 2 declares that "no defect in the contents of the petition or in the title or form of the notice or signatures, or lack of signatures thereto, shall vitiate any proceeding thereon; provided such petition or petitions have a sufficient number of qualified signatures attached thereto." A large number of the petitioners appear to have signed the notice as published; the notice stating that they signed on behalf of all the petitioners. If any signatures are necessary under the clause quoted, it is clearly sufficient if the notice is signed by some of the petitioners in behalf of all.

[11] Another objection is that the notice does not state that the petition will be presented at a meeting of the board. It states that the "foregoing petition" will be presented to the board of supervisors of Imperial county at the court house thereof on Monday, June 5, 1911, at 10 o'clock a. m. That day was, in fact, a day for a regular meeting of the board. The statute provides that the petition shall be presented to the board at a regular meeting of that body, but with respect to the notice it provides only that it shall state "the time of the meeting" at which it will be presented. The board is not a board except while it is in session. At all events, it is not such for the purpose of receiving petitions. The notice given substantially complies with the provisions of the act concerning it.

[12] With respect to the genuineness of the signatures to the notice, we think the issues tendered did not require proof thereof. It is not claimed that the notice was unauthorized by the petitioners. Under the statute, a notice authorized by the petitioners and purporting to be signed by some of them for all, and regularly published as required by the act would be valid, whether the purported signatures of the petitioners thereto were actually written by the petitioners or some other person by their authority

[13] A further claim is made that the above quoted clause of the act makes the whole law unconstitutional. It is argued that it authorizes a notice without any signatures thereto, and that due process of law by constructive service requires that the notice published shall be signed by some officer or actor. In support of this proposition in Re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354, is cited. That decision is not in point. It had to do with the irrigation act of 1887, which simply provided that a notice of the time of the meeting should be published. This was held to mean a notice signed by the petitioners. That act did not contain any clause declaring that a lack of signatures should not vitiate the proceedings. The case is no authority on the question of the

meaning of a law declaring that signatures are not essential. It does not discuss at all the question whether due process of law can be had without a signed notice. We know of no authority to the effect that a signature to the published notice is a necessary part of such process, where the only notice given or required is a publication in a newspaper. The substantial thing is that such notice shall be given as, under the circumstances, would have a reasonable tendency to apprise the parties interested of the nature of the proceeding and the time and place of the hearing. Lent v. Tillson, 72 Cal. 413, 419, 14 Pac. 71. If its contents are such that one reading it would understand that it was given by those who intend to apply for the relief indicated, the authorization thereof would be sufficient. The notice here given consists of the petition itself, with all the petitioners' names, followed by the notice, as above stated, purporting to be signed by a large number of the petitioners. It is clearly sufficient to inform all persons of the nature of the proceeding, the time and place of hearing, the property affected, and the persons who are the actors.

[14] The proof of the publication of the notice and petition was made by the affidavit of the publisher of the newspaper in which it was made. This was competent and sufficient evidence thereof. Code Civ. Proc. § 2010.

[15] When the petition was presented to the board on June 5th, it made an order appointing F. N. Payton to compare the signatures to the petition with the names on the last assessment roll of the county for the purpose of verifying the sufficiency of the petition as to the number and qualifications of the petitioners. The hearing was continued to June 10th. Payton then made and filed his affidavit stating facts showing that the petition was signed by a sufficient number of qualified persons, both with regard to their number and the value of the lands owned by them. The affidavit also states that he testified before the board to the same facts. The order of the board recites that witnesses were sworn and testified before the board at the hearing, and that therefrom the board found that the petition was signed by the requisite majority of landowners, both in number and value. This finding implies that the signatures to the petition were genuine, and that the evidence taken was directed to that question. The complaint under which this proceeding in review was issued does not aver that any of the signatures to the petition were false or forged, or that the persons making them were unauthorized to sign for the owners of the land in cases where the signature was by agent. The plaintiff appeared before the board at the hearing and made various objections to the sufficiency of the petition and the qualifications of the signers thereto, but it did not dispute the authenticity of the signatures. We may assume for the purposes of this consideration that a finding in the record upon a question which affects the jurisdiction of a tribunal may on certiorari be disputed by evidence de hors the record. There are authorities holding that this cannot be done. Los Angeles v. Young, 118 Cal. 298, 50 Pac. 534, 62 Am. St. Rep. 234. But, whether this is the true doctrine or not, it must be conceded that upon a review on certiorari, where there is no charge that the signatures to such a petition are not genuine, the mere fact that the evidence upon which the court found their authenticity is not made a part of the return and was not incorporated into the record in detail, is a wholly insufficient basis upon which to declare that the proceedings are invalid. Under these circumstances, we must presume that the authenticity of the signatures was sufficiently established by the proof before the board.

There is no merit in the claim that there were not a sufficient number of qualified petitioners. If, as is claimed, town lots are not irrigable and the owners thereof not eligible as petitioners, the only result would be that the 600 town lot owners, alleged to have signed as petitioners, must be rejected from both sides of the calculation. In that event, the remaining petitioners would still constitute a majority, in number and value, of the landholders within the district having land of the character designated in the act as necessary to qualify such petitioners.

[16] The objection that owners of possessory rights cannot be made eligible petitioners is untenable. The Legislature is the sole judge of the propriety of the formation of such districts. The question of procedure is a matter of legislative policy. Conceding that a notice and hearing are required, under the authorities, it is nevertheless clear that the Legislative may authorize the initiatory proposal to be made by such persons as it sees fit. In re Madera Irr. Dist., 92 Cal. 320, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106.

[17] It is claimed that the order of the board is void because it includes certain tracts of land not within the boundaries described in the petition. The statute expressly gives power to the board to include such lands in the district as finally established, provided the lands so included will be benefited by irrigation from the system of works contemplated by the petition. It also provides that any person whose lands are susceptible of irrigation from the source described may upon application, in the discretion of the board, have such lands included within said proposed district. The order declares that certain lands lying outside of the original boundaries are susceptible of irrigation from the proposed source and by the same system of works and will be benefited thereby, and thereupon it declared that such

lands should be included in the district, and it was so ordered. The order is silent upon the question whether the owners of lands thus embraced applied to have such lands made a part of the district. It is not claimed that the present plaintiff the Imperial Water Company No. 1 is in any way interested in said lands. They comprise a very small proportion of the district as finally established. It is unnecessary here to determine whether the owners of these lands, in case they did not consent to the inclusion thereof in the district, could have the proceedings declared void as to them, and their lands excluded from the district by any appropriate proceeding in court or otherwise. Whatever the rights of the owners thereof may be, the consideration thereof is immaterial to the present case. The complainant has no right to invoke aid from them, and no right to represent them here. The lands comprise so insignificant a portion of the district that the exclusion thereof from the legal boundaries would not be sufficient to nullify the order providing for the organization of the district.

[18] 4. A motion was made to require the defendant to make a further return by certifying a statement of all the testimony and evidence produced and received before the board at the time of the hearing. This motion was not presented to this court upon the argument. It is not claimed that the oral testimony if produced would do anything more than present a conflict of evidence as to the facts necessary to establish jurisdiction. The authenticity of the signatures not being disputed, it is unnecessary, upon this hearing, to produce the evidence establishing that fact. Upon the issues made, the return shows that there was enough evidence before the board to establish the necessary facts. It is settled law that in certiorari the reviewing court will not consider the weight of conflicting evidence as to jurisdictional facts given before the tribunal whose action is sought to be reviewed (Golden Gate M. Co. v. Superior Court, 65 Cal. 189, 3 Pac. 628; 6 Cyc. 824), and no good end would be secured by requiring any further return or in continuing this proceeding to allow any further presentation thereof. The motion will be denied.

We find no other questions which we think of sufficient importance to notice. It appears that the board of supervisors had jurisdiction to make the order complained of, and that the board was acting in pursuance of a constitutional law.

It is ordered that the proceedings be affirmed and the writ discharged.

We concur: ANGELLOTTI, J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.; SLOSS, J.

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17 Cal. App. 579

PEOPLE v. MARTINEZ. (Cr. 211.)

(District Court of Appeal, Second District, California. Dec. 4, 1911.)

1. HOMICIDE (§ 332*)—ASSAULT WITH INTENT TO MURDER—APPEAL—REVIEW.

As the jury, in passing on the guilt of accused, charged with assault with intent to murder, must determine the intent, its conclusion must be considered as final on that issue.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 699–704; Dec. Dig. § 332.*]

2. HOMICIDE (§ 230*)—WEIGHT OF EVIDENCE—INTENT—TESTIMONY OF ACCUSED.

The mere assertion by accused, when testifying, that he had no intention of killing prosecutrix may be rejected by the jury, where, in view of the facts, they are satisfied, beyond a reasonable doubt, that his intent included the intent to murder.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 230.*]

3. HOMICIDE (§ 89*)—ASSAULT WITH INTENT TO MURDER—EVIDENCE.

To establish an assault with intent to murder, it is not essential that the person assaulted should have been desperately or even seriously wounded to show murderous intent, and such intent is shown by proof of an assault with a large knife and the infliction of wounds, indicating that the knife used was of a deadly character, and that a more dangerous injury did not result because of the struggles of the person assaulted.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 115–118; Dec. Dig. § 89.*]

4. HOMICIDE (§ 257*)—ASSAULT WITH INTENT TO MURDER—EVIDENCE.

Evidence *held* to support a conviction of assault with intent to murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 543–552; Dec. Dig. § 257.*]

Appeal from Superior Court, Kings County; John G. Covert, Judge.

George Martinez was convicted of assault with intent to murder, and he appeals. Affirmed.

W. R. McQuiddy, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted of the crime of assault with a deadly weapon, with intent to commit murder. The sentence pronounced against him was that he be imprisoned in state prison for the term of two years. He has appealed from this judgment, and from an order denying his motion for a new trial.

For several months, and until about three weeks prior to the date upon which the alleged assault was committed, defendant and one Mary Rodrigues, the complainant, had lived together, without the sanction of any marriage ceremony, at the town of Hanford, in Kings county. The woman finally left the house of defendant, and went to live at another place, and with another man, in the same town. On the morning of March 31, 1911, defendant went to the house where the woman then was and attacked her with a knife, inflicting, besides a small wound on the wrist, a cut across her shoulder of about four inches in length and from one-half to three-quarters of an inch in depth. The complaining witness testified that Martinez came in at the door and asked her why she had left his house, to which she replied that she had left because he had ordered her to, and that the man immediately advanced upon her in an angry manner with a knife, the blade of which was about five inches in length; that she parried his blows in part; and that, after striking her on the shoulder and wounding her, he left the room and went away. A young woman, Petra Gomas, who was in the room with the complainant when defendant arrived, and who had gone out to obtain assistance upon discovering the angry manner of the latter, did not see defendant commit the assault, but did hear the complainant scream when she was attacked. After he had cut the woman in the manner described, defendant went out, and when discovered by the peace officers he was running toward the outskirts of the town. By this time, he had thrown away the knife which he had used in making the assault, and the weapon was not found nor produced at the trial. Defendant, testifying in his own behalf, asserted that he had gone to see the woman on a peaceful errand to ask her for some money of his, which he claimed she had taken from his house. He admitted having used the knife upon her person, but testified that it was a small knife, and that the woman had thrown a stick of wood at him before he cut her, and that he had had no intention of killing her at the time.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1-3] Defendant complains that there was no evidence warranting the jury in determining that he was guilty of an assault with intent to commit murder. In passing upon the question of the guilt of defendant, the jury assumed the duty of determining with what intent the accused made the assault; and as to this matter its conclusion must be considered as final. The mere assertion of defendant, when he testified, that he had no intention of killing complainant the jury was entitled to reject altogether, if, upon a survey of all the other facts and circumstances shown in evidence, the jurymen were satisfied, beyond a reasonable doubt, that the defendant's intent at the time he committed the assault was of the kind charged. An assault with intent to commit murder in its execution necessarily falls short of the crime of murder itself. The victim of such an assault still lives; and it is not essential that he or she should have been desperately or even seriously wounded, in order to establish that the assault was committed with murderous intent.

[4] In the brief summary of the evidence which we have given, there appears ample proof to support the verdict of the jury. It was shown by the testimony of the complaining witness that the assault was made with a large knife. The wound inflicted clearly demonstrated that the instrument used was of a deadly character; and that a more dangerous injury did not result was no doubt due to the struggles of the complainant, rather than to any nice care exercised by defendant to avoid the inflicting of a mortal wound. In order to uphold the appellant in his position, it would be necessary to say that no evidence was presented to the jury from which the intent necessary to make out the crime charged could be legally inferred. The record does not present such a case.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

17 Cal. App. 576

JOURNEYMEN BUTCHERS' PROTECTIVE & BENEVOLENT ASS'N OF THE PACIFIC COAST v. BRISTOL et al. (Civ. 872.)

(District Court of Appeal, First District, California. Dec. 1, 1911. Rehearing Denied Jan. 29, 1912.)

1. INSURANCE (§ 771*)—FRATERNAL INSURANCE—BENEFICIARIES—BY-LAWS.

Where the by-laws of a fraternal beneficial association provide that the beneficiary must be a relative or dependent on the member, the beneficiary must stand in that relation to the member; neither the society nor a member, nor both, can divert the fund due on a certificate from a person within the by-laws, and the designation of an ineligible person is ordinarily ineffectual.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1935, 1937; Dec. Dig. § 771.*]

2. INSURANCE (§ 771*)—FRATERNAL INSURANCE—BY-LAWS—CONSTRUCTION.

The court must construe the rules of a fraternal beneficiary society liberally to effect the benevolent purposes of the order; and where any doubt exists as to whether the mother of a deceased member or a stranger is entitled to the fund due on the certificate the court must construe the rules so that the mother will receive the fund, under Code Civ. Proc. § 1866, requiring that an ambiguous statute be construed in favor of a natural right, rather than against it.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1935; Dec. Dig. § 771.*]

3. INSURANCE (§ 771*)—FRATERNAL INSURANCE—BY-LAWS—CONSTRUCTION.

A by-law of a fraternal beneficiary society, stipulating that the benefits on the death of a member shall be paid to his legal heirs designated in his application, and that, where one or more beneficiary shall die during the lifetime of the member, the surviving beneficiaries shall be entitled to the benefits equally, and where all the beneficiaries shall die during the lifetime of the member, and he shall have made no other provision, and no legal heir shall appear, the certificate shall be void, gives the benefit, on the death of a member, to his mother, who is the sole heir, though she is not mentioned in the certificate, as against a person, not a relative of the member, though mentioned as beneficiary in the certificate, since the naming of an ineligible person is equivalent to the failure to designate any one.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 771.*]

Appeal from Superior Court of the City and County of San Francisco; J. M. Seawell, Judge.

Complaint in interpleader by the Journeymen Butchers' Protective & Benevolent Association of the Pacific Coast against Alice Bristol and Josephine Aubrey to determine the rights to a fund due under a benefit certificate. From a judgment for defendant Alice Bristol, defendant Josephine Aubrey appeals. Reversed.

H. W. Hutton, for appellant. Harris & Hess and Knight & Webster, for respondent.

KERRIGAN, J. The plaintiff is a fraternal and beneficial organization, of which Charles R. Aubrey was, at the time of his death, a member in good standing. While such member, in accordance with the laws of the plaintiff corporation, there was issued to him a benefit certificate for $500, in which certificate he named as the beneficiary thereof the respondent, Alice Bristol. She, although sometimes known by the name of Aubrey, was not related to the deceased, and the sole heir left surviving him is his mother, the appellant. Upon the death of Aubrey, both respondent and appellant demanded payment of the certificate, whereupon the plaintiff filed a complaint in interpleader against them, in which, while it denied the claim of appellant to any interest in the fund, it offered to pay the money into court "for the use and benefit of the person or persons, if any, found to be entitled thereto." Subsequently the $500 was by plaintiff deposited with the clerk of the superior court for that purpose.

The provision of the laws of the plaintiff which governs the question as to who is entitled to this fund reads as follows: "In case of the death of a member in good standing, the benefits shall be paid to his legal heirs designated in the application for endowment certificates. If one or more members of the beneficiaries shall die during the lifetime of the member, the surviving beneficiary or beneficiaries shall be entitled to the benefits equally, unless otherwise provided in the application for endowment certificate; and if all the beneficiaries shall die during the lifetime of a member, and he shall have made no other provision, or no legal heir shall appear within twelve calendar months from the death of a member, the certificate shall be null and void."

[1] Organizations like the plaintiff are generally created and instituted for the aid and relief of the families of deceased members, and usually their laws provide that the beneficiary of the fund must be a relative and dependent on the deceased member, and that the appointee must be one of that class. Caldwell v. Grand Lodge, 148 Cal. 195, 82 Pac. 781, 2 L. R. A. (N. S.) 653, 113 Am. St. Rep. 219; 3 Am. & Eng. Ency. of Law, 1042; 29 Cyc. 111. Where the class of persons to whom the benefits shall be paid is prescribed by the society, neither the society nor the member, nor both, can divert the fund from that class, and the designation of an ineligible person is ordinarily void or ineffectual. 29 Cyc. 107, 108.

Respondent does not dispute these general principles; nor does she dispute that the intention of the plaintiff corporation, as manifested by the quoted by-law, was to confine members to nominating heirs as beneficiaries. Respondent does, however, contend that the appellant, not having been designated in the endowment policy, she has no interest in the fund, and that therefore no one but the fraternal association could question the ineligibility of the person designated, and the society, having paid the money into court, has waived its right to object and the respondent is therefore entitled to recover the fund.

There is a conflict in the authorities as to whether the society, by paying the money into court, waives its objection to the ineligibility of the person nominated. 29 Cyc. 105; Keener v. Grand Lodge, 38 Mo. App. 543-550; Bacon on Benefit Societies and Life Ins. vol. 1, §§ 242, 252; McLaughlin v. McLaughlin, 104 Cal. 171, 37 Pac. 865, 43 Am. St. Rep. 83. But here the plaintiff in the complaint denied that the respondent had any interest in the fund, and ultimately paid the money into court expressly for the limited purpose of having the court determine who, under the laws of the society, was entitled thereto. Hence the soundness of the respondent's position, both as to the law and the facts, may, to say the least, be seriously doubted. But whatever may be the correct view of these matters is unimportant here, for we think the mother of the deceased is entitled to the fund under the laws of the association.

[2] As before stated, the object of a society of this kind is to assist and benefit the families and heirs of deceased members; and courts are bound to construe its rules and regulations liberally to effect the benevolent purposes of the order. 3 Am. & Eng. Ency. of Law, 1067; Niblack, §§ 160-175; Keener v. Grand Lodge, 38 Mo. App. 553. Again, if there were any doubt as to which of these two claimants is entitled to the fund, the policy of our law would be to give the by-law the interpretation that would favor the mother; she having the natural right. Code Civ. Proc. § 1866.

[3] Liberally construing the laws of the plaintiff corporation, if a liberal interpretation is necessary, we think the mother, being a legal heir of the deceased member under the statute of successions (Civ. Code, § 1386), is the beneficiary of the fund, although she

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

was not nominated as such. It is true that the first paragraph of the by-law mentioned, as claimed by respondent, limits, in a negative way, the payment of the certificate to designated legal heirs; but what immediately follows in effect provides that, if all the nominated heirs die before the member, and no other heir is designated, and an heir appears within 12 calendar months from the date of the member's death, such heir shall be entitled. For example, if Charles R. Aubrey had named several heirs, and they had all died before him, or if he had failed to nominate any beneficiary, and the mother in either case had claimed payment of the certificate within the stated time, she would have been entitled to such payment. Here the naming of an ineligible person is equivalent to the failure to designate any one, and the mother, being an heir, must prevail.

The judgment is reversed.

We concur: HALL, J.; LENNON, P. J.

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17 Cal. App. 591

DINKELSPIEL v. NASON et al. (Civ. 870.)

(District Court of Appeal, Third District, California. Dec. 4, 1911.)

Brokers (§ 57*)—Limitation of Actions (§ 50*)—Right to Commissions—Accrual of Cause of Action.

Where a broker is given a contract, to continue in force till withdrawn in writing, entitling him to commissions on sale of the property by him, the owner, or any one else, while the contract is in force, and the owner gives a lease of the property, with an option to the lessee to purchase at any time during the five-year term of the lease, the broker is not entitled to a commission, and therefore his cause of action does not accrue till the lessee exercises his option; an option not amounting to a sale; and his contract giving him no right to a commission on withdrawal of the property from sale, even if the lease, with the exclusive option to the lessee, amounts to such a withdrawal.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 67; Dec. Dig. § 57*; Limitation of Actions, Cent. Dig. §§ 273–279; Dec. Dig. § 50.*]

Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by Edward Dinkelspiel against James E. Nason and others. Judgment for defendants, and plaintiff appeals. Reversed.

T. T. C. Gregory, for appellant. W. U. Goodman, for respondents.

BURNETT, J. On July 28, 1904, plaintiff entered into a broker's contract with defendants for the sale of certain real property. Plaintiff was authorized to sell the property for $30,000, or any less sum accepted by defendants, and he was to receive a commission of 5 per cent. This provision was also in the agreement: "We also agree to pay said Edward Dinkelspiel, in the event of the sale of said property by him, or by any one else, including ourselves, while this agreement is in force 5 per cent. as and for his compensation thereunder." The contract was to continue until withdrawn by defendants in writing, and it was in force during all the time herein mentioned. On April 17, 1905, defendants leased the property to one William Pierce for the term of five years from April 1, 1905. The lease contained the following provision: "It is agreed that at any time during the said term, the said party of the second part [Pierce] may, at his option, purchase from the said parties of the first part [defendants] the said premises for the sum of $18,000.00 in gold coin; and the said parties of the first part will, in consideration of the said $18,000.00, convey to the said party of the second part a good, clear and valid title."

The complaint is in two counts. In the first, it is alleged that: "On or about December 6, 1909, said William Pierce tendered to defendants the sum of $18,000 in gold coin. Said defendants, and each of them, refused to accept the said sum. At said time, the said William Pierce was ready, willing, and able to buy the said property in accordance with the terms of said Exhibit B [the lease], and so informed the said defendants, and each of them, and offered to purchase the said property for the sum of $18,000 on the said date." In the second count it is alleged that, "on or about April 2, 1910, the real property was sold by defendants for the sum of $18,000 to said William Pierce." Hence, the claim for $900 as commissions.

A demurrer, on various grounds, including the statute of limitations, was interposed, and the court made the following order: "It is hereby ordered that the demurrer to the complaint of plaintiff, and each cause of action set forth therein, is hereby sustained, upon the ground that the action is barred by the provisions of subdivision 1 of section 337 of the Code of Civil Procedure, and said demurrer is overruled as to all other points." The appeal was taken from the judgment of dismissal of the action.

It is stated by appellant that: "It is the theory of defendants, and the one adopted by the court, that the cause of action arose in favor of plaintiff when the option was given to Pierce on April 17, 1905. Our position is that no cause of action arose until the tender or sale was made." The only controverted question, then, is: When is a broker, under such a contract, entitled to his commission? The agreement provided, in clear and simple language, that plaintiff was to receive the 5 per cent. in the event of a sale by *himself* or by *defendants* or by any one else. It is not disputed that the sale of the premises did not take place until the 10th day of April, 1910. So, if we are to follow the ordinary signification of the terms employed, we would reach the conclusion that plaintiff's cause of action arose on that date. But when it is provided that a broker shall receive a commission for the sale of property it is universally held that he earns his commission when he has produced a purchaser who is ready, able, and willing to purchase upon the terms prescribed. See Justy v. Erro, 117 Pac. 575, and cases therein cited. If the same rule should be applied to a case like this, where the broker is to receive a commission for a sale by the owner, then, according to the allegations of the complaint, the cause of action arose on December 6, 1909, for the reason that Pierce was at that time ready, able, and willing to purchase the property according to the terms of his option. At all events, it seems entirely clear that plaintiff had not earned his commission at any time prior to December 6, 1909; and therefore the action was not barred by the statute of limitations.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It seems to be held, without conflict, that a mere option to purchase does not entitle the broker to his commission. It is not a "sale," as that term is used in his agreement with the owner. The rule is stated in 19 Cyc. 251 and 252, as follows: "To entitle a broker to a commission, the customer produced by him and the principal must come to a final agreement on the terms of the transaction. Consequently the conclusion of a preliminary or tentative agreement which is not binding upon the party, and which is not carried into effect, does not give a right to compensation. Nor is a broker entitled to a commission where he procured a contract between the parties, subject to a condition not authorized by the terms of his employment. So if a broker, employed to effect a transaction, merely secured from a customer a contract, by which the latter becomes entitled to enter into the transaction at his option, the broker is not entitled to his commission. Thus a broker employed to sell property is not entitled to compensation for procuring a customer who takes an option on the property."

The same doctrine is announced in the well-considered case of Brown v. Mason, 155 Cal. 155, 99 Pac. 867, 12 L. R. A. (N. S.) 328. The two essentials to a broker's right to recover are stated by the court, through Mr. Justice Melvin, as: "(1) That he should produce and introduce to the seller a customer ready, able, and willing to take the property upon the terms stipulated; and (2) that this should be done within the time limit of the option." The court mentions certain exceptions to the rule, not in point here, and concludes that: "Wanting any of these exceptions, however, a broker is strictly held to the terms of his contract." In that case the plaintiff, Brown, was to get a commission for selling the property. He took a Mr. Long to defendant, and Long obtained an option to purchase the property, but did not purchase it under that option. The Supreme Court held that Brown was not entitled to any commission.

In Brackenridge v. Claridge, 91 Tex. 527, 44 S. W. 819, 43 L. R. A. 593, it is held that: "A contract by a broker to find a purchaser for land is not performed, so as to entitle him to a commission, where he procures one who merely obtained an option on the land, and made no offer to purchase." Other cases to the same effect, cited by appellant, are. Lawrence v. Rhodes, 188 Ill. 96, 58 N. E. 911; Bennett v. Egan, 3 Misc. Rep. 421, 23 N. Y. Supp. 154; Ward v. Zborovski, 31 Misc. Rep. 66, 63 N. Y. Supp. 219; Walsh v. Gay, 49 App. Div. 50, 63 N. Y. Supp. 543; Dwyer v. Raborn, 6 Wash. 213, 33 Pac. 350; Tousey v. Etzel, 9 Utah, 329, 34 Pac. 291; Lawrence v. Pederson, 34 Wash. 1, 74 Pac. 1011; Brown v. Keegan, 32 Colo. 463, 76 Pac. 1056.

On the same principle, manifestly, the broker would not be entitled to the commission in a case like this, when the owner, instead of selling the property, had only given an option for its sale.

But respondents contend that, by the execution of the lease to Pierce, the property was withdrawn from sale; and therefore the commission became immediately due. In support of this position, they cite Rucker v. Hall, 105 Cal. 425, 38 Pac. 962. In that case the defendant, in writing, appointed the plaintiffs her agents for the sale of certain lands, and the authorization contained the following clauses: "The said J. E. Rucker & Son shall have complete control of all sales to purchasers furnished by them or through their agency, and I agree in case I shall sell or dispose of such property to any customer furnished by said J. E. Rucker & Son, to pay them three per cent. commission on such sales. Should I find a purchaser independent from said J. E. Rucker & Son, or *withdraw the property from sale* I agree to pay said J. E. Rucker & Son one-half of the above commission as compensation for their services in advertising." Mrs. Hall leased the property for a term of five years, giving the lessee "the sole and exclusive privilege of purchasing the property." It was held that the plaintiffs were entitled to their commission. It is true that certain language is used in the opinion that tends to support respondents' contention that the lease here, as far as plaintiffs' right to commission is concerned, is equivalent to a sale. For instance, the court said: "The fifth finding is not justified by the evidence, in so far as it finds that Mrs. Hall did not find a purchaser or sell the property while her agreement with plaintiffs was in force. It is true the lease for five years, with the exclusive privilege of purchasing, did not bind the lessee to purchase, but Mrs. Hall bound herself to sell to the lessees at any time during the continuance of the lease, and to convey upon payment of $5,000 of the purchase money. She thus placed it out of her power to complete any sale plaintiffs might make for the space of five years, or forever, as the case might be. Such contracts must have a reasonable construction. The transaction must be considered as to its effect upon her contract with the plaintiffs, and not simply as to whether she had made a contract of sale, such as she could, in any event, enforce against a purchaser. This is apparent from the further provision of the contract with the plaintiffs that, if she should withdraw the property from sale, she was bound to pay plaintiffs the same commission as though she had made a sale to an independent person." This last sentence, as we view it, presents really the substantial ground for the decision. The property was withdrawn from sale in consequence of the lease, and therefore, under the express terms of the agreement with the brokers, they were entitled to their commission. We have no such condition in the case before us. There was no agreement here to pay a commission if the property should be withdrawn from the market. We repeat, the plaintiff here was to be paid only in case of a sale. There is nothing in their agreement that precluded defendants from leasing the property or granting an option to any one to purchase it, without incurring any pecuniary obligation to plaintiff. Of course, we must construe the opinion of Rucker v. Hall, supra, in accordance with the peculiar facts there in evidence. Thus the decision can be justified, and we will not be required to attempt the hopeless task of reconciling an expression or two, not necessary to the decision, with what we understand to be the universal trend of authority.

As we view it, the contention of respondents introduces an entirely new element into the broker's agreement. It is equivalent to interpolating into said contract the provision that the broker shall be entitled to his commission if the owner of the property should lease the same, with the option of purchase to the lessee. If, immediately after said lease was executed, appellant had brought an action to recover his commissions, the only conceivable grounds for recovery would be as follows: (1) That a "sale" was consummated, within the meaning of the broker's contract when a third person had taken "an option to purchase." This position is entirely untenable, as we have already seen. (2) That the property, by the act of the owners, was withdrawn from sale, and thereby the broker was prevented from obtaining a purchaser; and hence he should be held entitled to his commission. The answer to this is that there was no agreement to this effect. The parties contracted that the plaintiff should have his commission only in case of a sale. If, during the life of the option, he had produced a purchaser ready, willing, and able to buy, he probably would have earned his commission, notwithstanding the lease; but no such question arises here. (3) That there was an implied covenant, when the brokerage contract was executed, that the owners would not lease the property with an exclusive option to purchase, or, if they did, that the broker would be entitled to his commission. We are not aware of any principle of law or justice that demands such construction. The contract, as we have construed it, was quite favorable to the broker. He certainly had no right to demand any further indulgence than that he receive his commission when he procured a purchaser, or the owners themselves obtained one, ready, willing, and able to buy during the existence of the brokerage contract.

The other cases cited by respondents are in harmony with the views herein expressed, as will be seen by a brief reference to them.

In Phelan v. Gardner, 43 Cal. 306, it is held that: "If the owner of land employs another person to sell for him his land, at an agreed rate of commission, and the broker finds a purchaser who is willing to take the land at the price fixed, the owner cannot, by a refusal to sell to him, or by a sale to another, avoid the contract, and escape the payment of the commission." As well said by the court: "The plaintiff could do no more than procure a purchaser who was acceptable to the defendant, and willing and able to purchase the land upon terms satisfactory to him."

Gonzales v. Broad, 57 Cal. 224, was a similar case, as far as the broker's rights were concerned. There the plaintiff, having been employed by the defendant to find a purchaser for real estate, brought to him a party who was ready and willing to purchase, and with whom the defendant was satisfied and entered into an agreement to sell. Afterwards the purchaser refused to take the property, solely on the ground that the defendant's title was not satisfactory. It was held that the plaintiff did all that was required of him, and was entitled to his commission.

Smith v. Schiele, 93 Cal. 144, 28 Pac. 857, is to the same effect. There it was held that: "A written contract between the owner of land and real estate brokers, authorizing the brokers 'solely to sell' the land upon certain commissions, will be construed as simply conferring upon the brokers the exclusive right to sell the property, and not as limiting the contract of employment solely to the consummation of a sale, so as to make the payment of the broker's commission contingent upon such consummation."

In Quitzow v. Perrin, 120 Cal. 255, 52 Pac. 632, the agent was to receive his commission at the time of the actual transfer, when the "deeds of conveyance are executed"; and it was provided that: "If no deeds of conveyance are executed or actual transfers of property made, there will be no commission earned." It was held that there was sufficient evidence of an actual transfer to support the verdict of the jury in favor of the agent.

In Coward v. Clanton, 122 Cal. 451, 55 Pac. 147, the main controversy was as to whether the contract between the owner of the realty and the real estate broker constituted a partnership. The court determined that no such relation was created; but it was held that evidence tending to show that purchasers for the entire tract, who were acceptable to and accepted by defendant, and with whom satisfactory contracts were made, were found by the plaintiff, as defendant's agent, notwithstanding conflicting evidence to the contrary, is sufficient to sustain a decision that plaintiff had performed the contract on his part to sell the real estate.

In Hoadley v. Savings Bank of Danbury, 71 Conn. 599, 42 Atl. 667, 44 L. R. A. 321, the disputed question was whether the broker was the procuring cause of the sale; and it was held that, although the broker was not given the exclusive sale of the property, and the owner himself made the sale, the broker will be entitled to his commissions if he was the procuring cause of the sale, and after he has rendered the services which made him the procuring cause the owner cannot escape liability by telling him that no commission will be paid, in case the property brings only a certain price.

Lunney v. Healey, 56 Neb. 313, 76 N. W. 558, 44 L. R. A. 593, simply reaffirms the familiar doctrine that, "where a real estate broker contracts to produce a purchaser who shall actually buy, he has performed his contract by the production of one financially able, with whom the owner actually makes an enforceable contract of sale." In the notes to the last two cases, the whole subject of real estate brokers' commissions is ably and exhaustively treated, and a vast number of cases is cited; but we find nothing therein inconsistent with appellant's position here.

Hill v. McCoy, 1 Cal. App. 159, 81 Pac. 1015, was decided upon conflicting evidence as to whether the agent was the procuring cause of the sale; and it was held that the finding of the lower court that the agent was entitled to his commission was sufficiently supported.

This is not a case, we may repeat, where the owners, by the execution of their lease and option to purchase, were acting in bad faith, or were attempting to avoid their contract with the agent. On the contrary, they were acting entirely within their rights, and, as a matter of fact, the lease, with its option to purchase, was a step towards the consummation and in contemplation of a sale that would entitle the agent to his compensation. All parties in interest had a right to assume that no claim for commission could be successfully asserted, unless the agent or the owners should secure a purchaser ready and willing to buy the property.

We cannot avoid the conclusion that it was erroneous to hold that the plaintiff was entitled to his commission when said lease was executed. We think, therefore, the action was not barred by the statute of limitations, and the judgment is reversed.

We concur: CHIPMAN, P. J.; HART, J.

162 Cal. 47

MERRITT v. CITY OF LOS ANGELES.

(L. A. 2,741.)

(Supreme Court of California. Jan. 19, 1912.
Rehearing Denied Feb. 17, 1912.)

1. APPEAL AND ERROR (§ 509*)—RECORD—STATUTORY REQUIREMENTS.

Code Civ. Proc. §§ 951, 952, defining the record on appeal, applies to records on appeal prepared under sections 953a, 953c, providing for the preparation of papers on appeal, and a copy of the notice of appeal is a necessary part of the record on appeal and must be included in the transcript.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2317; Dec. Dig. § 509.*]

2. WATERS AND WATER COURSES (§ 12*)—WATER RIGHTS—ACQUISITION.

On July 18th one filed in the United States land office a declaratory statement under the desert land act to obtain patent for land situated several miles distant from a place of diversion of water. Two days later he posted a notice of appropriation on the creek, claiming a specified quantity of water for use on the land. Nothing further was done in pursuance of the notice. *Held* that, under Civ. Code, § 1419, providing for the forfeiture of the right to the use of water as against a subsequent claimant, he did not acquire any rights under the notice.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 12.*]

3. WATERS AND WATER COURSES (§ 33*)—WATER RIGHTS — DETERMINATION OF CONFLICTING CLAIMS.

One who posts a notice of appropriation of water from a running stream, as authorized by Civ. Code, §§ 1410–1422, providing for the acquisition of rights to water by appropriation, has an incomplete, conditional right in the water, which is a vested interest in real property, and which may be adjudged to be such in a civil action to determine conflicting claims under Code Civ. Proc. § 738, authorizing actions to quiet title.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 33.*]

4. WATERS AND WATER COURSES (§ 33*) — WATER RIGHTS—ACTIONS.

Where a plaintiff, within 60 days after the posting of notice of appropriation of water of a running stream, had a survey and map made of the route of the proposed ditch from the proposed dam to the proposed place of use, to be used in applying for a permit from the federal government to construct the same over land in a forest reserve, and the survey was completed within 60 days, and plaintiff within 60 days filed his application with the United States authorities for permission to build the proposed dam, which application was pending, and plaintiff acted in good faith and prosecuted his application with reasonable diligence, he acquired such interest against subordinate adverse claims as to enable him to maintain an action to determine conflicting claims to the use of the water, but the judgment should not declare that plaintiff was absolutely entitled to the water, but it should only describe plaintiff's contingent right to use the water and enjoin adverse claims injurious thereto.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 33.*]

In Bank. Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action by C. Howard Merritt against the City of Los Angeles. From a judgment for defendant, plaintiff appeals. Reversed.

W. P. Thompson and W. J. Clark, for appellant. John W. Shenk, City Atty., Leslie R. Hewitt, Ex-City Atty., Ben H. Yandell, and W. B. Mathews, for respondent.

SHAW, J. The plaintiff sued for the purpose of obtaining an adjudication of the alleged conflicting claims of the plaintiff and defendant, respectively, to the use of the water of Haiwee creek in Inyo county, and to enjoin the defendant from claiming or using the same and from interfering with plaintiff's use. The defendant in its answer alleged that it is the owner of the first and paramount right to take from said creek all the water flowing therein to the extent of 300 inches constant flow, under a 4-inch pressure. Upon the trial the evidence showed that the normal flow of the creek did not exceed 75 inches, although for about a month of each year, while the mountain snows were melting, it far exceeded that quantity. The court found that the defendant is the owner of the right to take all the water therein to the extent of 75 inches, and that the plaintiff owned no interest therein. There was no affirmative adjudication of the defendant's title. The judgment merely declares that the plaintiff shall take nothing by his action and that defendant recover of him its costs.

[1] The record on appeal appears to have been prepared in the manner provided in sections 953a and 953c of the Code of Civil Procedure. It contains no copy of the notice of appeal. In the brief for plaintiff, counsel say that appeals were taken from the judgment and from an order denying a new trial. This statement is not questioned by counsel for defendant, and no motion to dismiss the appeals has been made. Consequently, we ignore the objection and assume that the appeals were properly taken and that we have jurisdiction accordingly. Inasmuch as there has recently been on the part of many members of the profession, who have chosen this mode of presenting the record, neglect in observing the requirements of the statute availed of, we take this occasion to state that sections 951 and 952 obviously apply to records prepared under sections 953a and 953c, as in other cases, and that a copy of the notice of appeal is a necessary part of every record on appeal and should be included in the transcript in all cases.

[2] The plaintiff on July 18, 1905, filed in the United States land office a declaratory statement under the desert land act to obtain patent for a half section of land situated several miles distant from the place of diversion of the water in question. On July 20, 1905, he posted a notice of appropriation on Haiwee creek claiming 500 miners' inches of the water for use on said land. Nothing further was done in pursuance of this notice, and, under section 1419 of the Civil Code, it lapsed after 60 days, so far as subsequent bona fide claimants under valid notices were concerned. The lack of diligence was so great that the court below was justified in holding, as the findings imply, that no rights ever accrued under this notice. Senior v. Anderson, 115 Cal. 504, 47 Pac. 454.

On September 20, 1906, plaintiff posted at the same place another notice of appropriation of the same quantity of water from said creek for the same purpose. No work was ever done under this notice. The notice showed that the place of diversion was upon public land within a forest reservation of the United States. Section 1422 of the Civil Code, as amended in 1903, provides that a person appropriating water upon such land shall begin his diversion works within 60 days after he shall have received permission to do so from the United States, provided that within 60 days after posting his notice of appropriation he must in good faith begin the surveys and other work necessary for use with his application for such permission and diligently prosecute the same to completion, and must, on completion of that work, in good faith apply for such permission and diligently prosecute such application. There was no proof of any survey or other work in compliance with this section. Some vague testimony of the making of a survey was introduced, but the date thereof was not stated. The claim under this notice appears to have been abandoned. At all events, the court was justified in so finding.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Another notice of appropriation was posted on February 10, 1908. Nothing appears to have been done in pursuance of it, and this claim also must be deemed to have been abandoned.

On June 14, 1908, plaintiff posted at the same place another notice of appropriation of 100 inches of water of said creek for use on the same land. The notice states that the proposed dam and ditch would be within the Sierra National Forest, a forest reservation of the United States. Within 60 days after the posting of this notice plaintiff had a survey and map made of the route of the proposed ditch from the proposed dam to the proposed place of use, to be used in applying for a permit from the United States to construct the same over the land in the forest reserve. The survey was completed on July 23, 1908. On August 10, 1908, plaintiff filed his application to the United States authorities for permission to build the proposed dam and ditch or pipe line. This application was still pending and undetermined at the time of the trial. It appears to be conceded by defendant's counsel that it was made in good faith, and that the survey was made and the application prosecuted with the reasonable diligence required by section 1422 of the Civil Code.

[3] Defendant attempts to support the judgment solely on the ground that one who has posted a notice of appropriation of water from a running stream, under the provisions of the Civil Code, sections 1410 to 1422, has no vested estate, right, or interest in the water, present or future, until he has actually diverted and used the water in pursuance of his notice, and that in the meantime he has no standing in court to ask for protection of the right to use the water, which he expects to have upon the completion of the work necessary for that purpose, against hostile claims or diversions which may ripen into a prescriptive right by continuous use, and no right to invoke the aid of the courts to determine and adjudge whether or not a hostile diversion is in fact prior or paramount to his own. In the case entitled Inyo Consolidated Water Company v. Jess et al. (L. A. No. 2,638) 119 Pac. 934, decided on December 11, 1911, we had occasion to consider this proposition; made there also on behalf of the city of Los Angeles. The briefs were substantially the same as those on file in the present case. It was there decided that such a claimant to the use of water has an incomplete, incipient, conditional right in the water, which is a vested interest in real property, and which may be adjudged to be such in an action to determine conflicting claims under section 738, Code of Civil Procedure.

[4] Upon the authority of that decision, we hold that the plaintiff showed sufficient interest to entitle him to a judgment of the court protecting that interest against all adverse claims which would be subordinate to plaintiff's right if he should comply with all the requirements of the statute and thereupon take the water and apply it to a useful purpose. Such judgment, of course should not declare the plaintiff absolutely entitled to the water, nor enjoin the defendant from taking or using it during the intervening time prior to the completion of plaintiff's works to a stage which will enable him to divert and use it. It should only declare and describe the plaintiff's contingent right to use the water and enjoin adverse claims or uses injurious thereto. If the plaintiff's right shall have terminated at or before the time of trial, the judgment should be for the defendant. If the defendant's right is paramount, but does not include all the waters of the stream, the judgment may so declare and fix the plaintiff's contingent right in the surplus at such time as there is an excess over defendant's use. We think the court below erred in refusing relief to the plaintiff.

The judgment and order are reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.

162 Cal. 44

TITLE INS. & TRUST CO. v. KING LAND & IMPROVEMENT CO. et al.

(L. A. 2,728.)

(Supreme Court of California. Jan. 17, 1912.)

1. Judgment (§ 153*)—Default—Application for Relief—Time of Presentation—Proceeding Taken.

An application to set aside a default and a judgment thereon, made under Code Civ. Proc. § 473, authorizing the granting of relief on application made within six months, from a proceeding taken against the petitioner for relief, is made too late, where the application by the defaulting defendants, who were personally served with summons and personally appeared, is not made until after the expiration of six months from the time of the default, though within six months after entry of judgment.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 153.*]

2. Judgment (§ 135*)—Default—"Proceeding Taken Against."

The taking and entering of a default is a "proceeding taken against" the party in default, within Code Civ. Proc. § 473, authorizing the court to relieve a party from proceedings taken against him on application therefor within a specified time.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 135.*

For other definitions, see Words and Phrases, vol. 6, pp. 5631–5638.]

3. JUDGMENT (§ 134*)—"DEFAULT."

A "default" confesses the material facts in the complaint and precludes defendant from making any objection to the relief authorized by the complaint until set aside in a proper proceeding.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 244; Dec. Dig. § 134.*

For other definitions, see Words and Phrases, vol. 2, pp. 1928–1930; vol. 8, p. 7630.]

Department 1. Appeals from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by the Title Insurance & Trust Company against the King Land & Improvement Company and others. From an order denying the motions of defendants Charles Kern and others to set aside a judgment and to relieve them from a default entered against them, they appeal. Affirmed.

E. E. Keech, for appellants. Stephens & Stephens, for respondent.

SHAW, J. The appeals here presented were taken from an order denying the several motions of the appealing defendants to set aside a judgment and to relieve them from a default entered against them. The action was upon a promissory note executed to the plaintiff by the King Land & Improvement Company, Charles Kern, W. J. King, G. W. Burleigh, A. C. Black, H. E. Smith, H. C. Cartmell, C. R. Ward, Robert McFadden, William L. Inness, and Albert Fuller, all of whom were made defendants. The appealing defendants are Black, Smith, Cartmell, Inness, Fuller, and Kern, each of whom had suffered a default to be taken and entered against him. The defaults of all except Kern were entered by the clerk on January 4, 1909. Kern joined in an answer with the other defendants, Ward, Burleigh, and McFadden; but at the beginning of the trial, to wit, on June 1, 1909, he withdrew therefrom, and thereupon his default was duly entered by the court. The judgment was rendered on March 3, 1910. The motion to have the defaults and the judgment set aside was made on May 16, 1910.

[1] It is apparent that the applications to set aside the defaults came too late. They were made under the provisions of section 473 of the Code of Civil Procedure. All of the appellants were personally served with summons, and Kern personally appeared. In such cases, the court, under that section, is without power to grant such relief unless the application therefor is made within a time not exceeding six months after the proceeding from which relief is sought was taken. As to all except Kern, the default was entered more than 16 months before the application to vacate it was made. As to Kern, it was more than 11 months before the application.

[2] The proposition that the taking and entering of a default is not a "proceeding taken against" the party in default, within the meaning of section 473, that the judgment is the only effectual proceeding, and that its date fixes the beginning of the period of six months within which a motion to set aside the default may be made, is not tenable. A default is entered by the clerk or by the court, at the instance of the adverse party. It is clearly a proceeding against the delinquent party. Burns v. Superior Court, 140 Cal. 5, 73 Pac. 597; Stonesifer v. Kilburn, 94 Cal. 43, 29 Pac. 332; Lukes v. Logan, 66 Cal. 33, 4 Pac. 883. If it were not a proceeding, or order, the party could not obtain relief from it at all under that section. It is not a judgment, and the section authorizes relief only from a judgment, order, or proceeding. The argument is really self-destructive. If the default cannot be set aside, because it is not a proceeding or order, of what avail would it be to set aside the judgment? The default would stand undisturbed.

[3] A default cuts off the defendant from making any further opposition or objection to the relief which plaintiff's complaint shows he is entitled to demand. A defendant against whom a default is entered "is out of court and is not entitled to take any further steps in the cause affecting plaintiff's right of action." 6 Ency. of Pl. & Pr. 126. He cannot thereafter, nor until such default is set aside in a proper proceeding, file pleadings, or move for a new trial, or demand notice of subsequent proceedings. Id., 127. "A default confesses all the material facts in the complaint." Rowe v. Table M. W. Co., 10 Cal. 441. Consequently, if the judgment were vacated, it would be the duty of the court immediately to render another of like effect, and the defaulting defendants would not be heard for the purpose of interposing any denial or affirmative defense.

Under these circumstances, the court below was justified in refusing appellants any relief. We are not to be understood as intimating that on the merits there was a sufficient case of excusable neglect established.

The order is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

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17 Cal. App. 621

PEOPLE v. LEWIS. (Cr. 355.)

(District Court of Appeal, First District, California. Dec. 12, 1911.)

CRIMINAL LAW (§ 829*)—INSTRUCTIONS—REPETITION.

Where the instructions given were not objected to for failing to cover every phase of the case, including the law and the evidence applicable to self-defense, the refusal of a requested charge on self-defense, which was but a reiteration of a charge already given, was not error.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Appeal from Superior Court, Alameda County; E. P. McDaniel, Judge.

Hardie Lewis was convicted of manslaughter, and he appeals. Affirmed.

A. L. Frick and Frank M. Carr, for appellant. Attorney General Webb, for the People.

LENNON, P. J. The defendant was tried upon an information charging him with the crime of murder, and was convicted of manslaughter. His appeal, which is from the judgment and an order denying a new trial, presents for determination the single point of the trial court's refusal to give a requested instruction upon the subject of self-defense, defendant claiming, in support of his plea of not guilty, that his acts were justified upon that ground.

The circumstances leading up to the crime need not be related. With reference to the immediate facts of the killing which have any bearing upon the point under consideration, it appears from the evidence that the defendant fired at least five shots, three of which found lodgment in the body of the deceased. Two of the latter shots inflicted only superficial wounds which in no wise contributed to the death of the deceased. One of the three shots penetrated and fractured the skull of the deceased, and was necessarily fatal. The shooting commenced in a Pullman car which was standing in the West Oakland yards of the Southern Pacific Railroad Company, and, when it ceased, the deceased was lying on the ground at or near the end of the car. The defendant did not take the stand to give his version of the difficulty, and, as none of the witnesses testified exactly as to what occurred during the affray, it is difficult to say when and where, whether in the car or out of it, all of the several shots which took effect were fired. It is certain, however, that at least one shot was fired at the deceased while he was lying on the ground, but whether this last shot reached its mark is not made manifest by any direct evidence.

It is the contention of counsel for the defendant that, considering the nature of the wounds and the course of the bullets, the evidence fairly indicated that the two men must have been standing in an upright position and about on a level when the shot which caused the wound in the head was fired, and that the defendant must have been at an elevation above the deceased when the two shots which inflicted only superficial wounds were fired. From this assumption of fact it is inferred that the fatal wound in the head was inflicted by one of the shots fired in the car, that of the two remaining shots which reached the deceased the first was fired as he was fleeing or falling from the rear steps of the car, and the second while he was prostrate on the ground. This contention, and the inference deduced therefrom, formed the basis of a requested instruction which the court refused to give, and which in effect required a verdict of not guilty if the jury found as a fact, regardless of how many shots the defendant fired into the body of the deceased, that the first shot was fatal and fired in necessary self-defense.

Upon an examination of that portion of the record pertinent to the point presented, we are unwilling to concede that the evidence is fairly susceptible of the construction placed upon it by counsel for the defendant; but, even if it were conceded that the evidence shows all that counsel claims for it, the requested instruction was properly refused. Assuming that the instruction in question correctly stated the law, that it was free from the vice of being argumentative and in the nature of a special plea, which singled out and gave undue prominence to a particular phase of the case, it was in its ultimate analysis but a reiteration of that portion of the charge of the court wherein the jury were told, in substance, that in deciding to what extent a man may go in resisting an assault he may act upon the circumstances as they appear to him, and will not be held to the same strict accountability for an error in judgment or for the use of force disproportionate to the impending danger as one who is not required to act quickly.

No complaint is made that the charge of the court as a whole did not completely and correctly cover every phase of the case, including the law and the evidence applicable to the defendant's claim of self-defense; and therefore it cannot be said that the refusal of the trial court to give the particular requested instruction prejudiced the defendant or tended to his prejudice in respect to any of his substantial rights.

The judgment and order are affirmed.

We concur: KERRIGAN, J.; HALL, J.

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17 Cal. App. 583

LANTZ v. FISHBURN et al. (Civ. 925.)

(District Court of Appeal, Second District, California. Dec. 4, 1911. Rehearing Denied by Supreme Court Feb. 2, 1912.)

1. Appeal and Error (§ 1195*)—Former Appeal—Law of Case.

A judgment on a former appeal became the law of the case upon retrial as to all matters considered and properly involved on the appeal, though the order denying the application for rehearing recited that the decision rested upon the determination that the evidence did not justify the findings.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.*]

2. MUNICIPAL CORPORATIONS (§ 408*)—RETROACTIVE STATUTES.

Act Feb. 27, 1893 (St. 1893, p. 36), making assessment bonds conclusive evidence of the regularity of all proceedings had prior to the making of the certified list of assessments, affected a right of property, and was not a mere rule of evidence, so that the amendment of 1899 (St. 1899, p. 40), making such bonds prima facie evidence only, did not apply to bonds, the validity of which was involved in an action begun before the amendment was enacted.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 408.*]

3. MUNICIPAL CORPORATIONS (§ 339*)—PUBLIC IMPROVEMENTS—SPECIFICATIONS—CONDITIONS.

A provision in the specifications of street improvements that the contractor shall be responsible for all damage to water pipes, etc., under the street, and liable for damage to fences, trees, etc., was not objectionable, so as to vitiate bonds issued for special assessments.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 339.*]

4. LIMITATION OF ACTIONS (§ 167*)—BAR OF PERSONAL ACTION—EFFECT AS TO LIEN.

Civ. Code, § 2911, provides that a lien is extinguished by the lapse of the time within which an action can be brought under the principal obligation. Act Feb. 27, 1893 (St. 1893, p. 36), provides that assessments for street improvements shall be a first lien upon the property affected until the bonds issued for its payment and the accrued interest thereon shall be fully paid. *Held* that, as the only remedy for enforcing payment of assessment bonds is by public sale of the property, that remedy is not barred by failure of the city treasurer or the bondholder to bring a personal action against the property owner within the period of limitations applicable to such action.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 651-653; Dec. Dig. § 167.*]

5. CONSTITUTIONAL LAW (§ 169*)—IMPAIRMENT OF CONTRACT—STATUTES AFFECTING REMEDIES.

An amendment of Act Feb. 27, 1893 (St. 1893, p. 36), enacted in 1899 (St. 1899, p. 40), required notice of sale of property to satisfy a street assessment bond to be published for only two weeks, instead of three weeks, as provided by the original statute, and also provided that the cost of publication and 50 cents for a certificate of sale should be collected by the city treasurer. *Held*, that the amendment worked a mere change of remedy, and did not impair contractual obligations, so that it would apply to sales, made after it became effective, in street improvement proceedings terminated before its enactment.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 478-481; Dec. Dig. § 169.*]

6. MUNICIPAL CORPORATIONS (§ 581*)—ASSESSMENTS—SALE—TITLE OF PURCHASER.

The title of a purchaser of property sold upon a default in payment of street assessment bonds, pending issuance of deed, becomes absolute, unless the right to redeem is exercised within the time prescribed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1296-1298; Dec. Dig. § 581.*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by H. P. Lantz, as administrator with the will annexed of the estate of George Locke, against J. E. Fishburn and Walter M. Rheinschild, as special administrator of the estate of George Rheinschild, deceased. From the judgment and an order denying a motion for a new trial, plaintiff and defendant Rheinschild appeal. Order denying new trial affirmed, and judgment reversed and remanded, with directions to enter judgment.

See, also, 91 Pac. 816.

Charles Lantz, for plaintiff. J. L. Murphey, for defendant Rheinschild.

JAMES, J. After decision heretofore rendered in this action by this court, a rehearing was granted. Upon a re-examination of the case, we are satisfied with the conclusions expressed in our former decision, except as to the matter discussed in the concluding paragraphs of the opinion filed, and we therefore adopt, as stating our present views, the major portion of that opinion, which is as follows:

"This action was brought to secure a decree quieting title to lots 7 and 9, in block 4, of the Brooklyn tract in the city of Los Angeles. The trial court by its judgment determined that the fee title was held by the estate of George Locke, subject to liens of defendant Rheinschild, acquired under street improvement proceedings. Plaintiff has appealed from the judgment, and from an order denying his motion for a new trial, and there is also an appeal taken by defendant Rheinschild from the judgment. The appeals of the two parties are presented on the same transcript.

"Under the proceedings for the improvement of Bridge street, assessments were levied against the two lots mentioned, the assessment on lot 9 being for the sum of $452.90, and that against lot 7 for the sum of $148.22. Under the proceedings for the improvement of Echandia street, an assessment for the amount of $105.43 was levied against lot 9. The ordinance of intention for the improvement of Bridge street was adopted on May 19, 1893, and that for the improvement of Echandia street was adopted March 15, 1893. In accordance with the provisions of the act, bonds Nos. 20 and 21 were issued on June 19, 1894, on account of the improvement of Bridge street, and bond No. 4 was issued on January 12, 1894, on account of the Echandia street assessment. The term of the bonds was for 10 years from their date, with annual payments required to be made as is provided for by the bond act. On May 26, 1900, defendant Rheinschild, then the owner of bonds Nos. 20 and 21, there not having been paid any part of the principal or interest installments which had theretofore matured, gave notice to the city treasurer of the city of Los Angeles that default had been made, and then elected to declare the whole sum of principal and interest of said bonds due, and directed the city treasurer to sell lots 7 and 9 to satisfy the amounts due upon said bonds. Notices of sale were published, and a sale was had thereafter, at which defendant Fishburn was the successful bidder, and to whom a certificate of sale was issued, followed by a deed upon the expiration of the period for redemption. Default had also been made in the payment of the installments due upon bond No. 4; but no notice thereof was given to the city treasurer until June, 1907. Defendant George Rheinschild performed the work of improvement upon the streets mentioned under a contract regularly awarded to him. The complaint in this action was filed on March 6, 1902. Defendants in their answer set up the various proceedings had for the improvement of Bridge and Echandia streets, and claimed title to the lots under and by virtue of the sale made as before mentioned, and the deeds issued thereunder. The first trial of the action in the superior court on the issues so made resulted in a judgment in favor of plaintiff, and the defendants appealed therefrom. The appeal was heard in this court and decided on May 29, 1906. See Lantz v. Fishburn, 3 Cal. App. 662 [91 Pac. 816]. It was there held that all of the bonds were regularly issued, but that the sale of the property made to satisfy payments delinquent thereon was void because of irregularity in the notices given, et cetera. The case was remanded for a new trial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] "The questions, as to the validity of the bonds, and the validity of the sale made of the property, were fully considered, and the determination of this court, as thereon announced in that decision, became the law of the case. Klauber v. San Diego St. Car Co., 98 Cal. 105 [32 Pac. 876]. This, notwithstanding the fact that in the order made thereafter, denying the application for a rehearing, it was recited that the decision of the court rested upon the determination that the evidence was insufficient to justify the findings. The original opinion as filed was not modified, and for that reason we think it was controlling upon the court upon a retrial as to all other matters therein considered, and which were presented and properly involved upon the appeal.

[2] "Counsel for plaintiff suggests that the decision, wherein the validity of the bonds was treated of, and wherein it was held that any defects in the specifications could not be considered, in view of the decision of the Supreme Court in the case of Chase v. Trout, 146 Cal. 350 [80 Pac. 81], should not be deemed conclusive of that question. In the decision in the case of Chase v. Trout, supra, it was held that the matter of the irregularity in the specifications could not be inquired into, because the act of 1893, under which the bonds were issued, contained a clause making the bonds upon their issuance conclusive evidence of the regularity of all proceedings had previous to the making of the certified list of assessments. In 1899 [St. 1899, p. 40] the street improvement act of 1893 was amended, and by the amendment the conclusive evidence clause was changed, so as to provide that the bonds should only be prima facie evidence of the regularity of the proceedings. Counsel now contends that the conclusive evidence clause prescribed a rule of evidence governing the trial of an action only; and that as the first trial of this cause was had after the adoption of the amendment referred to, he would not be foreclosed from raising the question as to the sufficiency of the specifications, according to which the improvement work on Echandia and Bridge streets was performed. Even though it be conceded that this point can now properly be considered, notwithstanding the former decision in this case, we do not think that the proposition advanced by counsel can be maintained. In the absence of limiting words in the statute expressing a contrary intention, the provision making the bonds conclusive evidence of the regularity of the proceedings up to a certain point is given a reasonable and fair construction by holding that it was the intention of the Legislature to affect a right of property, and not to establish a mere rule of evidence. Cook v. Cockins, 117 Cal. 140 [48 Pac. 1025].

[3] The clause in the specifications to which attention is directed, to wit, that 'the contractor shall be responsible for all damages to water pipes, gas pipes, sewers and other underground improvements of the street; he shall also be held liable for damages done to fences, trees, etc.,' does not embody such a condition as was considered objectionable in the case of Blochman v. Spreckels, 135 Cal. 662 [67 Pac. 1061, 57 L. R. A. 213], and Woollacott v. Meekin, 151 Cal. 701 [91 Pac. 612]. The property affected by the assessment proceedings was described as is required by the act of 1893, and that description was sufficiently definite and certain, and the ordinances of intention appear to have been properly published and posted.

"It was determined by the former decision in this case that the sales made of the lots, because of delinquency in payments of the installments and interest due on bonds Nos. 20 and 21, were invalid. It does appear that the proceedings were regular and valid up to and including the notice given by the holder of those bonds to the city treasurer, demanding that a sale be made of the property to satisfy the amounts due.

[4] "The money collected from the property owner is set apart in a special fund from which the bonds are paid, and the bonds on their face, following the form prescribed by the statute, provide that payment of amounts due thereunder shall be made exclusively

from that fund. There is no authority given to the city treasurer or to the bondholder under the street bond act to bring any action to compel payment from the property owner of the amount of the assessment; the only method of enforcing payment provided for is that of subjecting the property to a public sale. Therefore no statute of limitations is made to run against the collection of the assessment by such means. This observation is made in view of the point urged by appellant Lantz that the liens of the bonds have been extinguished. In support of that contention, he cites section 2911, Civil Code, which provides as follows: 'A lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation.' By express provision of the bond act (Stats. 1893, p. 36), the amounts of the assessments are made 'a first lien upon the property affected thereby, until the bond issued for the payment thereof, and the accrued interest thereon, shall be fully paid.' The power conferred upon the city treasurer to enforce payment in the same manner as a tax collector is authorized to enforce collection of delinquent tax assessments does not, as before noted, include any right to bring a personal action against the property owner. A tax collector has no such authority, although by the statutes of 1880, page 136, such a right is specially given to a city, county, or city and county. Section 2911, Civil Code, is therefore not applicable here, and it follows that the liens of the assessments against the property of plaintiff's testator have not been extinguished by limitation of time."

[5] In the concluding portion of the opinion from which we have quoted, it was noted that, after this action had been decided upon, the former appeal, as hereinbefore referred to, defendant Rheinschild, as the owner of the three bonds, had again given notice to the city treasurer, requiring that the property holden as security for the payment thereof be sold; this notice covering bond No. 4, which had not been included in the first notice of sale. Further, that the city treasurer had again proceeded with the sale of the property, but that the notice of sale was published for only two weeks, instead of three weeks, as required by the provisions of section 3766 of the Political Code; also that charges claimed against the property, and for which it was sold, included an item of $10 costs, for the collection of which no authority seemed to be given. Our conclusion was that the second sale was invalid, and that a new trial should be had, for the reason that the evidence was insufficient in that view to sustain the judgment. For the first time upon petition for rehearing, it was called to our attention that by the statute of 1899 the street bond act of 1893 was so amended as to require notice of sale to be published for two weeks only, and also providing that the cost of such publication, and 50 cents for a certificate of sale, should be collected by the city treasurer. The amendatory act became effective before the sales were had, but after the proceedings for the improvement of the streets described had all been concluded. If the effect of the amendatory act was to work a change only in the manner by which a remedy was provided to be pursued, then the city treasurer was justified in giving only such notice, and in making such charges by way of costs, as the amendatory act provided should be given and made. On the other hand, if, by applying the amendatory provision to proceedings instituted prior to the adoption thereof, a right of property would be affected, and in consequence contract rights interfered with, then the amendatory act should be held inapplicable to the street improvement proceedings considered in this case. We are of the opinion that the amendment worked a mere change of remedy, and did not affect or impair contract obligations. As was said in the case of Mill & Lumber Co. v. Olmstead, 85 Cal. 84, 24 Pac. 649: "The authorities are numerous to the effect that a change of remedy, or in the time within which it must be sought, does not impair the obligation of a contract, provided an adequate and available remedy be left. Thus it has been held that an enactment reducing the time prescribed by the statute of limitations in force when the right of action accrued is not unconstitutional, provided a reasonable time be given for the commencement of an action before the bar takes effect. Terry v. Anderson, 95 U. S. 628 [24 L. Ed. 365]. In that case the court, by Waite, C. J., said: 'The parties to a contract have no more a vested interest in a particular limitation which has been fixed than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and, as to the forms of action or modes of remedy, it is well settled that the Legislature may change them at its discretion, provided adequate means of enforcing the right remain.' "

As to the matter of costs, the street act, as amended, provides for the collection of the cost of publication of notice of sale, which was not theretofore included in the charges to be made against the delinquent property. We believe that this provision also may be classed as one affecting remedy only. It may be likened to a case where, after judgment and execution issued in an ordinary action, but before execution sale, the Legislature had changed the amount of fees to be collected by the officer making execution sale. It could scarcely be contended, in the event that by such change the fees were increased in amount over those which such officer would have been entitled to charge at the time judgment was rendered or execution issued, that some vested right of property was disturbed, and that the increased charges could not be collected.

[6] We conclude that the last sales made by the treasurer were legal and valid, and had the effect of vesting in Rheinschild, as purchaser, title to the property. Therefore, at the time the issues were made up in the action upon which the trial court based its judgment, there was no title left in the plaintiff, and no right, except the right to redeem within the time fixed by the street act. The title of such a purchaser, pending the issuance of a deed, is only qualified by this right of redemption, and unless such latter right is exercised within the limit fixed by the law, such title becomes absolute. Duff v. Randall, 116 Cal. 226, 48 Pac. 66, 58 Am. St. Rep. 158. The trial court properly held that the proceedings had, with respect to all matters conferring jurisdiction upon the treasurer to make the second sales, were regular and valid. Upon these findings, the judgment should have been that defendant Rheinschild held title to the lots in question, subject only to the right of plaintiff to redeem within the time allowed by law.

The order denying plaintiff's motion for a new trial is affirmed. The judgment is reversed, with directions to the trial court to enter judgment upon the findings in accordance with the views expressed in this opinion.

We concur: ALLEN, P. J.; SHAW, J.

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17 Cal. App. 637

RASSAERT et al. v. MENSCH. (Civ. 834.)

(District Court of Appeal, Third District, California. Dec. 12, 1911.)

1. Partnership (§ 344*)—Accounting and Settlement—Disposition of Assets.

Though generally a judgment cannot be entered against a partner in a suit for an accounting and settlement of the firm until the firm assets have been disposed of and a final balance ascertained, yet where the assets are of but little value which is ascertained, the court may award the assets to a partner, if he is willing, and charge the assets as cash, where, in the settlement, he is entitled to judgment against the copartners.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 813–818; Dec. Dig. § 344.*]

2. Partnership (§ 344*)—Firm Debts—Liabilities of Partners.

The partners of a firm are each individually liable for the whole of firm debts after the firm assets are exhausted, and a decree in a suit between the partners that one partner shall pay firm debts is not binding on the firm creditors.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 813–818; Dec. Dig. § 344.*]

3. Partnership (§ 344*)—Dissolution—Accounting—Payment of Firm Debts.

A court of equity may not decree a dissolution of the firm and an accounting until the liabilities of the firm are adjusted to the satisfaction of the creditors, and the fact that the firm debts are small, only amounting to $104.50, does not permit the court to dissolve the firm and render an accounting and adjudge that a partner shall pay the firm debts, the amount of such debts not being within the maxim "de minimis non curat lex."

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 813–818; Dec. Dig. § 344.*]

4. Appeal and Error (§ 1032*)—Questions Reviewable—Rulings on Evidence.

A party complaining of the sustaining of objections to questions asked witnesses must show that he was prejudiced by the ruling by showing that the matter sought to be brought out would have aided him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4047–4051; Dec. Dig. § 1032.*]

5. Partnership (§ 330*)—Dissolution—Liabilities of Partner to Copartner for Breach of Obligations—Recovery of Damages.

An order dissolving a firm, pending a further hearing, in a suit for an accounting and for a dissolution, does not preclude proof of damages to plaintiff arising from defendant's breach of the firm agreement and breach of duty in winding up the firm affairs, and plaintiff may show that defendant used some of the material of the firm in his private business which he charged to the firm, and that he recklessly conducted the firm business in a way to involve loss.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 787; Dec. Dig. § 330.*]

6. Partnership (§ 278*)—Dissolution—Effect.

A mere dissolution of a firm has no effect on the property of the partners or their interest in the firm property, or their power over existing debts due to them or due from them, except they have lost the power of acting for each other any further than joint debtors or joint creditors may do.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 625; Dec. Dig. § 278.*]

7. Partnership (§ 298*)—Obligation of Partners—Special Agreements.

Where there was no special agreement defining the powers of the partners after dissolution, each partner had a right to require, and, through equity, to compel, a final settlement and adjustment of all questions and property, and each had the same power as to this and all details connected with it as any other.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 680–686; Dec. Dig. § 298.*]

8. Partnership (§ 280*)—Liquidation—Obligation of Partners.

A partner charged with the duty of liquidating the business of the firm after the partners had ceased to act as such, pursuant to an agreement, must so act as to conserve the interests of the partners, and a copartner could visit the place of business and learn of the manner in which the business was being wound up.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 631, 632; Dec. Dig. § 280.*]

9. Partnership (§ 327*)—Dissolution—Breach by Partner of Partnership Agreement—Damages—Pleadings.

A complaint, in a suit by a partner for the dissolution of the firm and for an accounting, which alleged that defendant had breached the firm agreement in that he had failed to furnish the money necessary to carry on the firm business, and that his conduct in the management of the business, departments of which were intrusted to different partners, caused dissensions and interfered with the orderly management of the business, resulting in damages in a specified sum, sufficiently alleged a cause of action for damages.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 769–778; Dec. Dig. § 327.*]

10. EVIDENCE (§ 474½*) — BREACH OF PARTNER'S AGREEMENT—DAMAGES.

Where, in a suit for the dissolution of a firm and for an accounting, plaintiff demanded damages for defendant's breach of agreement and duty in the management of the firm business, the opinion of witnesses as to whether a certain line of policy would not have been profitable if pursued was inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2220–2233; Dec. Dig. § 474½.*]

11. EVIDENCE (§ 441*) — PAROL EVIDENCE — VARYING TERMS OF WRITTEN AGREEMENT.

Where a partnership agreement reduced to writing set forth minutely what was to be done by the partners, the duties of each, and the general scope of the venture, parol evidence of prior conversations was inadmissible, since the written instrument must be presumed to contain the entire agreement.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2030–2047; Dec. Dig. § 441.*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Oscar Rassaert and another against L. J. Mensch. From the judgment, plaintiffs appeal. Reversed.

Francis Dunn, for appellants. Louis H. Brownstone, for respondent.

CHIPMAN, P. J. In plaintiffs' amended complaint they pray that the partnership existing between plaintiffs and defendant be dissolved, for an accounting, and "for such other further and separate relief as may be meet in the premises." The original complaint was filed November 23, 1907, and prayed, among other things, that defendant be restrained from interfering with the partnership property. In their amended complaint plaintiffs allege that plaintiffs and defendant entered into a written agreement of copartnership on September 17, 1907, under the name of the Concrete Products Company, and that said partnership "is engaged in the business of manufacture and selling various products of concrete"; that "defendant has failed to perform his duties under said agreement, and in many respects has violated the terms of said agreement." Defendant's shortcomings are thus specified: "Said defendant agreed to furnish the money necessary to carry on said business, but he has neglected and refused to do so; by said agreement plaintiff above named, Oscar Rassaert, was made superintendent of construction, and was given superintendence of all the construction work of said partnership; said defendant has interfered with said plaintiff in said work in many ways, countermanding orders given to the employés of said partnership by said plaintiff without the knowledge or consent of said plaintiff, and has himself assigned employés to construction work without the knowledge or consent of said plaintiff, and has taken said employés from work of said partnership and assigned them to his own individual work; that said conduct of said defendant has led to frequent quarrels and dissensions among the members of said partnership, and has interfered with the orderly management of the business of said partnership; that by the premises said partnership has been damaged in the sum of three thousand dollars."

Averring the ownership of "certain property located in the city and county of San Francisco and the county of Alameda," the amended complaint closes with the prayer. Defendant answered the amended complaint without demurring thereto.

A referee was appointed who had the parties before him. From his report, which is in the record, and from the evidence submitted at the trial, the court found that, by stipulation made in open court, it had made an order dissolving the partnership and ordering an accounting; that defendant has not violated the terms of the partnership agreement in any respect; but has in all respects complied therewith; that he has not failed or refused to furnish the necessary money to carry on the business nor has he done any of the acts complained of in plaintiffs' complaint as specified therein; that on November 18, 1908 (the evidence shows that 1908 should read 1907), a dispute arose between the parties, and as a result thereof "the said plaintiffs and defendant agreed between themselves to separate, and thereafter the said plaintiffs abandoned the business, and said defendant liquidated the said business."

In the matter of the accounting the court found: That defendant advanced in the business $3,872; that plaintiffs advanced no money; that the money received by the defendant in the business was $1,800; that the value of the partnership assets remaining undisposed of was $143.50; that defendant is entitled to have said assets set over to him; that the amount paid by defendant on account of said partnership in excess of the amount received by him is $1,828.70, which the court finds is the loss sustained by the partnership and is to be borne equally by the partners. The court, therefore, found that defendant is entitled to judgment against each of plaintiffs for one-third of this amount—$609.56. Judgment passed accordingly, from which and from the order denying their motion for a new trial plaintiffs appeal.

In his oral decision (which appears in the record) the trial judge states that he arrived at his figures as follows: After deducting the charge made by defendant for rent the expenditures were $3,767.70, to which the court adds $104.50, being the outstanding indebtedness which is charged to defendant and to be paid by him, making $3,872.20. The receipts from work done were $1,800, to which the court adds $143.50, the value of the remaining assets, making $1,943.50. This amount, deducted from the expenses, leaves $1,928.70. The findings state this latter sum to be $1,828.70, or $100 less than as shown by the oral decision—manifestly an error in subtraction.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The first point made is that the decision is against law because there remained liabilities unpaid and assets not reduced to cash.

There was evidence as to the value of the assets, which consisted of some forms, or molds, and equipment. Plaintiffs offered no evidence in rebuttal of this value, the amount being $143.50. No evidence was offered to show that the value was not fairly ascertained or that any greater amount could have been realized by ordering a sale which would necessarily have involved some expense.

[1] The rule, generally stated, is that a judgment cannot be entered against a partner in a suit for an accounting and settlement of the partnership until all the assets of the copartnership have been disposed of and a final balance ascertained. Clark v. Hewitt, 136 Cal. 77, 68 Pac. 303. Where, however, the assets are of but little value, and that value is ascertained and is not called in question, we can see no objection to awarding these assets to one of the partners, if he is willing, and charge him with them as cash, where, in the settlement, under any view of the case, he would be entitled to judgment against the other partners.

[2, 3] The matter of the liabilities presents a question of greater difficulty. The adjustment made might be said, in one view, to protect plaintiffs, as between them and defendant, to the extent of two-thirds of the indebtedness, but they are individually liable for the whole of it after the assets are exhausted. Defendant may not pay the liabilities and the creditors might look to plaintiffs for payment and subject them to an action for enforcement. The creditors are not bound by the decree in this action. The judgment would leave the partnership business unsettled and the liabilities unpaid. Before there can be a decree finally settling the partnership accounts the liabilities must be paid or adjusted to the satisfaction of the creditors. No dissolution of any kind affects the rights of third parties, who have had dealings with the partnership, without their consent. Parsons on Partnership, §§ 296, 297. When equity undertakes to adjust the differences between partners, it adjusts them all; the account and decree must include all these matters, and leave nothing open for future litigation or controversy. Griggs v. Clark, 23 Cal. 427. The fact that the amount is not large does not affect the principle. It certainly is not so small as to come within the maxim "de minimis non curat lex."

There was evidence from which the court was justified in finding that the partners had practically dissolved the partnership about the 18th day of November, 1907, and that after that date—either the 18th or 20th of November—the defendant was engaged exclusively in liquidating or winding up the business. Plaintiffs filed their original complaint for a dissolution and accounting on November 23, 1907; and there was evidence that they took no part in the management of the partnership business thereafter.

Plaintiffs endeavored, in many ways and by various forms of questions, to prove damage to the partnership, resulting from the conduct of defendant in the particulars set forth in their amended complaint, and otherwise. The court sustained objections to practically all these questions and such offers, and these rulings are alleged as error.

The partnership contract provided that defendant Mensch should "have charge of the office end of the business" and that plaintiff Rassaert should "have charge of the manufacturing end of the business, while Mr. McCarthy shall have charge of negotiation and acquisition of business, provided, that the system followed by each party in the conduct of his part of the firm's affairs shall be such as will enable the other parties at all times to ascertain and understand their details, and further provided that each and every party shall not do any act or pursue any course in the conduct of his part in the firm's affairs which appear to the other parties to be impolitic, imprudent or unsafe as a business proposition." It was also agreed that defendant "Mensch is to furnish the money necessary to run the business as long as the other parties are not able to realize or borrow money on whatever property they may possess or as long as they are unable to make their earnings in the business offset the money invested by Mr. Mensch." There are many other provisions in the contract showing that it was the intention of the parties to subdivide the work but that no one partner should have the right to act independently of the others in managing the business.

Appellants thus classify the questions which were objected to and objection sustained: (1) Questions relating to the matter of alleged damage caused the partnership by defendant's breach of the contract. (2) Questions relating to the exclusion of plaintiffs from participating in the winding up of the partnership affairs. (3) Questions relating to the weight of defendant's testimony and the matter of laying a foundation for rebutting it.

[4] We cannot take up these questions in detail; they are numerous and in some instances counsel for plaintiffs stated at some length what they were prepared to prove if permitted. Some of the questions were objectionable in their form and others were proper, but were not followed up in a way to show prejudice by the ruling; i. e., it did

not appear that the matter sought to be brought out would have aided plaintiffs.

But there is enough in the record to show that plaintiffs were not permitted to go into matters which were relevant and material under the issues presented by the pleadings. At a point when plaintiffs endeavored to show that defendant had not supplied money for the business as he had agreed to do, and after plaintiffs had offered to show other alleged breaches of duty, objection was sustained, and the court said: "I know perfectly well why you ask it, and in a moment more you will see why I have ruled this way. You have some things here that would be pertinent to dissolution, and some of them would be impertinent to dissolution. In so far as they are pertinent to dissolution, you have obtained your remedy in that behalf, that they have become functus officio—we are no longer concerned with them at all. Then you have got some other things here, and you wind up with a prayer for damages in the sum of $3,000. Mr. Brownstone: That is the original complaint your honor is reading from. The Court: No; I have the amended complaint, and it winds up with asking for damages in the sum of $3,000. Now, Mr. Dunn, the complaint does not state any cause of action for damages. If you have any idea that you have been damaged in any respect, there has been no cause of action for damages pleaded here. Mr. Dunn (after citing 109th California, 130): We claim that this decision decides that it would be perfectly pertinent in this action to give the partnership a judgment against the defendant for any damages by reason of misconduct on his part caused to the partnership. The Court: Under an appropriate pleading, unquestionably so."

It appears that, on October 19, 1908, the cause came on for trial, and on that day defendant consented to the entering of an order dissolving the partnership and appointing "a referee to take the account," and thereafter, on November 30, 1908, the "cause came on regularly for trial" and was tried. The court consistently, throughout the subsequent efforts of plaintiffs to sustain their claim of damages, ruled against them.

[5] We do not think that the order dissolving the partnership pending the further hearing precluded proof of damages arising from defendant's alleged breach of the partnership agreement. Nor do we think it precluded evidence of defendant's breach of duty while winding up its partnership affairs. If it could be shown that, during the continuance of the partnership, he had interfered with his partners in the discharge of their separate duties in a way to result in damage to the partnership or refused to supply money for the business and the circumstances were such as to import a breach of duty on his part and the resulting damages were proximately chargeable to his misconduct and could be estimated in terms of money, we see no reason why such evidence was not admissible.

[6] The dissolution of the partnership was a distinct issue apart from the issue of damages and did not affect the rights of the parties in the matter of the accounting. "A mere dissolution has no effect whatever on the property of the partners, or their interest in the joint stock or joint rights, or their power over old existing debts due to them or due from them; excepting always that they all entirely lost the power of acting for each other, any further than all joint debtors or joint creditors may do."

[7] And where, as here, there was no special agreement as to the powers of the partners after dissolution, "each one has a perfect right to require, and through equity to compel, a final settlement and adjustment of all questions and all property; and each one has the same power as to this, and all the details connected with it, as any other." Parsons on Partnership, § 286.

[8] We think that defendant was charged with the duty of liquidating the business (if it be true that he was liquidating the business after the partners had apparently agreed to disagree and ceased to act as partners) in a manner to conserve the interests of all the partners, and plaintiffs had the right to visit the works and to know something of the manner in which the business was being wound up. If defendant used some of the material of the partnership in his own private business, which he charged to the partnership, it was competent to show this; if he recklessly or improvidently conducted the business at this stage in a way to involve loss which by ordinarily prudent management might have been avoided, it was competent to so show; if, during the partnership, defendant neglected his duties and devoted his time to his private business, to an extent not authorized by their agreement, to the detriment of the partnership business, this could be shown.

[9] The case of Bremner v. Leavitt, 109 Cal. 130, 41 Pac. 859, is authority for holding that the trial court was in error in its ruling that no cause of action for damages was pleaded. We cannot undertake to point out the specific questions and rulings of which complaint is made. It may be that some of the alleged resulting damages claimed are too remote—indeed, we think they are.

[10] In some instances the opinion of the witness was asked as to whether a certain line of policy would not have been profitable if pursued. Such an opinion alone would have been immaterial and so of other mere opinions sought to be shown.

[11] A line of questions was objected to and sustained in which plaintiffs sought to show what the parties talked about and agreed to do before they had entered into the written agreement.

The agreement is quite an elaborate document, consisting of 20 separate paragraphs setting forth minutely what was undertaken to be done by the parties, the duties of each, and the general scope and purposes of the venture. It was not competent for plaintiffs to show by previous conferences something in addition to or in variance of this written instrument, which latter must be presumed to contain all matters that were agreed upon.

Upon a careful review of the record we are impressed with the belief that plaintiffs' rights were not adequately conserved, and, for the reasons stated, the judgment and order are reversed.

We concur: HART, J.; BURNETT, J.

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17 Cal. App. 625

O'DONNELL et al. v. MURPHY et al.

(Civ. 1,034.)

(District Court of Appeal, First District, California. Dec. 12, 1911. Rehearing Denied by Supreme Court Feb. 9, 1912.)

1. Trusts (§ 35*)—Secret Testamentary Trusts—Establishment and Enforcement—Jurisdiction.

A court of equity may impose and enforce a trust on a legatee who has procured a legacy by a promise, express or implied, to take and hold the same for a particular person or use.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 45–50; Dec. Dig. § 35.*]

2. Wills (§ 688*)—Secret Testamentary Trusts—Invalidity.

Where a secret testamentary trust is for a purpose prohibited by law, and no other disposition is made of the legacy, equity will adjudge that the legacy shall belong to the heirs at law; but, before this may be done, the evidence must establish that the legacy was given on a promise, express or implied, that it would be taken and used for the particular trust.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 688.*]

3. Wills (§ 672*)—Testamentary Trusts—Secret Trusts.

A testamentary gift to a legatee solely to enable him, if he sees fit, to dispose of it in a particular way, does not create a trust, where there is no promise by him, express or implied, to so dispose of it, and he may apply the gift to his own use.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1579–1581; Dec. Dig. § 672.*]

4. Wills (§ 675*)—Testamentary Trusts—Secret Trusts.

Where a will shows that a secret trust was not intended, but shows that testator expected that the gift would be applied in accordance with his known wishes, the legatee, who has made no promise, and none has been made in his behalf, takes an absolute title, and no legal obligation rests on him.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1587–1589; Dec. Dig. § 675.*]

5. Wills (§ 671*)—Testamentary Trusts—Secret Trusts.

Testatrix declared that she had abandoned her idea of providing for the erection of a memorial gate at the entrance of a public park of a city because of a doubt as to the validity of a gift for that purpose, and then gave to two persons, who were park commissioners of the city, a specified sum, and stated, "This is an absolute bequest to them, without any trust or understanding, either express or implied, as to its use or appropriation or otherwise." The executor knew nothing of the will until after its execution, and he made no promise as to the use of the gift for the erection of a memorial gate. One of the commissioners knew nothing of the will until after the death of testatrix, and the other commissioner, who knew of the will at the time of its execution, made no promise, express or implied, as to the use of the gift. After the death of testatrix and the probate of the will, the commissioners executed a declaration of trust to secure the gift for the erection of such a gate as testatrix had wished to be erected. *Held* not to show that a secret trust was imposed on the gift.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 671.*]

6. Wills (§ 487*)—Construction—Declaration of Testator.

A declaration of intention of testator made subsequent to the execution of his will is inadmissible as hearsay for any purpose.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1027; Dec. Dig. § 487.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by James O'Donnell and others against Samuel G. Murphy, as executor of Honora Sharp, deceased, and others. From an order denying a motion for new trial, plaintiffs appeal. Affirmed.

See, also, 10 Cal. App. 1, 100 Pac. 1071.

Maguire, Lindsay, Houx & Barrett, for appellants. Charles S. Wheeler and A. Heyneman (J. F. Bowie, of counsel), for respondents.

HALL, J. This is an appeal by plaintiffs from an order denying their motion for a new trial. This action was brought, by the next of kin and heirs at law of Honora Sharp, deceased, for the purpose of obtaining a decree of the superior court that certain bequests made by said Honora Sharp, deceased, in her last will and testament, are held by respondents in trust for appellants. The action as brought involved a bequest of $200,000 to Adolph B. Spreckels and Reuben H. Lloyd, a bequest of $25,000 to the Kings Daughters' Home for Incurables, and one of $25,000 to the Society for the Prevention of Cruelty to Animals; but the action was dismissed as to the two latter named legatees, and the action as tried involved only the bequest of $200,000 given to Spreckels and Lloyd.

By the first paragraph of the will of Honora Sharp, she appointed Samuel G. Murphy sole executor thereof.

The second paragraph is as follows: "I have no near relatives nor any to whom I desire to give any part of my estate; my late husband, George F. Sharp, now deceased, having derived profit from the dedication and opening of Golden Gate Park in said city and county, and I, during my later years, having obtained much enjoyment out of said park, it was my desire to erect some suitable memorial to my said late husband in said park; for that purpose I intended to donate a large portion of my fortune (all of which was inherited by me from my late husband), towards erecting a memorial gate at the entrance to what is known as the Panhandle of the park; but there being some doubt as to whether or not a donation for that purpose would or would not be considered a charity, or unlawful trust, and be set aside at the instigation of some one claiming heirship to me, to whom I had left nothing and to whom I desire to leave nothing; I have therefore abandoned that idea; and do now devise and bequeath to Adolph B. Spreckels and R. H. Lloyd, two of the park commissioners of the city and county of San Francisco, the sum of two hundred thousand dollars ($200,000). This is an absolute bequest to them, without any trust or understanding, either express or implied, as to its use or appropriation or otherwise."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

By the third and fourth paragraphs of her will she gave to the Kings Daughters' Home $50,000, and to the Salvation Army $25,000. The bequest to the Kings Daughters' Home was subsequently in a codicil cut to $25,000.

By the fifth and sixth paragraphs she gave to certain named persons a total of $30,000.

By the seventh paragraph she directed the executor to pay all inheritance taxes.

The eighth and ninth paragraphs are as follows:

"Eighth. In case any bequest or devise in this will hereinbefore specified shall fail, or be declared inoperative or void for any cause, then the amount of such devise or bequest shall go to and be a part of my residuary estate; and shall go to and be the property of my residuary legatee hereinafter named.

"Ninth. All the rest, residue and remainder of my estate, be it real, personal or mixed, and wheresoever situate, and all illegal or inoperative bequests or devises, I give, devise and bequeath to my said executor, Samuel G. Murphy."

By the terms of her will exclusive of the eighth and ninth paragraphs, said Honora Sharp disposed of a total of $280,000, which exceeded the net value of her estate. Therefore, if it should prove to be a fact that the bequest of $200,000 was given in trust for a charitable use, it would in great part be void by reason of the statute providing that a testator may devise or bequeath not more than one-third in value of his estate to charitable uses. Civ. Code, 1313.

It is manifest from the reading of the will that before the appellants as the heirs at law, can have any interest or claim upon the $200,000, it must be established not only that the $200,000 was given in the second paragraph upon an invalid secret trust, but that the same trust followed the said $200,000 in case it should fall into the residuum of the estate, and pass under paragraphs eight and nine of the will to Samuel G. Murphy. Consequently it was alleged in the complaint, in substance and effect, that said $200,000 was given by said Honora Sharp in said will in trust and upon the promise of said Lloyd, Spreckels, and Murphy, and each of them, made to her by them and each of them, to apply and use the said bequest, when received by them or any of them, from her estate, towards the erection of a gate at the entrance to the Panhandle of Golden Gate Park. The defendants, Spreckels, Lloyd, and Murphy, denied these allegations, and set forth that said $200,000 was bequeathed as in said will set forth and not otherwise, and the court found upon these issues in favor of respondents, and entered judgment that appellants take nothing by their action. It is upon the alleged insufficiency of the evidence to support these findings that appellants rely for a reversal of the order.

[1] That a court of equity may impose and enforce a trust upon a legatee who has procured a legacy to be given to him by a promise, express or implied, to take and hold the same for some particular person or use, is not disputed. Edson v. Barstow, 154 N. Y. 218, 48 N. E. 541; O'Hara v. Dudley, 95 N. Y. 403, 47 Am. Rep. 53; Amherst College v. Ritch, 151 N. Y. 283, 323, 45 N. E. 876, 37 L. R. A. 305.

[2] Where the secret trust is for a purpose prohibited by law, and no other disposition is made of the legacy, the legatee will be held by a court of equity to hold the legacy for the heirs at law. See cases above cited. But before this may be done the evidence must establish that the legacy was given upon a promise, express or implied, that it would be taken and used for the particular trust.

[3, 4] "While a testator may make a gift to a legatee solely for the purpose of enabling him, if he sees fit, to dispose of it in a particular way, still, if there is no promise by him, express or implied, to so dispose of it, and the matter is left wholly to his will and discretion, no secret trust is created, and he may, if he chooses, apply the legacy to his own use. When it clearly appears that no secret trust was intended, even if it is equally clear that the testator expected that the gift would be applied in accordance with his known wishes, the legatee, if he has made no promise, and none has been made in his behalf, takes an absolute title, and can do what he pleases with the gift. Whatever moral obligation there may be, no legal obligation rests upon him." Amherst College v. Ritch, supra. See, also, Rowbotham v. Dunnett, 8 L. R. Ch. Div. 430; McCormick v. Grogan, 4 L. R. Eng. & Iri. App. 82.

[5] This brings us to a discussion of the evidence. As before indicated, unless the finding as to Mr. Murphy is not sustained,

appellants have no claim upon any part of the $200,000. So far as Mr. Murphy is concerned, we are unable to find anything in the evidence to support the contention that any promise was made by him or for him, either express or implied. He knew nothing about the will or its contents until after it had been executed. It was then brought to him by Mr. Lloyd, at the direction of Mrs. Sharp, when he read it and placed it in his safe. It did not on its face indicate that any trust was intended by the legacy of $200,000 to Spreckels and Lloyd or by the residuary bequest to him. Though the will on its face indicated that Mrs. Sharp at one time did intend to give by her will a large sum for the erection of a memorial gate at the park, it showed that she had fears that such a bequest might be held invalid, to the advantage of her heirs at law, to whom she desired to leave nothing, and contained her solemn declaration to the effect that for that reason she had abandoned the idea once entertained. After bequeathing to Spreckels and Lloyd $200,000 the testatrix is careful to state in her will that "this is an absolute bequest to them, without any trust or understanding, either express or implied, as to its use or appropriation or otherwise."

Mr. Murphy, during the short period that Mrs. Sharp survived the making of the will, visited her several times. On the occasion of one of these visits, Mrs. Sharp told him that she wanted him to see that her will was carried out, and this he promised to do. But there is not a suggestion in the evidence that either he or she in any way spoke of any gate for the park, or of any purposes she had as to the disposition of her estate other than as shown upon the face of her will. He did tell her the story of the boy eating an apple, who, being asked by a companion for the core, replied, "There isn't going to be any core"; but it would be a strained construction to say that this contained a promise to apply any money that might come to him to the erection of any gate. The story was probably told as indicating his opinion that, in view of the amount of her bequests and the value of the estate, there would be no residuum to come to him—no "core" for him.

We have not overlooked the fact that Mr. Murphy, after the will had been admitted to probate, executed an instrument designed to further and assist in the purpose of Spreckels and Lloyd, as evidenced by a declaration of trust executed by them, to apply whatever should be realized from the bequest of $200,000 to the erection at the park of a memorial gate. While this indicates public spirit on the part of the gentlemen concerned, and shows that the hope that Mrs. Sharp doubtless entertained, as to what disposition her legatees might make of her bounty, was not without foundation, it does not in itself prove that this action was taken by the legatees because of any promise so to do. Mr. Murphy, so far as the record shows, made no promise regarding the $200,000 legacy or any other, and no promise was made for him in that regard.

It is thus clear that the findings of the court, so far as they relate to Mr. Murphy, are supported by the evidence. Indeed, we are of the opinion that a contrary finding could not be justified by the evidence.

This conclusion is sufficient for a disposition of the contention that the findings are not supported by the evidence, for, as before stated, the appellants have no interest in the disposition of the $200,000 or any part of the estate of Mrs. Sharp, unless they can charge Mr. Murphy as a trustee for them, and this they have failed to do.

We have, however, examined the record with care as to the findings with regard to respondents Spreckels and Lloyd, and are unable to agree with the contention of appellants. Mr. Lloyd, on the day before the will was drawn, visited Mrs. Sharp at her request, and found her confined to her bed with the sickness of which she within two months thereafter died. She explained to him, as her attorney, her wishes as to the disposition of her estate, and among other things told him that she wished to leave $200,000 (which would constitute the major portion of her estate) for the purpose of erecting a gate at the park as a memorial to her deceased husband. In view of the amount of the intended bequest and her estate, he suggested doubts as to its validity, but told her that he would consult his partner and advise her further the next day. He returned the next day and told her that such a bequest would be invalid, and gave the reasons therefor. She then suggested that the bequest be made to himself and Mr. Spreckels as park commissioners. He told her that they would take as public officers and in trust, and the bequest would still be void. She then asked him if she could not give the money to Mr. Lloyd and Mr. Spreckels individually, and he then proceeded to explain to her that she could as follows: "I said: 'You can give it to anybody individually, providing you can't put any strings on it, but you can't give it to anybody with a secret trust in it, express, implied, or understood in any way. If you want to give it absolutely to any one, you can do so. You can give your property to anybody you please—do as you like, but you can't make a trust of it. If you do, that will be investigated, and, if it turns out that it is a trust, of course it has to take the result.' 'Well,' she said, 'I want to give it to you absolutely, without any strings on it.' I said, 'You can do that if you wish.' 'Well,' she said, 'that is what I wish to do. Do with it as you please; put it in your pocket, or do anything you like with it.' I said, 'You can do that if you wish, Mrs. Sharp.' She said, 'Well, that is what I wish to do.'" The will was thereupon drawn with the provisions as hereinbefore set forth, and containing her explicit declaration that she had abandoned the idea of providing for the erection of the memorial gate, with her very cogent reasons therefor. In addition, Mr. Lloyd answered categorically that he, neither for himself, Mr. Spreckels, or Mr. Murphy, made any promise, express or implied, with relation to the use of the legacy in question.

We think it hardly needs argument to demonstrate that the above evidence amply supports the findings of the court in question. There is no pretense that Mr. Spreckels ever knew anything about the will or its contents, or the purposes of Mrs. Sharp, until after her death. While it is true that Mrs. Sharp knew that each of these gentlemen was a park commissioner, and had for years taken great pride and interest in its development; that they were men of ample private fortune; that she had great confidence in them as men of integrity and public spirit—these matters but justified her hope and expectation that the legacy would be applied in accordance with her known wishes. Their prompt action, after her death and the probate of her will, in executing a declaration of trust as to the legacy for the purpose of securing its application to the erection of such a gate as she had wished to be erected, shows that her confidence was not misplaced, but does not necessarily show that the bequest was made upon any promise, express or implied.

The whole evidence and circumstances simply bring the case within the rule stated near the beginning of this opinion in the excerpt from the case of Amherst College v. Ritch, supra. The most that can be reasonably claimed for the evidence is that it possibly exhibits a case in which either of two opposite conclusions might be drawn by the trial court, in which case we are bound by the conclusions of the trial court. Edson v. Barstow, supra.

The findings of the trial court are amply supported by the evidence in the record.

[6] The only other point presented as a reason why a new trial should be granted is that the court erred in refusing to permit appellants, over the objection of respondents, to prove a declaration claimed to have been made by Mrs. Sharp to one McManus, after the execution of the will, that she had made her will and had done handsomely by the park. We have been cited to no authority that holds that the intention of a testator may be proved by evidence of her declarations to third parties, made subsequently to the execution of her will, and we know of none. Such evidence is clearly hearsay and inadmissible for any purpose. Vreeland v. Williams, 32 N. J. Eq. 734.

The order should be affirmed, and it is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

17 Cal. App. 634

In re SHARP'S ESTATE.

O'DONNELL et al. v. MURPHY et al.

(Civ. 585.)

(District Court of Appeal, First District, California. Dec. 12, 1911.)

Trusts (§ 359*)—Establishment of Secret Trusts—Jurisdiction.

Where a will, finally admitted to probate, imports on its face an absolute gift, heirs of testator, who seek to establish a secret and invalid trust, must bring an independent action in equity against the legatee to establish the trust, and the probate court, in proceedings for the distribution of the estate, has no jurisdiction.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 359.*]

Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Proceedings by Samuel G. Murphy, executor, for the distribution of the estate of Honora Sharp, deceased, in which James O'Donnell and others, heirs at law of deceased, filed a petition, cross-complaint, and answer to the petition of Adolph B. Spreckels and another for distribution. From a decree of partial distribution, the heirs appeal. Affirmed.

Maguire, Lindsay, Houx & Barrett, for appellants. Chas. S. Wheeler and A. Heyneman (J. F. Bowie, of counsel), for respondents.

HALL, J. This is an appeal from a decree of partial distribution, made by the superior court (in probate), whereby it distributed to Adolph B. Spreckels and Reuben H. Lloyd $80,000 of the $200,000 bequeathed to them by the will of deceased, and which was the subject-matter of the litigation in the case of James O'Donnell et al. v. Samuel G. Murphy et al. (No. 1,034), 120 Pac. 1076, this day decided by this court.

In the case at bar the respondents Spreckels and Lloyd filed a petition, on June 6, 1907, for the distribution to them of the $200,000 bequeathed to them in terms by the will of said decedent, Honora Sharp. To this petition the appellants, claiming to be the only heirs at law of said decedent, filed a demurrer, and subsequently, before the court had passed thereon, filed an answer, petition, and cross-complaint. This pleading was filed subsequently to the commencement by respondents of the action in equity, above referred to as this day decided by this court, and the "petition and cross-complaint" consisted of the complaint filed in the action in equity. The answer also set forth the commencement of such action in equity, and made the complaint therein a part of such answer. Respondents demurred to the answer, petition, and cross-complaint, and this demurrer was sustained without leave to amend, and the court in due time granted the petition of respondents in part, and from this order or decree appellants appealed. As stated by counsel for appellants at the oral argument (the two appeals were argued together before this court), appellants opposed the petition for distribution of the $200,000, given by the will to Spreckels and Lloyd, on the ground that it was void because given as a secret but invalid trust, and that appellants had a right to litigate this question in the probate proceedings. The court, however, was of the opinion that appellants had mistaken their remedy; that the court in probate could not consider the matter; that their remedy was to bring an independent action in equity to charge the legatee of the void legacy with a trust in favor of the heirs at law. Counsel at the oral argument admitted that such was the usual course, but, as appellants had appealed from the decree of distribution, the matter was submitted to this court.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

That the course adopted by the heirs at law in bringing the action in equity was the proper one to pursue to enforce their alleged rights is abundantly established by the authorities called to our attention through the learning and industry of counsel for appellants upon the appeal in the equity case. Matter of Will of O'Hara, 95 N. Y. 403, 47 Am. Rep. 53; Edson v. Bartow, 154 N. Y. 199, 215, 48 N. E. 541; Amherst College v. Ritch, 151 N. Y. 282, 45 N. E. 876, 37 L. R. A. 305. In that action the appellants in this action sought to litigate against the same parties the very same matters that they seek to litigate in this proceeding. In the other action all parties whose interests could be affected were impleaded, in a court of appellants' own choosing, whose jurisdiction has not been, and could not successfully be, challenged by any one. These same appellants prosecuted that action to a judgment which determined the matters sought to be litigated in this proceeding. This court has this day affirmed that judgment; and upon the going down of the remittitur such judgment will become final and conclusive against these appellants as to the very matters that they seek to litigate in this proceeding. It is thus manifest that a reversal of the judgment in this proceeding, and the remanding of the matter for further proceedings in the court below, could result in no practical good to appellants. The respondents could at once plead the judgment rendered in the other action as a bar to the right claimed by appellants in this proceeding. For this reason we think we might well affirm the judgment appealed from in this proceeding without further examination. However, we are of the opinion that where, as in this case, the will has finally been admitted to probate, and upon its face imports an absolute gift, and it is sought to establish a secret and invalid trust, as against the legatee, not only the proper, but the only, remedy is by an independent action to charge the legatee as a trustee.

No trust or invalidity appearing upon the face of the will, it must be given effect in probate according to its terms, and the secret trust can only be established through an independent action in equity against the legatee. This certainly has been the uniform practice, as is abundantly shown by the authorities referred to in this opinion and in the opinion filed in the equity case.

In the cases of Fairchild v. Edson, 154 N. Y. 199, 215, 48 N. E. 541, 61 Am. St. Rep. 609, and Edson v. Bartow, 154 N. Y. 199, 215, 48 N. E. 541, the court had before it two appeals involving the same bequest. It determined in the first case that the bequest in question was upon its face absolute, and therefore valid on the face of the will. In the second case it was held that the same bequest was upon a secret and invalid trust; but the court pointed out that no intestacy resulted therefrom, but that the bequest passed to the legatee, where it would be impressed by a court of equity with a trust in favor of the heir at law.

The judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

MEMORANDUM DECISIONS

17 Cal. App. 624

In re GALIVAN. (Cr. 227.) (District Court of Appeal, Second District, California. Dec. 12, 1911.) Application for writ of habeas corpus by J. B. Galivan. Denied, and petitioner remanded into custody. E. W. Camp, U. T. Clotfelter, and M. W. Reed, for petitioner. R. B. Goodcell, for respondent.

PER CURIAM. The Justices of this court being unable to concur in a judgment, the writ must be and is denied, and petitioner remanded into custody.

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17 Cal. App. 660

JOHN HEINLEN CO. v. SUPERIOR COURT, KINGS COUNTY, et al.

(Civ. 1,058.)

(District Court of Appeal, Second District, California. Dec. 16, 1911.)

VENUE (§ 36*)—CHANGE OF VENUE—DISQUALIFICATION OF JUDGE—CONDEMNATION PROCEEDINGS.

Under Code Civ. Proc. §§ 170, 398, providing that, when disqualification of judge appears in an application for a change of venue, the judge must change the same, a judge disqualified by interest from acting in eminent domain proceedings, part 3, tit. 7, § 1243 et seq., providing that, except as otherwise provided, the provisions of part 2 of the Code are applicable, must change the place of trial, and he may not transfer the proceeding to a judge of his own selection as authorized by section 160 in case of disability, which does not control in case of a disqualification of the judge on account of interest; Pol. Code, § 4481, declaring that, where the provisions of any title conflict with the provisions of another title, the provisions of each must prevail as to matters arising out of such title not applying, there being no provision in title 7 for proceedings where judge is disqualified.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 54, 55; Dec. Dig. § 36;* Eminent Domain, Cent. Dig. § 474.]

Application for a writ of prohibition by the John Heinlen Company against the Superior Court in and for the County of Kings and the judge thereof. Granted.

Houghton & Houghton, for petitioner. Lamberson & Lamberson and M. L. Short, for respondents.

SHAW, J. This is an application for a writ of prohibition directed to the superior court of Kings county and to Hon. John G. Covert, judge of said court, commanding and directing said court and judge to desist and refrain from taking any proceeding or making any order in a certain proceeding pending therein, wherein the Lake Land Canal & Irrigation Company is plaintiff and petitioner is defendant, other than an order transferring said cause to the nearest or most accessible court not subject to objection upon the ground that the judge thereof is disqualified to act in the trial of the cause.

An alternative writ was issued, in response to which the respondents have interposed a general demurrer. The application grows out of a special proceeding instituted by the Lake Land Canal & Irrigation Company against petitioner in the superior court of Kings county, the purpose of which was to condemn certain riparian rights appurtenant to the lands owned by petitioner and situated in said county. At the time set for the trial of the cause, the defendant therein, pursuant to notice, made a motion to change the place of trial upon the admitted fact that Hon. John G. Covert, judge of the court, was disqualified by reason of the fact that he was interested in the subject-matter involved in the proceeding. The court denied the motion, and postponed the trial to a future date, stating that he would apply to the Governor of the state of California to designate a judge in his place and stead to preside at the trial of the proceeding in the superior court of Kings county.

The point involved is whether or not the provisions of section 398 of the Code of Civil Procedure apply to special proceedings in eminent domain. Section 1243 of title 7 of the Code of Civil Procedure, entitled "Eminent Domain," provides: "All proceedings under this title must be brought in the superior court of the county in which the property is situated." It is the contention of respondents that such proceedings must not only be brought in the court of the county wherein the property is situated, but that the trial thereof must be had in such county. This contention is based upon what was said by the Supreme Court in California Southern R. R. Co. v. Southern Pacific R. R. Co., 65 Cal. 395, 4 Pac. 344, and a case of the same title, reported in 65 Cal. 410, 4 Pac. 388, and Santa Rosa v. Fountain Water Co., 138 Cal. 579, 71 Pac. 1123, 1136, in all of which the proceedings were for the condemnation of land, and the sole point involved was the application for a change of the place of trial based, not upon the disqualification of the judge, but upon the ground that the owner of the land resided in another county than that wherein the land was situated. What was said in those cases had reference alone to the facts there presented, and all that the court decided was that the cases were brought in the proper county, as required by section 1243 of the Code of Civil Procedure, and that such proceedings were not within or affected by the provisions of section 395 of the Code of Civil Procedure. Hence, they should be tried in the county where brought, notwithstanding the fact that the defendants therein resided elsewhere. The cases cited furnish no authority for respondents' position.

The proceeding to condemn the riparian rights of petitioner was brought in the proper county, as required by section 1243 of the Code of Civil Procedure. By reason of his interest in the result of the suit Judge Covert was disqualified. Section 170 of the Code of Civil Procedure provides that no judge shall sit or act as such in any action or proceeding in which he is interested. While title 7, entitled "Eminent Domain," is silent as to the steps which shall be taken in proceedings thereunder where the judge of the court of the county wherein the suit is brought is disqualified, section 1256 thereof provides that: "Except as otherwise provided in this title, the provisions of part two of this Code are applicable to and constitute the rules of practice in the proceedings mentioned in this title." Hence, in determining the rules of practice in a case where the judge is prohibited from acting and as to which no provision is made in the title, we must look to title 4, pt. 2, of the Code. Section 398 of the Code of Civil Procedure (found in part 2) provides: "If an action or proceeding is commenced or pending in a court, and the judge * * * thereof is disqualified from acting as such * * * it must be transferred for trial * * * to the nearest or most accessible court, where the like objection or cause for making the order does not exist." It has been held that proceedings in eminent domain are not actions, as defined in section 22 of the Code of Civil Procedure, for which reason it was likewise held that certain provisions of the Code treating of actions only did not apply to proceedings of this character. Santa Rosa v. Fountain Water Co., supra. Section 170 of the Code of Civil Procedure, however, specifies what shall constitute disqualification of a judge in a proceeding, and when the fact of such disqualification is made to appear in an application for change of the place of trial of a proceeding, then, as expressly provided in section 398 of the Code of Civil Procedure, the disqualified judge has no discretion other than to perform the duty imposed upon him by this section. Parrish v. Riverside Trust Co., 7 Cal. App. 95, 93 Pac. 685; Livermore v. Brundage, 64 Cal. 300, 30 Pac. 848. He cannot transfer either an action or a proceeding, wherein he is interested in the result of the trial to a judge of his own selection, a right, however, which would exist if section 160 of the Code of Civil Procedure should be deemed to control. Under the provisions of that section, he may, in case he is unable to hold court by reason of sickness, absence, disability, or other (like) causes, request another judge to sit for him, or the fact of such disability may be certified to the Governor, who may request a judge to act. There is a marked distinction between inability to hold court, as mentioned in section 160, and disqualification of the judge, as defined in section 170. The former section cannot be construed to refer to disqualification of a judge on account of his interest in the matter involved in the proceeding.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Respondents direct our attention to section 4481 of the Political Code, which declares: "If the provisions of any title conflict with or contravene the provisions of another title, the provisions of each title must prevail as to all matters and questions arising out of the subject-matter of such title." This section can have no application to the case at bar, for the reason that, as we have seen, no provision is made in title 7 for the trial of a proceeding wherein the judge is disqualified, and hence there is no conflict as to a matter concerning which the title is silent. In such case we must, as directed by section 1256, Code of Civil Procedure, look to title 2 for a rule of practice.

It follows from what has been said that the writ should be granted. It is therefore ordered that the respondents refrain and desist from any action or proceeding in that certain cause entitled Lake Land Canal & Irrigation Company (a corporation) v. John Heinlen Company (a corporation), now pending in the superior court of Kings county, other than to make an order changing the place of trial of such proceeding to the nearest or most accessible superior court the judge of which is not disqualified from trying the same.

We concur: ALLEN, P. J.; JAMES, J.

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17 Cal. App. 678

Ex parte TOM. (Cr. 225.)

(District Court of Appeal, Second District, California. Dec. 18, 1911.)

1. INFANTS (§ 68*) — CRIMINAL LIABILITY — JURISDICTION OF JUSTICE.

Where, at a preliminary hearing of one accused of crime, the counsel for the accused stated that he was a boy 18 years of age, St. 1911, p. 658, providing that, whenever it is suggested in a court other than the superior court that the accused is under the age of 18 years, the magistrate shall refer the case to the juvenile court, did not require the justice of the peace, under this statement of counsel, to so refer the case.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 174, 175; Dec. Dig. § 68.*]

2. INFANTS (§ 69*)—CRIMES—JURISDICTION—SENTENCE.

Relator having been charged with crime in the justice court, and ordered held for trial, was informed against in the superior court where he pleaded guilty. He claimed that he was under 18. Before sentence he filed a written application stating that he was 17 years old, and asking to be released on a probationary term, which matter was referred to a probationary officer, and hearing thereon continued from time to time until finally he was sentenced to be imprisoned in the state prison. *Held*, that the superior court had jurisdiction to enter the judgment of imprisonment, and that St. 1911, p. 658, providing for the certifying of cases against parties under the age of 18 years to the juvenile court, did not require any other course than that pursued.

[Ed. Note.—For other cases, see Infants, Dec. Dig. § 69.*]

Application by Henry Tom for writ of habeas corpus. Writ discharged, and petitioner remanded to custody of sheriff.

Frank Stewart and Shaw & Stewart, for petitioner. J. D. Fredericks, Dist. Atty., and J. W. Joos, Deputy Dist. Atty., for respondent.

JAMES, J. Application by petitioner on habeas corpus for discharge from custody after plea of guilty and sentence of imprisonment. Petitioner was informed against in the superior court under the provisions of section 288 of the Penal Code, which denounces as a crime the committing of certain lewd and lascivious acts with or upon a child under the age of 14 years.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The contention made on behalf of petitioner is that the charge should have been heard in and punishment determined by the juvenile department of the superior court, and not by the regular criminal trial department, in which it was heard and considered, for the alleged reason that petitioner at the time of the filing of the information against him was under the age of 18 years.

[1] The act of the Legislature, commonly called the juvenile court law (Stats. 1911, p. 658), provides that, whenever it is suggested in a court other than a superior court that a person against whom a crime is charged is under the age of 18 years, it shall be the duty of the magistrate to certify the case to the juvenile court for further proceedings. It appears by the petition in this case that petitioner was first charged in a justice's court, and therein ordered to be held to answer for trial in the usual way. It does not appear that any suggestion was made, while the charge was pending before the justice of the peace on preliminary examination, that petitioner was under the age of 18 years; but, on the contrary, it appears that a statement was made by petitioner's counsel before the justice to the effect that petitioner then was "a boy 18 years of age." The justice of the peace was not required, under such a statement, to refer the case to the juvenile court.

[2] After being held to answer for trial on the charge mentioned, without making any claim that he was of such an age as to entitle him to consideration under the juvenile act, petitioner entered a plea of guilty in the superior court to the information there filed against him. The petition recites that before sentence he filed a written application with the court, asking to be released from custody on a probationary term, in which application he stated that at the time the information was filed he was of the age of 17 years. The petition further recites that the court then referred the matter to a probationary officer and continued the hearing thereon from time to time until finally sentence was pronounced that petitioner be imprisoned in the state prison for a period of two years.

We are of the opinion that the superior court had jurisdiction to enter the judgment of imprisonment and that the juvenile court law does not, under the circumstances shown in this case, require that any other or different course be pursued than that followed. The court, under the provisions of section 1203, Penal Code, after a plea of guilty, could in its discretion have allowed petitioner to be released from custody on probationary term, but no doubt, for good reasons, it was considered that petitioner was not deserving of such leniency.

The writ is discharged and petitioner remanded to the custody of the sheriff.

We concur: ALLEN, P. J.; SHAW, J.

17 Cal. App. 600

CRACKEL v. CRACKEL. (Civ. 964.)

(District Court of Appeal, First District, California. Dec. 5, 1911. Rehearing Denied by Supreme Court Feb. 1, 1912.)

1. Divorce (§ 184*)—Review—Evidence.

Code Civ. Proc. § 670, provides that, in case of default judgment, the judgment roll shall contain the summons with the proof of service, the complaint with a memorandum indorsed thereon of entry of defendant's default in answering, and a copy of the judgment. Section 650 provides for the settling of a bill of exceptions taken at trial, and section 953a provides that one desiring to appeal from a judgment, etc., may, in lieu of preparing a bill of exceptions, have a transcript of the testimony, and all rulings, instructions, etc., prepared and filed with the trial judge for approval, which when so settled and allowed shall become a part of the judgment roll and may be considered on appeal in lieu of the bill of exceptions. *Held* that, where defendant in a divorce case defaulted, plaintiff's evidence would not be reviewed on defendant's appeal, though in fact incorporated in the record, notwithstanding Civ. Code, § 130, providing that the court shall in defaults in divorce cases require proof of the facts alleged, and before granting the relief.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 570–573; Dec. Dig. § 184.*]

2. Appeal and Error (§ 204*)—Exceptions—Evidence.

Objections to the admission of evidence will not be considered on appeal, where no objection was made below; Code Civ. Proc. § 646, providing that an exception must be taken at the time a decision is made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1258–1280; Dec. Dig. § 204.*]

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by John T. Crackel against Martha P. Crackel. From an interlocutory decree for plaintiff, defendant appeals. Affirmed.

J. E. White, for appellant. Fitzpatrick & Greeley, for respondent.

KERRIGAN, J. This is an appeal from an interlocutory decree of divorce granted the plaintiff from the defendant upon the ground of the defendant's extreme cruelty.

[1] In due time after service of summons the defendant appeared in the action and filed a demurrer, which was overruled, and, having failed to answer within the time allowed by the court's order, her default was regularly entered; whereupon the cause was placed upon the calendar, and after hearing the testimony of the plaintiff and of two corroborating witnesses, an interlocutory

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

decree of divorce was regularly rendered and entered.

The defendant urges four grounds upon which she seeks a reversal of the judgment, all of which depend upon, and require an examination of, the evidence taken at the hearing of the case. This, however, being an appeal from the judgment in a default case, and therefore no issue of fact having been raised by the pleadings, the defendant was not entitled to have the testimony incorporated in the transcript (sections 670, 650, 953a, Code Civ. Proc.; Spelling on New Trial & Appellate Prac., § 3); and the mere fact that the evidence is inserted in the record here does not warrant the court in reviewing or considering it for any purpose (Sutton v. Symons, 97 Cal. 475, 32 Pac. 588; Thomson v. Thomson, 121 Cal. 11, 12, 53 Pac. 403; Lane v. Tanner, 156 Cal. 135, 138, 103 Pac. 846).

The defendant concedes as a general rule that these propositions are true; but she contends, on the other hand, that as section 130 of the Civil Code provides that the court shall, in defaults in divorce causes, require proof of the facts alleged before granting the relief, the law thereby raises an issue of fact, and consequently provides for a trial. But the contrary of this was expressly held in the case of Foley v. Foley, 120 Cal. 33, 37, 52 Pac. 122, 123 (65 Am. St. Rep. 147). There the defendant defaulted, and the court, after the hearing required by the statute, made a decree of divorce. Subsequently the defendant moved for a new trial, and his motion was denied. He appealed from the judgment and from the order denying his motion for a new trial. The Supreme Court, in refusing to entertain the appeal from the order denying a new trial, said: "A new trial is a re-examination of an issue of fact; * * * and unless such an issue has been raised and tried, there is nothing which can be reviewed by this method." There, as here, the defendant contended that in divorce cases there was always of necessity a trial of issues of fact; that the law raises such issues whether the defendant answer or not. But this the court declared to be a misapprehension of the effect of section 130 of the Civil Code, and in referring to that section said: "The effect of that provision is not to raise issues of fact, nor to constitute the taking of proof submitted by plaintiff in cases where the defendant has not answered a 'trial,' as those terms are used in the provisions relating to new trials. Such an issue arises only where a material averment of fact is made on the one side and is controverted upon the other (Code Civ. Proc., §§ 588, 590); and the re-examination provided for in section 656 is when there has been a trial of such an issue."

We think it clearly appears from the reasoning of that case that a defendant who has defaulted is not entitled to a new trial, nor to have a bill of exceptions settled, nor the certification of the evidence "in lieu" thereof, both of which proceedings are intended to review issues of fact "after a trial." Here, as we have seen, there were no issues of fact and no trial. Where a defendant fails to answer, the only question that can arise upon an appeal is a legal one, and the appellate court is limited in its examination in such a case to the judgment roll, i. e., the papers mentioned in subdivision 1 of section 670 of the Code of Civil Procedure.

The defendant knew of the entry of the default at or about the time it was made; and we are unable to perceive why, if she desired to contest the action, she did not seek relief under the provisions of section 473 of the Code of Civil Procedure.

Turning now from this preliminary objection interposed by plaintiff to the propositions advanced by the defendant, these propositions involve the sufficiency of the evidence to support the judgment, and some purely formal objections to the admission of evidence. As we have seen above, the evidence is not legally before us, from which it follows that the defendant is not entitled to have any point reviewed by this court which involves a resort to the record of such evidence. Nevertheless we have considered these points, and are satisfied that they are without substantial merit. The evidence is amply sufficient to sustain the decree. It shows that the plaintiff resided in the city and county of San Francisco, the place where the action was brought, for more than one year prior to its commencement; that defendant's treatment of the plaintiff caused him grievous mental suffering; and the evidence given by the plaintiff was corroborated by other witnesses in every essential feature.

[2] As to the other points urged by defendant, all concern the admission of evidence, and the simple and complete answer to them is that, no objection having been made at the trial to the admission of such evidence, defendant cannot now be heard to complain. Section 646, Code Civ. Proc.; Randall v. Freed, 154 Cal. 299, 97 Pac. 669; Bullard v. Stone, 67 Cal. 477, 8 Pac. 17; Roper v. McFadden, 48 Cal. 346.

The judgment is affirmed.

We concur: LENNON, P. J.; HALL, J.

17 Cal. App. 653

TAKEKAWA v. HOLE. (Civ. 987.)

(District Court of Appeal, Second District, California. Dec. 14, 1911.)

1. Specific Performance (§ 114*) — Complainant's Nonperformance—Pleading.

Where a bill for specific performance showed that complainant was in default as to deferred payments stipulated for in the contract of sale, it showed on its face that complainant was not entitled to the relief demanded, notwithstanding an allegation that he had performed all of the obligations imposed on him by the contract.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356-372; Dec. Dig. § 114.*]

2. JUDGMENT (§ 714*)—RES JUDICATA.

Under Code Civ. Proc. § 1911, providing that that only is deemed to have been adjudged in a former judgment which appears on its face to have been so adjudged, or which was actually and necessarily included therein, where a different contract was set up in a subsequent suit for specific performance from that pleaded in a prior bill on which judgment had been rendered for defendant, such judgment was not conclusive against complainant's right to relief in the second suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1242, 1243; Dec. Dig. § 714.*]

Appeal from Superior Court, Orange County; Z. B. West.

Action by M. Takekawa against W. J. Hole. Judgment for plaintiff, and defendant appeals. Affirmed.

Anderson & Anderson, Watkins & Blodget, E. W. Freeman, and Victor Montgomery, for appellant. John W. Kemp, J. S. Noyes, L. B. Stanton, N. Blackstock, and Chas. F. Blackstock, for respondent.

ALLEN, P. J. The action was one for specific performance. The judgment and decree sought to be reversed in this proceeding is based upon a certain written agreement for the purchase and sale of described real property, together with certain executed oral modifications thereof agreed to between the parties. These oral modifications provided for the extension of certain deferred payments specified in the written agreement; a sufficient consideration therefor being shown. The trial court found that these oral modifications and the obligations thereby imposed upon plaintiff had been fully performed, and found all other facts necessary to entitle plaintiff to the relief demanded. A decree was accordingly entered in plaintiff's favor, from which judgment, and from an order denying a new trial, defendant appeals. Defendant in his answer pleaded in bar a former judgment rendered in defendant's favor by a court of competent jurisdiction in an action wherein specific performance was sought by plaintiff against defendant on account of and based upon the terms of the original written agreement without modifications. Upon the trial defendant tendered in evidence the judgment roll and record of such former adjudication. The court sustained an objection to the introduction of this record and defendant assigns as error such action of the court, and the same is practically the only question presented upon this appeal.

[1] Appellant contends that the complaint in the original action was sufficient and under which all competent evidence in the second action was admissible. We think there is no merit in this contention. By the terms of the original written agreement set out in the first action, it affirmatively appeared by the complaint that plaintiff was in default as to deferred payments stipulated in the agreement. This affirmatively appearing, the bare allegation that he had performed all of the obligations imposed upon him by the agreement may be disregarded; the contrary being made to appear by other allegations of the complaint. The complaint did not state a cause of action warranting the equitable relief sought, and no evidence in that action could have been received under the allegations of the complaint with reference to the modifications and extensions of time.

[2] The rule as to what may be deemed adjudged in a former judgment is declared by section 1911 of the Code of Civil Procedure: "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto." It is settled law that in a judgment of any character pleaded in bar it must appear that the parties are the same and the subject-matter the same. Considering the allegations of the complaint in the two actions, while the parties are the same, the subject-matter, to wit, the right of the plaintiff to a specific performance under a particular contract, was not the same. The right to the relief in the second action was based upon entirely different facts from those set out in the first action. It may be conceded that the judgment in the first action, which was one ordered upon the pleadings, was in effect a judgment upon the merits as distinguished from a judgment of nonsuit. Bailey v. Ætna Indemnity Co., 5 Cal. App. 746, 91 Pac. 416. There is under our practice no distinction to be drawn, as affecting the character of judgment, between a judgment rendered upon the pleadings and a judgment rendered upon demurrer. Our Supreme Court in Flood v. Templeton, 152 Cal. 158, 92 Pac. 83, 13 L. R. A. (N. S.) 579, has said: "While a judgment rendered upon the sustaining of a demurrer to a former complaint will be a bar to another action based upon the same allegations of fact, yet where the facts are different and present different questions of law, as they do here, no such bar can be asserted." It cannot be said that, upon the face of the record in the former case, the rights of the parties as to the modified agreement could have been or were adjudged. City of Los Angeles v. Mellus, 59 Cal. 444; Newhall v. Hatch, 134 Cal. 269, 66 Pac. 266, 55 L. R. A. 673. This modified agreement was, in effect,

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

a new agreement. It imposed new obligations upon the parties and each, in consideration of new promises then made to the other, agreed to do acts which, according to his own contention, he was not then bound to perform. The agreements upon the part of plaintiff were each and all executed, as found by the court, and the obligations imposed upon him fully performed. This action was therefore based upon an entirely different statement of facts, and the first judgment was not a bar to this action. We see no error of the court in sustaining the objection to the introduction of the record in the original action.

No other questions are presented requiring consideration.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

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17 Cal. App. 657

BANK OF VENICE v. CLAPP. (Civ. 1,012.)

(District Court of Appeal, Second District, California. Dec. 15, 1911.)

1. Banks and Banking (§ 140*)—Bills and Notes (§ 26*)—Checks—Implied Promise to Pay.

Where one issues a check on a bank, there is a dual implied promise that the bank on which it is drawn will pay the amount thereof, and that, should the bank fail to make the payment, the drawer will pay the same to the holder.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 380-397; Dec. Dig. § 140;* Bills and Notes, Cent. Dig. § 31; Dec. Dig. § 26.*]

2. Bills and Notes (§ 26*)—Checks—Liability of Drawer to Drawee.

Defendant, having agreed to loan W. $425, issued to him two checks payable to plaintiff bank or order, and drawn on another bank in which defendant kept his account. These checks were received by W. in lieu of money, and were transferred to plaintiff by W. for value. Defendant stopped payment by the bank on which the checks were drawn. *Held*, that the checks were negotiable instruments, and, while defendant possessed the right to notify the drawee bank not to pay them, such notice did not relieve him from the legal obligation to pay the holder on demand.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 31; Dec. Dig. § 26.*]

Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by the Bank of Venice against C. F. Clapp. Judgment for plaintiff, and defendant appeals. Affirmed.

G. P. Adams, for appellant. Tanner, Taft & Odell, for respondent.

ALLEN, P. J. Action to recover upon two checks issued by defendant on a bank at Covina, payable to the order of plaintiff, payment of which was refused by the bank at Covina. Judgment went for plaintiff, from which, and an order denying a new trial, defendant appeals.

The facts are these: Defendant and one Widrig had some dealings through which defendant agreed to loan Widrig $425. Pursuant to such agreement, on Saturday, the 26th of December, 1908, he delivered to Widrig a check for $225, payable to plaintiff or order, and drawn upon the First National Bank of Covina. On the following Monday, the 28th of December, he delivered to Widrig another check, drawn upon the same bank and payable to plaintiff, for $200. Widrig, having dealings with plaintiff and having issued checks on plaintiff which had not been paid for want of funds, but which checks were nevertheless being held by plaintiff awaiting a deposit by Widrig of sufficient to cover the amount thereof, sent these checks so by him received from defendant to the Bank of Venice, which gave Widrig credit for the amount thereof and paid the checks of Widrig on and before the 29th of December, 1908. These checks of defendant delivered to plaintiff by Widrig were forwarded by plaintiff to the First National Bank of Covina, and payment was on December 30th refused because of defendant's instructions in that regard. Thereupon plaintiff brought this action upon said checks.

It is appellant's contention that the effect of the issuance of the checks by defendant, under these circumstances, was an agreement to deliver the money to Widrig when he collected the checks; that there was no authority to request plaintiff to pay any money to Widrig before the same had been received by it from the Bank of Covina; that the only duty of plaintiff was to forward the checks for collection and to pay out of the proceeds, as ordered, after, but not before, collection thereof. As we regard the transaction, no question of agency is involved. In discharge of an agreement to make a loan, defendant issued these two checks, which were received by Widrig in lieu of cash, and plaintiff, to whom they were made payable, paid the amount thereof to Widrig, the effect of which was, under the agreement between Widrig and defendant, to make plaintiff a creditor of Widrig to the extent of the amount of such checks. Sims v. Trust Co., 103 N. Y. 472, 9 N. E. 605, is an authority to the effect that, where checks upon one bank payable to another are delivered to a third person, the use of the payee's name indicates the drawer's intention to lodge the money in the payee's control, and nothing further is inferable from the language of the check. This may be accepted as the rule in the absence of any other agreement, but, where checks are delivered to a third person under an agreement of the character disclosed by this record, the agreement, and not the inference, must control.

[1] When one issues a check upon a bank, there is a dual promise implied: First, that

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the bank upon which it is drawn will pay the amount thereof; and, second, if such bank should fail to make the payment, the drawer will pay the same to the holder thereof.

[2] These checks delivered to Widrig were negotiable instruments, and, having been given and received in lieu of money under an agreement, the title thereto vested in Widrig, and, when delivered by Widrig to plaintiff, the title thereto was transferred from Widrig to plaintiff. While defendant possessed the right to notify the Covina Bank not to pay the checks, such notice did not relieve defendant from the obligation to pay the negotiable instruments to the holder upon demand, which demand was made and refused.

We see no error in the action of the trial court in rendering judgment in favor of plaintiff, or in its order denying a new trial, and the same are affirmed.

We concur: JAMES, J.; SHAW, J.

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17 Cal. App. 609

PETERSON v. FREIERMUTH et al.

(Civ. 830.)

(District Court of Appeal, Third District, California. Dec. 9, 1911.)

1. Mechanics' Liens (§ 73*) — Contract with Owner — Filing — "Materialman"— "Original Contractor."

Code Civ. Proc. § 1183, provides that contracts between the owner and the contractor for improvements exceeding $1,000 in cost shall be in writing and filed in the office of the county recorder, otherwise the contract shall be void, and no recovery shall be had thereon by either party. Plaintiff contracted with a lessee to raise a number of old buildings above the street level and remodel them, and "furnish all of the necessary labor and material to be used to fully complete the work," plaintiff to receive the actual cost of the materials and labor, plus 10 per cent. and the reasonable value of the work, to be determined by the amount of work and labor done when it was completed. *Held*, that the labor to be performed was not merely incidental to the furnishing of the materials, and hence plaintiff was an original contractor within the meaning of the statute, and not a materialman, and was not entitled to a mechanic's lien where the contract was not in writing and filed with the county recorder; the fact that the contract did not specify the price or total value of the labor and materials not excusing the parties from reducing it to writing, it being apparent that the cost of the work would exceed $1,000.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 90; Dec. Dig. § 73.*

For other definitions, see Words and Phrases, vol. 5, p. 4409; vol. 8, p. 7718; vol. 6, p. 5056.]

2. Mechanics' Liens (§ 74*)—Contractor's Lien—Filing Specifications—Necessity.

Under Code Civ. Proc. § 1183, providing that contracts for labor and materials between the owner and contractor shall be in writing, and shall be filed in the office of the county recorder before the work is commenced, plans and specifications to which the work is required to conform must be filed with the contract.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 109, 110; Dec. Dig. § 74.*]

3. Mechanics' Liens (§ 73*)—Sufficiency of Contract—Payment of Price.

Code Civ. Proc. § 1184, provides that no part of the contract price shall be made payable in advance of the commencement of the work, but shall by its terms be made payable in installments at specified times thereafter, or on the completion of specified parts of the work, or of the whole, provided that at least 25 per cent. of the whole price shall be payable at least 35 days after completion of the contract. A building contract provided that the contractor should be paid "the actual cost of the said materials and the labor, plus 10 per cent. and the reasonable value of the same, to be determined by the amount of work and labor done * * * when the same was actually finished and completed." *Held*, that the contract did not comply with the statute, and was void.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 73.*]

4. Landlord and Tenant (§ 157*) — Improvements by Lessee—Liability of Owners.

A lessor is not personally liable to a contractor for improvements made upon the leased premises under a contract with the lessee, in the absence of express or implied authority from the lessor to make the improvements; the mere leasing not impliedly authorizing the lessee to make improvements.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 571–607; Dec. Dig. § 157.*]

5. Landlord and Tenant (§ 157*) — Improvements by Lessee — Liability of Owner.

Code Civ. Proc. § 1192, provides that every building or improvement constructed upon any land to the owner's knowledge shall be subject to a mechanic's lien, unless the owner shall, within 10 days after obtaining knowledge thereof, give notice that he will not be responsible for the same by posting notice in writing upon the land or improvements, and section 1185 provides that the land upon which any improvement is constructed shall also be subject to a lien, if at the commencement of the work, or the furnishing of materials, the land belonged to the person who caused the improvements to be made. *Held*, that the failure of a lessor to post the prescribed notice on the premises would not impose a personal liability upon him for improvements made under a contract with the lessee, but would only entitle the contractor to a lien upon the fee.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 157.*]

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by George Peterson against George H. Freiermuth and others. From a judgment for defendants on demurrer to the complaint, plaintiff appeals. Affirmed.

James W. Cochrane and R. P. Henshall, for appellant. H. M. Anthony, for respondents.

HART, J. This is an appeal from the judgment entered after and upon the order sustaining a demurrer.

The action is for the foreclosure of a lien upon certain property for labor and materials furnished in the alteration and remodeling of certain buildings situated on said property.

It appears from the complaint that the respondents are the owners of certain real estate situated in the city of San Francisco, that said respondents leased said property to the defendant Overman, and that the latter held and enjoyed the possession of the same, as lessee under the lease so executed, from the 1st day of August, 1906, up to and including the 16th day of July, 1907.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The complaint further alleges that on or about the 22d day of August, 1906, the plaintiff entered into a contract with the said Overman under and by the terms of which said Peterson agreed to "raise the old buildings then situate upon the front and rear of the premises hereinbefore described to a height of 18 feet from the level of the street; to remodel said buildings throughout with the exception of the residence of George H. Freiermuth, known as No. 1562 Ellis street; to put in new brick foundations, wood columns, girders, etc.; to roof and floor the entire ground of said premises; to put in partitions in four stores; to install patent chimneys necessary for the use of said premises in its remodeled, altered and reconstructed condition." Said agreement further provided "that said Peterson should furnish all of the necessary labor and material to be used to fully complete the work of altering and repairing said premises, millwork, ironwork, cartage of débris, tinning and roofing of said premises; that all of the said materials were to be furnished, and all work and labor were to be done and performed in said building in accordance with * * * certain plans and specifications agreed upon by the parties and to the satisfaction of the said Overman; * * * that it was agreed between the plaintiff and said Overman that the said Peterson should be paid therefor the actual cost of the said materials and the labor, plus 10 per cent., and the reasonable value of the same, to be determined by the amount of work and labor done and performed by said Peterson, when the same was actually finished and completed." It is alleged that the actual cost of the materials so used by said Peterson and the labor performed under said agreement is the sum of $5,076.26. It is also averred that said Peterson has fully performed all of the obligations of said contracts on his part to be performed.

It is alleged that said contract was oral or verbal, and was not signed by the parties thereto; that the same or a memorandum thereof was never recorded in the office of the county recorder of said city and county of San Francisco. The complaint further alleges that the respondents and each of them had knowledge on or about the 22d day of August, 1906, of the remodeling and reconstruction of the buildings on the real property described in the complaint, and of the furnishing of materials for said purpose and the performance of labor on said buildings by plaintiff, but that, notwithstanding the possession of such knowledge by them, they did not post on the premises or give the notice prescribed by section 1192 of the Code of Civil Procedure within the time after the acquisition of the knowledge as designated by said section. The work under said oral contract with Overman was completed by the plaintiff on the 15th day of May, 1907, and on the 11th day of May, 1907, the last named filed and recorded his claim of lien in the office of the county recorder.

The demurrer is both general and special. The grounds of the special demurrer are that the complaint is uncertain, unintelligible, and ambiguous in the following particulars: That it cannot be ascertained therefrom whether the contract referred to therein "was an oral or a written contract"; that it cannot be ascertained therefrom whether "the plans and specifications" mentioned therein are signed by the parties to the contract; and that it cannot be told from the complaint whether said "plans and specifications" were recorded, and, "if so recorded, when and where recorded." We think the complaint is amenable to the criticisms of the special demurrer; but, as we are further of the opinion that the pleading wholly fails to state a cause of action of any character against the respondents, it will not be necessary to give extended notice to the grounds of the special demurrer.

[1] The first proposition advanced by the appellant is that the plaintiff was only a materialman, and that, therefore, he is entitled to a lien for the value of the labor bestowed upon and the materials furnished in the making of the improvements described in the complaint. If this contention be sound, the complaint would manifestly state a cause of action for the enforcement of the lien filed upon the premises for the value of such materials. Section 1183, Code Civ. Proc. We think the proposition is untenable. The complaint directly alleges that by the contract between Overman and the plaintiff the latter agreed to provide all the labor and furnish all the materials necessary for the making of the alterations and improvements as specified and in accordance with certain plans and specifications; that the plaintiff did perform all the labor and provide all the materials for that purpose; and that the actual cost of said labor and materials, with the addition of 10 per cent. provided for by the agreement, amounted to the sum of $5,076.26. We cannot perceive how it can reasonably be maintained, under these allegations, that plaintiff was not an original contractor.

One of the tests for the determination of the question whether under agreements such as the one here the party agreeing to furnish both the labor and the materials is an original contractor or only a materialman is: Was the amount or value of the labor trifling or insignificant when compared to the value of the materials furnished? Or, in other words, was the labor a mere essential incident only of the agreement to furnish the materials? Bennett v. Davis, 113

Cal. 337, 340, 45 Pac. 684, 54 Am. St. Rep. 354. And in James on Mechanics' Liens, § 55, it is said: "The materialman who merely furnishes materials for a building must not be confounded with the contractor who furnishes both materials and labor for and who constructs the building; nor with the laborer who furnishes his individual labor only upon the building. Nor must the common and statutory meaning of the word 'materialman' be lost sight of when the person who furnishes the materials also, and by the same contract, furnishes or performs labor upon and in the construction of the building for which he furnishes the materials. In such cases the persons who furnish materials cease to be materialmen and become original contractors or subcontractors as the facts of the case may be."

Tested by the rules thus stated, it seems to be very clear that there can be no room for doubting that the plaintiff was an original contractor. Under the terms of his contract with Overman, as we have seen, he was to raise the old buildings on the premises to a height of 18 feet above the level of the street, to remodel said buildings, to put in new brick foundations, wood columns, girders, etc., to roof and floor the entire ground of said premises, to put in partitions in four stores, to install patent chimneys, etc., and to "furnish all of the necessary labor and material to be used to fully complete the work," etc.

The facts alleged in the complaint here are materially different from those in Sparks v. Butte Co. Grav. M. Co., 55 Cal. 389, where it was alleged that the appellant merely furnished "certain materials to be used * * * in the construction of a certain building," etc. The case here is also wholly different from the case of Hinckley v. Field's Biscuit, etc., Co., 91 Cal. 136, 27 Pac. 594, where the plaintiffs, under a contract with the defendant, agreed to and did install a steam plant in the latter's factory. The court held that the plaintiffs were merely materialmen, having manufactured at their own shop the boiler, engine, heater, feed pipes, and necessary attachments, and that the work in setting the machinery up and in placing it in proper position on the premises "was only the completion of their contract to deliver such finished machinery, and did not convert them into contractors for the erection of the factory, or any part of it, within the true intent of the statute." But in the case of La Grill v. Mallard, 90 Cal. 373, 27 Pac. 294, it was held, in an action to foreclose a mechanic's lien, that a person who contracts to paper and decorate several rooms in a building and furnishes the material is an original contractor. Speaking of the two cases last mentioned, the Supreme Court, in Bennett v. Davis, supra, says: "The labor required to place the engines and machinery in proper position in the case of Hinckley v. Field's Biscuit Co., supra, was evidently much greater than the labor performed in La Grill v. Mallard, supra, but relatively to the material furnished it was much less. In the one case the material was not only the principal thing, but compared to it the work was trifling. In the other the work was the important matter."

In the case at bar, the relative amount or value of the labor and materials does not appear from the complaint, but it is evident, from the extent of the alterations and the different kinds of work required to make them, that the labor to be performed was the principal feature of the contract. The complaint most certainly does not disclose that plaintiff merely agreed to sell Overman materials. He was to perform the labor and furnish the materials for the completion of a specified contract, according to certain plans and specifications, and we can see no distinction between such a contract and one by which a contractor obligates himself to the owner of property to construct thereon a building and furnish the necessary labor and materials therefor.

Nor, as is suggested may be done, can the fact that the contract here does not specify the contract price or the total value of the labor and the materials be set up as an excuse for failure to commit such contract to writing and to file it as prescribed by law. It was the duty of the parties to have first ascertained, which they easily could have done, at least the approximate, if not the precise, cost of the labor and materials essential to the completion of the contract and thus have determined whether, in order to entitle the contractor to a lien, the contract was one which the statute imperatively requires shall be in writing and filed in the office of the county recorder. Smith v. Bradbury, 148 Cal. 43, 82 Pac. 367, 113 Am. St. Rep. 189. Particularly is this true in a case where, as here, it must have been apparent to the parties, when the contract was made, from the extent of the work to be done and the materials to be furnished, that the aggregate contract price would be far in excess of $1,000. That the contract in this case is one which does not entitle the contractor to a lien on either the fee in the property or the leasehold interest of Overman therein, whatever that may amount to, is a proposition as to which there can exist no degree of doubt. Of course, it follows that the plaintiff cannot maintain an action for the enforcement of his pretended lien upon the premises.

Section 1183 of the Code of Civil Procedure, among other things, provides: "* * * All such contracts shall be in writing when the amount agreed to be paid thereunder exceeds one thousand dollars, and shall be subscribed by the parties thereto; and the said contract, or a memorandum thereof, setting forth the names of all the parties to the contract, a description of the property to be affected thereby, together with a statement of the general character of the work to be done, the total amount to be paid thereunder, and the amounts of all partial payments, together with the times when such payments shall be due and payable, shall, before the work is commenced, be filed in the office of the county recorder of the county, or city and county, where the property is situated; otherwise, they shall be wholly void, and no recovery shall be had thereon by either party thereto; and in such case, the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof."

We need not quote from the numerous decisions of the Supreme Court to show that the language thus extracted from section 1183 of the Code of Civil Procedure means precisely what it says. It will be enough to say that the decisions uniformly hold, as the Code section plainly declares that all contracts, or proper memoranda thereof, between the owners and original contractors for labor to be performed and materials to be furnished, where the amount agreed to be paid under such contracts exceeds the sum of $1,000, shall be wholly void unless the same be in writing, and, before the commencement of the work, filed as said section requires. Willamette, etc., Co. v. College Co., 94 Cal. 229, 29 Pac. 629; Morris v. Wilson, 97 Cal. 644, 32 Pac. 801; Greig v. Riordan, 99 Cal. 316, 319, 33 Pac. 913; Donnelly v. Adams, 127 Cal. 24, 59 Pac. 208; Laidlaw v. Marye, 133 Cal. 170, 65 Pac. 391; Smith v. Bradbury, 148 Cal. 41, 82 Pac. 367, 113 Am. St. Rep. 189; Burnett v. Glas, 154 Cal. 249, 255, 97 Pac. 423.

[2] And in the case of Burnett v. Glas, supra, it is said, following many previous adjudications of the proposition by the Supreme Court, that, where a building contract provides that the construction of the building shall conform to certain plans and specifications, the latter constitute an essential part of the contract, and must be filed therewith, otherwise there is a failure to file the contract within the contemplation of section 1183 of the Code. The complaint in the case at bar alleges, as we have shown, that the work to be performed under the contract was to be in accordance with certain plans and specifications, and that such plans and specifications were not filed with the recorder for recordation. Had the contract specifying the contract price and the terms of payment agreeably to the code requirement been in writing and filed and the filing of the plans and specifications therewith had been omitted, such omission would have vitiated the contract.

[3] The contract, moreover, as to payments of the contract price, does not, according to the averments of the complaint, comply even approximately with the requirements of section 1184 of the Code of Civil Procedure. The complaint alleges that it was agreed between the parties to the contract that the plaintiff should be paid for the labor and materials "the actual cost of the said materials and the labor plus ten per cent. and the reasonable value thereof, to be determined by the amount of work and labor done by said Peterson, when the same was actually finished and completed." This is a substantial departure from the requirements of the statute, and would have rendered the contract void, even if it were otherwise valid, or otherwise prepared and filed as required by law. Merced Lumber Company v. Bruschi, 152 Cal. 372, 92 Pac. 844.

[4] But it is urged by appellant that, if he has not stated a case for the enforcement of a lien on the premises, the respondents are, nevertheless, personally responsible and liable, and that against them the allegations of the complaint disclose a cause of action in assumpsit. Therefore, it is contended, the demurrer should not have been sustained. If the position of appellant as thus declared were sound, there could be no doubt that the complaint would stand as against the demurrer. But we think the point cannot be maintained. The argument in support of this point is that, since the complaint shows by its averments that the improvements to be made and which were made upon the buildings under the contract between Overman and the plaintiff "were of such a character as that the same attached to and became a part of the realty" and further alleges that the sum sued for constituted "the reasonable value of said materials and labor," a cause of action is, therefore, stated against the respondents on an implied contract, and that, by reason of their failure, as alleged, to give the notice required by section 1192 of the Code of Civil Procedure, they are estopped from denying such contract or their personal liability.

In reply to these contentions, it is first to be remarked that there is absolutely no showing made by the complaint that the respondents authorized the improvements called for by the contract between Overman and Peterson, or that respondents were in any manner connected with said contract. There is, in other words, no privity of contract disclosed by the complaint to have existed between the respondents and Overman, or that the latter acted as their agent in contracting with Peterson for the making of the improvements. So far as we are advised to the contrary by the complaint, the respondents might have leased the demised premises to Overman with an understanding or an agreement that the latter might or might not improve the buildings on said premises, according to whether the purposes for which he intended to use them might or might not require their alteration and improvement. In such case, no one will deny the right of Overman to make a contract upon his own responsibility with a third party for that purpose, or, under such circumstances, that the lessors could not be held personally liable to the contractor for the value of the labor and materials employed in the construction or making of such improvements. If A. leases a tract or piece of land to B. for a long term of years, and the latter, in order to better facilitate the use of the land for the purpose to which he desired to put it, should construct a building thereon without consulting the owner or without express or implied authority from him to make the improvement, could it be held within any reasonable contemplation of the law of contracts that A. would nevertheless become personally liable to the contractor for the value of the labor and materials used in the construction of the building? We think the question answers itself. If, as in the case of Moore v. Jackson, 49 Cal. 109, cited by appellant, the lessee was authorized as agent of the lessor to construct the building or, as here, to make the alterations and improvements, then manifestly a different question would be presented. In the case mentioned the Supreme Court, in its opinion, declares that the evidence showed that the lessor authorized his tenant, or the lessee, to make the repairs. Here, as we have seen, there is no such authority shown by the pleaded facts. It certainly will not be argued that the mere allegation that the premises were demised to Overman is sufficient to show authority from the respondents to the former to make the improvements specified in the contract; but most surely we would be compelled to so hold if we were to sustain the argument of counsel.

[5] In the second place, we think that counsel's construction of section 1192 of the Code of Civil Procedure is erroneous. Said section provides, among other things, that "every building or other improvement mentioned in section one thousand one hundred and eighty-three of this Code, constructed upon any lands with the knowledge of the owner * * * shall be subject to any lien filed in accordance with the provisions of this charter, unless such owner or person having or claiming any interest therein shall, within ten days after he shall obtain knowledge of the construction, alteration, repair, or work or labor, give notice that he will not be responsible for the same, by posting a notice in writing to that effect, in some conspicuous place upon the said land, * * * or upon the building or other improvements situated thereon. * * *" It is very clear that the effect of failure on the part of the lessor to post the notice prescribed by the foregoing section is merely to entitle the contractor to a lien upon the fee in the demised real property, and not to impose a personal liability upon the lessor. This announcement is in consonance with the decisions. Phelps v. Maxwell's Creek Gold Mining Company, 49 Cal. 336; West Coast L. Co. v. Newkirk, 80 Cal. 275, 22 Pac. 231; Russ Lumber Co. v. Newkirk, 87 Cal. 596, 25 Pac. 747; Buell v. Brown, 131 Cal. 158, 161, 63 Pac. 167; Hubbard v. Lee, 6 Cal. App. 602, 92 Pac. 744; James on Mechanics' Liens, § 121.

Under the provisions of section 1185 of the Code, where the lessor of property, upon which the lessee has constructed improvements, has given the notice required by section 1192 of said Code, the leasehold interest of the lessee is subject to the lien for the value of the labor and materials, provided, of course, that the contract for the construction of the building has been reduced to writing and recorded as required; but there is no language either in section 1185 or 1192 of the Code of Civil Procedure imposing upon the lessor, or the owner of the property, in such a case, a personal liability for the labor and materials bestowed upon the work. This is not to say, however, that a personal liability does not exist against some one, for, indeed, one does so exist, but it arises, not from the provisions of our mechanic's lien act, but "upon general principles of law, and irrespective of the provisions of the act." Phelps v. M. C. G. M. Co., supra; West Coast L. Co. v. Newkirk, supra.

Thus it will be observed, as sound principle dictates, that, in order to personally bind the respondents here for the consequences of the contract between Overman and the plaintiff, it should have been shown by clear and direct averments that there existed, as to said contract, contractual privity between Overman and the respondents—that is, that the latter were in legal contemplation parties to the contract or authorized the work and materials called for by it to be done and furnished. This as we have pointed out, has not been shown. In other words, Overman, so far as the complaint discloses, was the lessee in actual possession of the premises when the contract was made, and, without any suggestion or authorization from the respondents, himself alone made the contract with the plaintiff.

We see no possible ground upon which the complaint may be held sufficient as against the demurrer, and the judgment is accordingly affirmed.

17 Cal. App. 677

We concur: CHIPMAN, P. J.; BURNETT, J.

HOVEY v. THORP. (Civ. 1,022.)

(District Court of Appeal, Second District, California. Dec. 18, 1911.)

APPEAL AND ERROR (§ 706*)—NEW TRIAL—SUFFICIENCY OF SHOWING.

A bill of exceptions sufficiently shows that application was made for a new trial, where it shows the notice of intention and the grounds therefor, that the case came on for hearing, that counsel for both parties were present, that the case was submitted, and thereafter the court granted the motion and ordered a new trial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2944–2947; Dec. Dig. § 706.*]

Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by Clara W. Hovey against C. I. Thorp. From an order granting a new trial, defendant appeals. Affirmed.

Roland G. Swaffield, for appellant. George A. Skinner and E. S. Williams, for respondent.

ALLEN, P. J. This is an appeal from an order of the superior court of Los Angeles county granting a new trial. Appellant's sole contention is that the order granting a new trial was made without an application therefor by respondent.

We see no merit in this proposition. The bill of exceptions shows the notice of intention and the grounds therefor; that the cause came on for hearing, and that counsel for both parties were present; that the cause was submitted, and thereafter the court granted the motion and ordered a new trial. The record discloses that nothing remained for hearing but this motion; that the cause which came on for hearing was such motion, and the order was in connection therewith. The grounds for the motion sufficiently appear from the bill of exceptions. A case is not presented where the notice of motion and the grounds therefor cannot be considered on account of the failure to incorporate the same in a bill of exceptions. Williams v. Hawley, 144 Cal. 100, 77 Pac. 762. The application for new trial and the grounds therefor sufficiently appear from the bill of exceptions, without considering the order of the trial court made pending the appeal and directed to be entered nunc pro tunc.

Order affirmed.

We concur: JAMES, J.; SHAW, J.

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17 Cal. App. 604

Ex parte CUTTING. (Cr. 221.)

(District Court of Appeal, Second District, California. Dec. 7, 1911.)

1. INTOXICATING LIQUORS (§ 50*)—UNLAWFUL SALES—"SALE."

The property of a social club which sold liquor to its members is owned in common by its stockholders, and the money paid for liquor goes into the corporate fund in lieu of the liquor received by him, which belonged to the corporation, and is used to support the club, so that, if there be a profit from the sales of liquor, it lessens the amount which those members not purchasing liquor from the club would have to pay. *Held*, that the dispensing of liquor to club members is a "sale" within San Diego City Charter, c. 2, subd. 33, authorizing the council to regulate the sale of intoxicants.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 50.*

For other definitions, see Words and Phrases, vol. 7, pp. 6291–6306; vol. 8, p. 7793.]

2. INTOXICATING LIQUORS (§ 15*)—SALE BY SOCIAL CLUBS—VALIDITY OF REGULATIONS.

San Diego City Charter gives the council power to impose a license tax upon the sale and retail of liquors, and upon all business places not prohibited by law that may require a special police surveillance, or be prejudicial to public morals and the general welfare. An ordinance made it unlawful for any agent of a social club to maintain a barroom where intoxicants were sold, or given away without a license issued to the club, upon verified petition of the directors of the club, and that the common council, after investigation as to whether the persons were suitable persons to sell liquors, and that the clubroom was a suitable place, and that it was a bona fide club, should pass upon the application. The ordinance fixed the license at $5 a month, requires all liquors to be drunk on the premises, prohibits gambling, and requires a report every three months by the officers and persons selling the liquors, and prohibits licenses for social clubs exceeding 25 from being granted. *Held*, that the ordinance was a reasonable exercise of the police power of the city under its charter, and was valid.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 15.*]

In the matter of the application of J. M. Cutting for a writ of habeas corpus. Writ denied.

A. J. Morganstern, for petitioner. W. R. Andrews, for respondent.

ALLEN, P. J. Petitioner has been convicted by the city justice's court of the city of San Diego for a violation of the provisions of an ordinance of said city, No. 4345, the same being entitled: "An ordinance imposing municipal licenses on social clubs in the city of San Diego, California, providing the manner of issuing, collecting and revoking the same, regulating the sale of liquor in such clubs, and fixing a penalty for the violation of said ordinance." By the first section of the ordinance it is made unlawful for any officer, agent, or employé of any social club to maintain a clubhouse, clubroom, barroom, or other place where any wine, ale, beer, or any spirituous, vinous, malt, or mixed liquors, or any intoxicating drinks, are sold, dispensed or given away to the members of such social club, or to the guests of such members, or for any person in said clubhouse, etc., to sell, dispense or give away to any member of such social club, or to any guest of any member, any wine, ale, etc., without a license therefor issued to such social club, as provided in said ordinance. Section 4 provides that no license shall be authorized to be issued under the ordinance, except upon a verified petition under oath of the board of directors or trustees of such social club, which petition must contain a statement of the incorporation of such social club; a list of officers and persons who are to have charge and control of the dispensing of liquors in the clubhouse of such club; the location of such clubhouse, wherein liquors are to be sold, dispensed or given away; the names of the members of such club, and their addresses, showing a membership of at least 50 persons; a statement that said club has been incorporated and in existence for a period of at least six months prior to the date of such petition, and has been occupying the clubhouse during the whole of said time; that such club is a bona fide social club, organized and conducted in good faith, with a limited and selected membership, owning its property in common. Section 5 provides that, upon the presentation of such petition, the common council, after investigation as to whether the persons in the control of such club are sober, suitable, and proper persons to sell and dispose of intoxicating liquors, and that the same is a suitable place in which to maintain a clubroom or barroom, and that it is a bona fide club and not a mere pretense, shall pass upon the question of such application and grant or deny the license; the rate of license being fixed at $5 per month. The ordinance further provides that all liquors sold or dispensed in such clubroom shall be drunk on the premises, and that no intoxicating liquors dispensed by such club are to be carried off the premises, and that no gambling games are to be allowed; that at least once every three months the president and secretary of such club shall prepare a statement of the officers and the persons having charge and control of the dispensing of liquor, with their addresses, and deliver the same to the chief of police; that the council has power, after a hearing, to revoke any license issued for a violation of any of the provisions of the ordinance; that no licenses for social clubs in excess of 25 shall be granted at any time by said common council. The ordinance prohibits the transfer of any license, and provides a penalty for a violation of such ordinance.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The contention of petitioner is that the city council, under its charter, has no power to pass such an ordinance, and that the same is unreasonable, arbitrary, and attempts to regulate a lawful association which is not per se immoral or dangerous to the public health, and that no need for the exercise of police power appears to exist in order to warrant the enactment of such an ordinance. The charter of the city of San Diego by subdivision 33 of chapter 2 gives to the council the power to regulate and impose a license tax upon the sale at retail of tobacco, cigars, alcohol, or malt liquors, and upon all business places not prohibited by law that may require special police surveillance, or that may be prejudicial to public morals and the general welfare.

[1] There is no basis for petitioner's contention that the dispensing of liquor owned by a social club to its members for a consideration is not a sale. While the property of such a corporation is owned in common by its stockholders, when one or more of the stockholders receives, in consideration of a cash payment, or on credit, a portion thereof, such portion so received is the separate property of the member. The money he pays goes into the corporate fund, in lieu of the common property so dispensed, and inures to the benefit of those who drink or smoke, as well as to those who do not. This money goes to the support of the club, and, if there be a profit, lessens the burdens upon those members who do not indulge in a use of this species of club property. As said by the Supreme Court of Oregon in State v. Kline, 50 Or. 426, 93 Pac. 237: "While the cases cannot be reconciled, the current as well as the weight of authority is undoubtedly in favor of the rule that the distribution and consumption of liquors in a club by its members in the manner above stated is a sale, and a violation of laws of the nature stated"—the manner of distribution therein being not unlike that in the case under consideration. In Manning v. Canon City, 45 Colo. 571, 101 Pac. 978, 23 L. R. A. (N. S.) 192, the Supreme Court of Colorado says in reference to the dispensing of liquor by a club to its members for a consideration: "The money that is received is used to replenish the treasury of the club, and in buying other liquors or supplies. The member, assuming that he has an interest in it, has but a minute interest; and, when he exchanges his money for a quantity of liquor, he pays for his minute interest and the interest of each of the other members. * * * When the members of the club clothe the board of control with the authority to dispose of liquor belonging to the club, they relinquish their right to have the entire property of the club remain intact for joint use, occupancy, and enjoyment of all the members, and make such board their agents to dispose of the liquor, and, in our opinion, such disposal by the board is a sale pure and simple." It is settled law that a sale is an agreement by which one of two contracting parties, called the seller, gives a thing and passes title, in exchange for a certain price in current money, to the other party, who is called the buyer or purchaser, who on his part agrees to pay such price.

We recognize no distinction between a transfer by a corporation or partnership, of which the buyer is a member, of a portion of the corporate or partnership property for a consideration, and that of any other purchase or sale of property. In both instances the title to specific property passes for a consideration, and the transaction is a sale. If we are correct in the views just expressed, the transaction here involved is comprehended within subdivision 33, c. 2, of the charter.

[2] Aside from this, however, the charter authorizes the licensing of places not prohibited by law that may require special police surveillance, and that may be prejudicial to public morals and the general welfare. This court, upon the authorities cited, has heretofore held in Re Kidd, 5 Cal. App. 159, 89 Pac. 987, that there is no inherent

right in a citizen to sell intoxicating liquors; and certainly there should be no question as to the necessity for police surveillance over places dispensing spirituous liquors. The evils which may result therefrom may not be as aggravated as those which would follow the keeping of a public house or bar for a like purpose, but the possibility of evil necessitates police control, and the character of this control is a legislative matter. In the case at bar we see nothing as indicating the unreasonable character of the control exercised. There is nothing in the ordinance interfering with the social relations between members of a club, nor restricting them in any respect, except as to their engaging in a traffic the effect of which may be injurious. That the legislative body may absolutely prohibit the sale of liquor, even by clubs, is unquestioned, and this right and power to prohibit comprehends the lesser power of control. The Constitution confers police power upon the municipal authorities when not in conflict with general laws. There is nothing in this ordinance conflicting with general laws. Within proper police regulations, it is within the province of a municipality to regulate its local affairs, and it is the duty of the court to uphold such regulations, except it manifestly appears that rights secured to a citizen have been contravened. There is no right sought to be controlled by this ordinance other than the right to traffic in intoxicating liquors, which is not an inherent right in the citizen. This ordinance, therefore, being exercised only for the purpose of protecting public safety, the public health and the public morals, is in our opinion, a valid enactment. Conceding that a man's club in certain instances is the only fireside of many of the members, nevertheless, the right to dispense for pay intoxicating liquors even at the fireside is a proper subject of police regulation. Whether or not a necessity existed for this ordinance is a matter for the city council, and not for the court. There is nothing in the ordinance directed to any acts of the association except those which from their nature may be prejudicial to good order and injurious to the public welfare.

In our opinion, the ordinance is a valid exercise of the police power and reasonable, and the action of the municipal authorities in relation thereto should be sustained.

The writ is denied.

We concur: JAMES, J.; SHAW, J.

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17 Cal. App. 676

Ex parte ROSS. (Cr. 231.)

(District Court of Appeal, Second District, California. Dec. 18, 1911.)

HABEAS CORPUS (§ 85*)—DISCHARGE OF ACCUSED BOUND OVER FOR TRIAL—RECORD.

Where the evidence on a preliminary examination of accused is not authenticated, on habeas corpus by him for his discharge from custody under a warrant binding him over, the writ must be denied.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 85.*]

Habeas corpus by Charles E. Ross for his discharge from custody under a warrant binding him over to answer for crime. Denied.

Conkling & Brown, for petitioner.

PER CURIAM. The writ must be denied for various reasons: First, the evidence had upon the preliminary examination is not authenticated in any manner. Second, while the aggressive acts of defendant were directed toward a third party, they were done in the presence of the officer, and so terrorized him that he was prevented from discharging a duty, and the effect of which was to resist such officer. As to the other offense of assault with a deadly weapon, it may be, if the case of People v. Sylva, 143 Cal. 62, 76 Pac. 814, is to be followed as a correct exposition of the law, that upon a final trial it might be held insufficient to warrant a conviction of the exact offense charged, although not of lesser offenses embraced therein. But upon a preliminary hearing we regard the unauthenticated evidence presented as insufficient, even if authenticated, to warrant the writ.

Assuming that reasonable grounds are shown to warrant the magistrate in binding the petitioner over, the bail is not excessive.

Writ denied.

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17 Cal. App. 646

LOS ANGELES PAC. CO. v. HUBBARD et al., Board of Public Works.
(Civ. 998.)

(District Court of Appeal, Second District, California. Dec. 13, 1911. Rehearing Denied Jan. 12, 1912. Denied by Supreme Court, Feb. 9, 1912.)

1. PROPERTY (§ 2*)—NATURE OF RIGHT OF "PROPERTY."

"Property" is a generic term, which, under Civ. Code, § 654, includes anything which may be the subject of ownership.

[Ed. Note.—For other cases, see Property, Cent. Dig. § 2; Dec. Dig. § 2.*

For other definitions, see Words and Phrases, vol. 6, pp. 5693–5728; vol. 8, pp. 7768–7770.]

2. MUNICIPAL CORPORATIONS (§ 425*)—STREET IMPROVEMENTS—ASSESSMENT FOR BENEFITS —STATUTORY PROVISIONS — "PROPERTY"— "LAND."

Laws 1903, p. 376, relating to street openings, requires by section 15 that each lot, piece, or parcel of land be designated upon a diagram as a basis for assessments. Section 17 requires the amount of assessment to be set opposite each lot, piece, or parcel of land which under section 20 is made a lien upon the property assessed. These sections and sections 23 and 26, use the terms "property," "lands," and "each lot, piece or parcel of land," interchangeably. *Held* that, in requiring the superintendent of streets to assess the benefits from street improvements on the property of any street railroad within the assessment district, the word "property" was used in a limited sense and as referring to that species of property designated as "land," which as defined by Civ. Code, § 659, is "the solid material of the earth," and hence there was no authority for an assessment against the "ties, tracks, poles, rails and switches" as such or apart from the franchise.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1031–1034; Dec. Dig. § 425.*

For other definitions, see Words and Phrases, vol. 5, pp. 3975–3984; vol. 8, pp. 7700–7701.]

3. STREET RAILROADS (§ 28*)—FRANCHISE—NATURE OF RIGHT ACQUIRED IN STREET.

A franchise to construct, maintain, and operate a street railroad along and over certain streets constitutes an estate or property in the land of the streets.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 39–42, 63–65; Dec. Dig. § 28.*]

4. MUNICIPAL CORPORATIONS (§ 425*)—STREET IMPROVEMENTS — ASSESSMENTS — PROPERTY LIABLE—STREET RAILROADS.

A street railroad company operating its line along and over a street under a franchise, which is benefited by the widening of a street, may be required to pay the cost of such improvement in proportion to the benefits received.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1031–1034; Dec. Dig. § 425.*]

5. MUNICIPAL CORPORATIONS (§ 425*)—STREET IMPROVEMENTS — STREET RAILROADS — ASSESSMENT OF RIGHT OF WAY.

The right of way of a street railroad fronting and abutting upon a street is not subject to assessment for the cost of improving the street under the general language used in the Vrooman act.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1031–1034; Dec. Dig. § 425.*]

6. MUNICIPAL CORPORATIONS (§ 407*)—STREET IMPROVEMENTS—ASSESSMENT FOR BENEFITS —RIGHT OF WAY—CONSTITUTIONAL PROVISIONS.

There is no constitutional objection to an act of the Legislature providing for the assessment of all or a part of a street railroad right of way, whether owned by it in fee or consisting merely of an easement, to cover benefits received from the widening of the street.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 407.*]

7. MUNICIPAL CORPORATIONS (§ 425*)—STREET OPENINGS — PROPERTY LIABLE TO ASSESSMENT—STREET RAILROADS—USE OF STREET UNDER FRANCHISE — "LAND" — "PIECE OF LAND"—"PARCEL OF LAND."

Laws 1903, p. 376, relating to opening and widening of streets, provides by section 16 that the superintendent of streets upon receiving a diagram shall assess the cost of an improvement upon the land in the district, including the property of any railroad. *Held*, in view of Civ. Code, § 3541, declaring that an interpretation which gives effect is preferred to one which makes void, that as all railroad land other than rights of way was subject to assessment under the general language used, it was intended to assess its rights of way, whether consisting of an easement or title in fee, and that the use of the street for the purposes specified in its franchise constituted a piece or parcel of land within the meaning of the act subject to assessment for resulting benefits.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1031–1034; Dec. Dig. § 425.*

For other definitions, see Words and Phrases, vol. 6, pp. 5166–5168, 5377.]

8. MUNICIPAL CORPORATIONS (§ 425*)—STREET IMPROVEMENTS—PROPERTY LIABLE TO ASSESSMENT — STREET RAILROADS — TIES, TRACKS, AND POLES.

Where a street railroad's use of a street for the purposes specified in its franchise constitutes a piece or parcel of land within the meaning of that term as used in the street opening act (Laws 1903, p. 376), and as such subject to assessment for benefits, the assessment of its franchise constituted also an assessment of the "ties, tracks, poles and switches" included in the greater term franchise, and the specific mention of them was surplusage.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1031–1034; Dec. Dig. § 425.*]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by the Los Angeles Pacific Company against A. A. Hubbard and others, constituting the Board of Public Works of the City of Los Angeles, to enjoin the sale of its tracks, etc., for an unpaid assessment for a street improvement. Judgment for plaintiff, and defendants appeal. Reversed.

John W. Shenk, City Atty., and Charles D. Houghton, Deputy City Atty., for appellants. Gurney E. Newlin and J. W. McKinley (Roy V. Reppy, of counsel), for respondent.

SHAW, J. In proceedings had and taken by the city of Los Angeles for the purpose of opening and widening Sixteenth street, pursuant to the provisions of the street opening act of 1903, an assessment for the cost of the proposed improvement was levied against the lands and property located within the boundaries of the district as specified in the ordinance of intention. Among other assessments was one levied upon certain property of plaintiff within the district so established, which assessment so made was as follows: "All ties, tracks, poles, wires, switches, franchises, etc., used in operating an electric street railway on Sixteenth street, between the west line of Figueroa street prolonged southerly across Sixteenth street and the intersection of said electric street railway tracks with the electric street railway tracks of the Los Angeles Interurban Railway Company at Georgia street, and between the intersection of the said electric street railway tracks with the electric street railway tracks of the Los Angeles Interurban Railway Company at Burlington avenue and the east line of Pacific avenue prolonged southerly across Sixteenth street." Plaintiff refused to pay the assessment, and the property so assessed was advertised for sale on account of delinquency in the payment thereof, whereupon this action was instituted, praying that defendants as said board of public works be perpetually enjoined from making such sale. Judgment went for plaintiff, and defendants appeal therefrom on the judgment roll. The property assessed constitutes a part of an electric railroad owned and operated by plaintiff within and extending from the city to points outside thereof.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The chief ground urged in support of a reversal involves the question as to whether the property described is subject to an assessment under the act pursuant to the provisions of which the proceedings were had. Appellants base their right to make the assessment upon section 16 of the act, which requires the street superintendent, upon delivery to him of a diagram made by the city engineer showing "each separate lot, piece, or parcel of land within the assessment district," together with the dimensions of each such parcel (Id., § 15), to "assess the total expense of the proposed improvement upon and against the lands, including the property of any railroad or street railroad within said assessment district, * * * in proportion to the benefits to be derived from said improvement."

[1] "Property" is a generic term, and, since it includes anything which may be the subject of ownership (Civ. Code, § 654), its meaning in a given case, and whether or not limited in application, must be determined by ascertaining the sense in which it is used.

[2] It is apparent from a reading of the act that the Legislature used the term "property" as applying to land only. Indeed, throughout the act, the words "property," "lands," and "each lot, piece, or parcel of land" are used interchangeably. Section 15 requires each lot, piece, or parcel of land to be designated upon a diagram, which diagram forms the basis for the acts of the superintendent in making the assessment. Section 17 prescribes the manner of making the assessment, the amount of which shall be set opposite each "lot, piece, or parcel of land" which assessment (section 20) shall be a lien upon "the property against which it is made." Upon offering the property for sale for delinquent assessments, it shall be sold (section 23) to the one who will take the "least quantity of land" and pay the assessment, and to whom the street superintendent shall execute a certificate of sale (section 26), "setting forth a description of the property sold." These and other provisions clearly indicate that in requiring the superintendent of streets to assess the "property of any railroad or street railroad within said assessment district" the Legislature used the word "property" in a limited sense, and as having reference to that species of property only designated as land, which is "the solid material of the earth." Civ. Code, § 659. Hence it follows there was no authority for the action of the superintendent of streets in levying an assessment against the "ties, tracks, poles, rails and switches" as such, entering into the construction of plaintiff's street railroad and used in the operation thereof. He might with equal propriety have assessed the buildings and improvements erected upon a lot or tract of land located in the district. The land, not the improvements thereon, is subject to assessment for the cost of widening a street, under the street opening act of 1903.

[3] Included in the assessment was the franchise, whereby was granted the right to construct, maintain, and operate plaintiff's railroad along and over that portion of the street within the boundaries of the district. The appeal of the North Beach & Mission Railroad Co., 32 Cal. 499, cited with approval in subsequent cases, is authority for the statement that such right constitutes an estate in the land of the street. In discussing a like question involving an assessment for benefits accruing to a street railroad in the widening of Kearny street in San Francisco, the court said: "Thus it appears that the appellant has acquired an interest in the soil in Kearny street; that it consists in the location of the road in the street, its right to lay down rails and attach them to the soil, and to run its cars over them for profit; its right to the exclusive use of them and the streets, so far as is necessary for the purpose, in the mode prescribed; that this interest is property—an interest in the land—and that it is real estate, and the rails thus laid down, attached to the soil and annexed to the easement became themselves a part of the land—of the estate of the company—and that, in those states where no special provision is made for taxing this species of property in a different mode, it is assessed as real estate in the same manner, and upon the same principles, as land, as if the company owned the land itself upon which the track is laid to the extent of its interest in it. * * * It is as immovably established on the particular portion of the earth as the lot occupied by stores fronting on the same street, and the estate in the one can no more be enjoyed away and apart from its fixed locality than the estate in the other." See, also, Stockton G. & E. Co. v. San Joaquin Co., 148 Cal. 313, 83 Pac. 54, 5 L. R. A. (N. S.) 174.

[4] That a street railroad company operating its line along and over a street under a franchise so to do may be largely benefited by the widening of the street, and may therefore be required to pay the cost of such improvement in proportion to the benefits received, must be conceded. Appeal of N. B. M. R. R. Co., supra. Indeed, the proposition is admitted by learned counsel for respondent, who, however, contends that the payment of such benefits cannot be enforced by sale and conveyance of a part of the right of way essential to the operation of a street railroad in the interest of the public; that to thus dismember and break up the entirety and utility of the roa(as a line of travel

would impair the paramount rights of the public therein to have the same operated in execution of an important public trust. This contention finds apparent support in numerous authorities cited by respondent. State v. District Court of Ramsey County, 31 Minn. 354, 17 N. W. 954; Seattle v. Seattle Electric Co., 48 Wash. 599, 94 Pac. 194, 15 L. R. A. (N. S.) 486; In re City of Seattle, 49 Wash. 109, 94 Pac. 1075; Seattle v. Seattle Electric Co., 54 Wash. 460, 103 Pac. 807; N. Jersey St. Ry. Co. v. Mayor of Jersey City, 68 N. J. Law, 140, 52 Atl. 300; So. Cal. Ry. Co. v. Workman, 146 Cal. 80, 79 Pac. 586, 82 Pac. 79. An examination of these cases, however, shows that none are in point, for the reason that in all of them the right to make the assessment was considered under statutes providing in general terms only for assessing property for local improvements.

[5] The question is not an open one in this state, it having been held by the Supreme Court (Southern Cal. Ry. Co. v. Workman, 146 Cal. 80, 79 Pac. 586, 82 Pac. 79) that the right of way of a railroad fronting and abutting upon a street is not subject to assessment for the cost of improving the street under the general language used in the Vrooman act.

[6, 7] As to all lands owned by a railroad within the improvement district, other than rights of way over which its road is operated, and which are essential to such operation, the general language of section 16 of the act in question, directing the street superintendent to assess the cost of the improvement upon the lands in the district would apply with equal force as to lands held in private ownership; and hence, if this was all that was intended, there could be no purpose in inserting the words, "including the property of any railroad or street railroad" within the district. Some effect must be given this language. Civ. Code, § 3541. We perceive no constitutional objection to an act of the Legislature providing for the assessment of all or a part of the right of way, whether owned in fee by the railroad, or consisting merely of an easement, to cover benefits received as a result of the widening of a street; and, since the words inserted in the act constitute express authority and direction to the street superintendent to assess the property of railroads or street railroads within the district, and inasmuch as all land other than rights of way in the district owned by a railroad is clearly subject to assessment under the general language used, it must have been the intent of the Legislature to provide for the assessing of such rights of way, whether the same consisted of an easement of title in fee, where the property would be benefited by the widening of the street. We are therefore of the opinion that the right of plaintiff to the use of the street for the purposes specified in the grant of its franchise constituted a piece or parcel of land within the meaning of the term as used in the street-opening act of 1903, and that such property was subject to assessment for benefits accruing to it by reason of the opening of the street. We perceive no insuperable difficulty in making a diagram delineating thereon that part occupied by the railroad for the purpose granted, nor in making a sale to the one who would take the least part of the property assessed, as directed in section 25 of the act.

[8] Since the easement created constituted a piece or parcel of land, it must follow that the improvements, consisting of poles, wires, ties, rails, etc., constructed thereon and affixed to the land pursuant to the terms of the grant and necessary to the use of the easement for the purpose granted, must be deemed a part of such piece or parcel of land. Appeal of North Beach & Mission R. R. Co., supra, and cases therein cited. The assessment of the franchise, a term used to designate plaintiff's estate in the land, constituted an assessment of all the property included in the term "land," when applied to plaintiff's interest in the street. The greater includes the less, and since the "ties, tracks, poles and switches" were included in the term "franchise," upon which the assessment was levied, the specific mention of these improvements must be deemed surplusage, and, while unauthorized by statute, gives no ground for enjoining the sale. Any objection to the form or amount of the assessment should be made to the council, which, by section 19 of the act, is authorized to correct, change, or modify the same. We think it clearly appears that it was the intent of the Legislature that the rights of way of railroads, whether owned in fee or otherwise, should be assessed for the cost of widening streets in proportion to the benefits inuring to such property as a result of the improvement made. That it might, as suggested by counsel, have devised a better means of enforcing the payment of the assessment, we have no doubt.

The judgment is reversed.

We concur: ALLEN, P. J.; JAMES, J.

17 Cal. App. 381

BROWN v. COFFEE. (Civ. 1,010.)

(District Court of Appeal, Second District, California. Nov. 7, 1911. Rehearing Denied by Supreme Court Jan. 5, 1912.)

1. APPEAL AND ERROR (§ 348*)—TIME FOR TAKING—NOTICE OF JUDGMENT.

Under Code Civ. Proc. § 941b, authorizing notice of appeal within 60 days after notice of entry of the judgment appealed from, or within 6 months after entry of the judgment, if notice of the judgment be not given, before respondent can object to a review of the evidence on an appeal, taken within 6 months, on the ground that the appeal was not taken within the 60-day limit, he must show giving of notice of entry of the judgment.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1900–1904; Dec. Dig. § 348.*]

2. NOVATION (§ 12*)—BURDEN OF PROOF.

The burden of establishing a novation is upon the party who asserts its existence.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 12; Dec. Dig. § 12.*]

3. APPEAL AND ERROR (§ 1011*)—FINDINGS ON CONFLICTING EVIDENCE.

To support a finding contradictory testimony must be given the same weight as though uncontradicted, since the finding on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

4. CONTRACTS (§ 322*)—BUILDING CONTRACTS—AUTHORITY OF ARCHITECT—EVIDENCE—SUFFICIENCY.

Evidence *held* insufficient to show that an architect had authority to agree to modification of a building contract.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 322.*]

5. CONTRACTS (§ 284*)—BUILDING CONTRACTS—ARCHITECTS — AUTHORITY—MODIFICATION OF CONTRACT.

An architect employed to draw plans and specifications and to superintend the work has no implied power to bind the owner by agreeing to a modification of the contract.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 284.*]

6. CONTRACTS (§ 290*)—BUILDING CONTRACTS—MODIFICATION—ESTOPPEL.

An owner under a building contract is not estopped to deny his architect's authority to agree to a modification of the contract, through having known that plaintiff was doing the work covered by the modification, if he was justified in presuming that the work was being done under the original contract.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 290.*]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by C. D. Brown against Harry Coffee. Judgment for plaintiff, and defendant appeals. Reversed.

Rehearing denied in Supreme Court (121 Pac. 311).

George E. Whitaker, for appellant. W. W. Kaye, for respondent.

SHAW, J. Action to recover $967.87, an alleged balance due on account. The complaint avers that plaintiff, at the special instance and request of defendant, performed work and labor and furnished materials in doing sundry carpenter work, the reasonable value of which was $1,467.87, upon which defendant paid the sum of $500. The answer denied the material allegations of the complaint, but admitted the existence of a balance due to plaintiff of $369. Judgment went for plaintiff in the sum of $809.73 and costs, from which defendant appeals.

As disclosed by the record, defendant was fitting up a storeroom in Bakersfield, and entered into a contract with plaintiff whereby the latter was to make certain repairs and reconstruct the front of the storeroom in accordance with certain plans and specifications therefor, as made by one Jones, an architect employed by defendant to prepare the same. Plaintiff entered upon the performance of the work, and, after proceeding therewith for a time, was employed to do certain other work in and about the storeroom, which work it appears was to be done by day labor, and as to the performance of which no price was agreed upon. The court found that, after plaintiff had entered upon the performance of this contract, "the plaintiff and the defendant entered into an agreement whereby the said contract was altered, so that the plaintiff agreed to furnish said labor and materials to the defendant as aforesaid, and the defendant agreed to pay therefor the reasonable value thereof." Appellant's contention is that the evidence is insufficient to justify the court in making the finding.

[1] Respondent has filed no points or authorities in opposition to the contention of appellant; his counsel merely suggesting that the appeal should be dismissed for the reason that the same was taken more than 60 days after the entry of the judgment. Hence it is claimed this court is without jurisdiction to review the decision on the ground that it is not supported by the evidence, in support of which he directs our attention to section 939, Code of Civil Procedure, which provides that only in cases where the appeal is taken within 60 days from the entry of judgment can the sufficiency of the evidence to support the decision be reviewed. The appeal, however, is not taken under section 939, but under the alternative method as provided by sections 941a and 941b, Code of Civil Procedure. The latter section provides that any person having the right to appeal may do so by filing the notice designated therein, which notice "may be filed at any time after the rendition of the judgment, order or decree, but the same must be filed within sixty days after notice of entry of said judgment, order or decree has been served upon the attorneys of record appearing in said cause or proceeding; provided, however, that if no notice of entry of judgment be given, the notice must, nevertheless, be filed, under any circumstances, not later than six months after the entry of the judgment, order or decree." An inspection of the record fails to disclose that any notice of the entry of judgment was ever served upon the attorneys of record appearing in said cause for defendant. Hence, in the absence of the service of such notice, the appeal being taken within six months from the entry of judgment, it was had within due time. Having been taken within time,

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

appellant, by virtue of the provisions of section 941c, Code of Civil Procedure, is entitled to have any question reviewed upon such appeal which could be reviewed upon an appeal taken within 60 days from the entry of judgment and pursuant to the provisions of section 939, Code of Civil Procedure. It thus appears there is no merit in respondent's suggestion.

[2-6] "The burden of establishing a novation is upon the party who asserts its existence." Netterstrom v. Gallistel, 110 Ill. App. 352. The only evidence tending in the slightest degree to establish the fact in controversy was that of Johnson, plaintiff's foreman, who testified that while the work was in progress, and owing to the difficulty of keeping the workmen's time, some of whom were doing the contract work on the store front and others engaged in work not covered by or included in the contract, he said to Jones, defendant's architect: "I can't keep track of the separate time here. The store front, I gave you a figure on that. And we talked it over, and I says, 'It would be better to turn it into day's work,' and Mr. Jones says: 'Yes, I believe it will. I will speak to Mr. Coffee.' And the very next day Mr. Jones told me that Mr. Coffee said it was agreeable to him to turn everything into day's work and cut out the contract, because we was so mixed up we couldn't work on the contract continuously, as we put in a tile floor, and we were delayed then a little on the front. So we came to the understanding between us that we would turn it all into day's work." Neither plaintiff nor his foreman claimed to have had any conversation upon the subject with defendant, although he was in and about the building frequently. Nor is there any evidence that Coffee, the defendant, was ever informed of the alleged conversation. It is flatly denied by Jones, who says he never made any such agreement with Johnson, and never informed Mr. Coffee, the defendant, of the making thereof; nor did the latter ever assent thereto. Nevertheless the testimony of plaintiff's foreman in support of the finding must be given the same weight as though it was uncontradicted. This for the reason that, where there is a conflict of evidence upon any issue, the conclusion of the trial court thereon will not be disturbed on appeal. Conceding the conversation as related by Johnson sufficient to constitute a novation of the contract, nevertheless, since defendant personally was not a party to it, he could not be bound thereby, unless it be made to appear that he had authorized Jones as his agent to assent thereto. In the absence of any aid from respondent's counsel, we have examined the record and fail to find therein any evidence tending to establish the fact that Jones had authority to assent to a change in the terms of the contract, the effect of which was to release plaintiff from his obligation to do the work for the stipulated sum agreed upon between him and defendant. The evidence discloses no acts on the part of defendant which would justify plaintiff in assuming that Jones possessed such power. Both defendant and Jones testified that the latter was not so authorized. The fact that Jones was an architect employed by defendant to draw the plans and specifications under which the work was done, and engaged to superintend the work and see that it was performed in compliance with such plans and specifications, conferred upon him no implied power to change the contract. Such power was wholly beyond the scope of his agency. It would be a dangerous proposition to hold that the employment of one as an architect and superintendent of construction of a building conferred upon him by implication the authority to change, modify, or alter the contracts entered into between the owner and the contractor. Gerrish v. Maher, 70 Ill. 470; 31 Cyc. 1644; Lawrence v. Johnson, 64 Ill. 351. Neither does the record disclose any acts upon the part of defendant which would estop him from disputing any assumed authority by Jones to make the contract on behalf of defendant. It is true that defendant knew plaintiff was engaged in the prosecution of the work upon the store front, but he was justified in presuming this work was being done under the contract therefor which he had made with plaintiff. Haubert v. Mausshardt, 89 Cal. 436, 26 Pac. 899.

The finding is not supported by the evidence, and without such finding the judgment cannot stand. It is therefore reversed.

We concur: ALLEN, P. J.; JAMES, J.

17 Cal. App. 381

BROWN v. COFFEE. (L. A. 3,122.)

(Supreme Court of California. Jan. 5, 1912.)

1. Appeal and Error (§ 348*)—Time for Taking—Notice of Judgment.

Under Code Civ. Proc. § 941b, authorizing notice of appeal within 60 days after notice of entry of the judgment appealed from, or within six months after entry of the judgment, if notice of the judgment be not given, before respondent can object to a review of the evidence on an appeal, taken within six months on the ground that the appeal was not taken within the 60-day limit, he must show giving of notice of entry of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1900-1904; Dec. Dig. § 348.*]

2. Appeal and Error (§ 1082*)—Review—Questions Not Raised on Intermediate Appeal.

Where a respondent, who objected in the District Court of Appeal to review of the evidence on the ground that the appeal was not taken within 60 days after notice of entry of the judgment appealed from as required by Code Civ. Proc. § 941b, failed to show giving of such notice, he is not entitled to establish that fact on rehearing in the Supreme Court.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1082.*]

In Bank. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by C. D. Brown against Harry Coffee. From a judgment of the District Court of Appeal (121 Pac. 309) reversing a judgment in favor of plaintiff, he moves for rehearing in Supreme Court. Rehearing denied.

George E. Whitaker, for appellant. W. W. Kaye, for respondent.

PER CURIAM. [1, 2] The appeal in this case was properly taken to the District Court of Appeal, where the judgment in favor of plaintiff was reversed upon the sole ground that a material finding of fact was unsupported by the evidence. Defendant objected in that court to any review or consideration of the evidence on the ground that the appeal was only from the judgment and that it had not been taken within 60 days after notice of the entry thereof. Code Civ. Proc. §§ 941a, 941b, 941c. But he furnished no evidence that he had ever given such notice, and his objection was for that reason disregarded. We think it was correctly held by the appellate court that the respondent should have furnished proof of the service of a notice which would have prevented a review of the evidence on the appeal. And if he desired relief after judgment from the consequences of his omission to supply the evidence which he offers now in support of his application for a rehearing in this court, he should have sought that relief in the court having original jurisdiction of the appeal, and of all questions essential to its decision. This he failed to do, and by his petition to this court asks, in effect, for a first hearing of a question which should have been first determined in the District Court of Appeal. We are unwilling to encourage a practice so irregular and so inconvenient.

Rehearing denied.

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162 Cal. 74

BRESETTE v. E. B. & A. L. STONE CO.

(S. F. 5,771.)

(Supreme Court of California. Jan. 26, 1912. Rehearing Denied Feb. 24, 1912.)

1. Master and Servant (§ 217*)—Injury to Servant—"Assumption of Risk."

A complaint for injuries to an employé while oiling a rock crusher, which alleges that the employé's coat sleeve was caught in uncovered gearing over which it was necessary for him to reach in working as oiler, that the employer negligently failed to warn the employé, who was inexperienced, as to the danger, and negligently set the employé to work in a place of danger, but which does not intimate that the exposed gearing was not obvious, shows, as a matter of law, that the employé assumed the risk, within the rule recognized by Civ. Code, § 1970, that an employé, understanding the dangers incident to the defective condition of machinery, assumes the risk, where he continues in the use thereof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574–600; Dec. Dig. § 217.*

For other definitions, see Words and Phrases, vol. 1, pp. 589–591; vol. 8, pp. 7584, 7585.]

2. Master and Servant (§ 260*)—Injury to Servant—Assumption of Risk—Pleadings.

Where specific allegations show that the employé must have known of defects in machinery, causing injury, and the danger therefrom, the complaint is demurrable, though it contains a general allegation of the absence of knowledge.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 260.*]

3. Master and Servant (§§ 101, 102*)—Obligation of Master—Safe Place of Employment.

The requirement that the place of employment shall be reasonably safe must be considered in connection with the rule as to the assumption by an employé of known and understood risks.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 173; Dec. Dig. §§ 101, 102.*]

4. Master and Servant (§ 154*)—Injury to Servant—Negligent Failure to Instruct.

Where an employé knew and understood the danger of oiling machinery, arising from the fact that he was required to work near unguarded gearing, the failure of the employer to instruct him as to such danger was not actionable negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 308; Dec. Dig. § 154.*]

5. Master and Servant (§ 217*)—Injury to Servant—Negligence—Assumption of Risk.

Though an employer was guilty of negligence in failing to provide guards for the protection of his employés, he was not liable for injuries to an employé in consequence thereof, where the employé knew and understood the danger, thereby assuming the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574–600; Dec. Dig. § 217.*]

6. Master and Servant (§ 219*)—Injury to Servant—Assumption of Risk.

Where a danger was so open and obvious that, considering the age, intelligence, experience, judgment, and discretion of an employé, he ought, in the exercise of reasonable care, to have known and appreciated it, he assumed the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610–624; Dec. Dig. § 219.*]

7. Master and Servant (§ 256*)—Injury to Servant—Complaint—Requisites.

A complaint, in an action for injuries to an employé, which affirmatively shows contributory negligence or assumption of risk is demurrable.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 256.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; G. A. Sturtevant, Judge.

Action by Leonard J. Bresette against the

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

E. B. & A. L. Stone Company. From a judgment for defendant, rendered on sustaining a demurrer to the amended complaint, plaintiff appeals. Affirmed.

Costello & Costello, for appellant. Heller, Powers & Ehrman (Sydney Schlesinger, of counsel), for respondent.

ANGELLOTTI, J. This is an action for damages for personal injuries alleged to have been suffered by reason of the negligence of defendant. A demurrer was sustained to plaintiff's second amended complaint, and judgment went for defendant. This is an appeal by plaintiff from such judgment.

[1] The complaint contained two counts. Facts shown by each are as follows: Defendant was the owner of a rock crusher, which it was operating. On November 15, 1908, plaintiff, who had up to that time followed the occupation of a barber, and had never at any time had any experience in the care and operation of machinery, was employed by defendant as oiler in and about said rock crusher. He continued in the service of defendant as such oiler from November 15, 1908, to January 10, 1909, being at all times under the supervision and direction of one Patrick Martin, the manager and general superintendent of defendant. On said January 10th while performing his duties as such oiler, he was severely injured, "while in the act of reaching over the gear wheel, in motion, with his left hand, in order to locate the oil hole preparatory to oiling the said machinery, by having his jumper sleeve on his left arm caught in certain gearing," with the result that his left arm was drawn into said gearing, up to the left shoulder, and injured to such an extent as to require amputation. The gearing was without a cover and wholly unprotected by guards or otherwise.

The first count alleged negligence on defendant's part in failing to instruct plaintiff of the dangers attending his employment. It alleged the following facts: Defendant had full knowledge of his inexperience in the matter of machinery. Nevertheless it never properly instructed him, and never warned him "as to the dangers or hazards connected with the said machinery." When he was instructed as to his duties in the matter of oiling, the said machinery was in motion, and he was following these instructions when injured. Defendant carelessly and negligently failed to instruct him as to the proper manner of oiling the machinery, and never "cautioned plaintiff as to the dangerous character of said machinery." His injuries "were caused by reason of defendant's failure to warn said plaintiff of the dangers attending the employment," and by reason of plaintiff's lack of knowledge of said dangers.

The second count alleged negligence producing the injuries in the failure of defendant to furnish a suitable and safe place for plaintiff's work. The material allegations were as follows: "That on the 10th day of January, 1909, the said plaintiff, as the hired servant and workman of said defendant corporation in and about the said rock crusher, was negligently, imprudently, and carelessly set to work in and about the said rock crusher in an unsuitable and unsafe place, and very near and by certain dangerous, unfenced, and unguarded machinery; that said defendant well knew that the said place at which said plaintiff was set to work was dangerous and unsafe; that said plaintiff was standing in the only practicable place in which he could stand to oil said machinery, and in close proximity to said dangerous, unprotected, and unguarded gearing, whereby the said plaintiff was exposed to great and unnecessary risks not required by his employment; that the said defendant, disregarding its duty to provide a safe place for said plaintiff to work in, and disregarding its duty to use reasonable and ordinary care for the safety of said plaintiff, nevertheless ordered said plaintiff to work in and about said unsafe place, and plaintiff was injured by reason of the unsafeness and dangerous condition of said place in which he was set to work; that plaintiff had no knowledge of the unsafe condition of the said place in which he was required to work in and about said rock crusher, and was never at any time warned or informed as to the unsafe condition of said place."

[2] The allegations of the amended complaint, hereinbefore substantially set forth, show that the sole reason for the unfortunate injury to plaintiff was that he allowed the sleeve of his coat to catch in certain exposed and uncovered gearing over which it was necessary for him to reach in the performance of his work as an oiler. The complaint in one count is substantially that the defendant was negligent in not warning him, he being a man inexperienced in the use of machinery, as to the danger and the necessity for care in the performance of this duty; and in the second count that the defendant was negligent in setting him to work in a place dangerous by reason of the fact that the gearing about which he was compelled to perform his work was unprotected and unguarded. There is absolutely nothing in the complaint to intimate that the exposed condition if this gearing was not obvious. Fairly construed, the allegations of the amended complaint affirmatively show that the only condition of the machinery having to do with plaintiff's injury was patent to any casual observer, and that any one, no matter how inexperienced he was in the use or knowledge of machinery, would necessarily know of the risk entailed in working over the gearing, and that if he allowed his hands or arms to come in contact with the gearing he would be severely injured. Whatever danger was attendant upon the performance of his duties by plaintiff in that place was clear-

ly apparent to any one. That danger was the possibility of allowing his hands or arms to come in contact with the uncovered and unguarded gearing. That one's hands or arms will be hurt, if allowed to become involved in the cogs of moving machinery, is so apparent a fact that certainly any adult must know it. In spite of such a general allegation of the absence of knowledge on the part of the employé as we have in this case, a complaint is demurrable, if the specific allegations thereof show that he must have known of the defects and the danger therefrom. See 1 Labatt on Master and Servant, § 388; Cleveland, etc., Co. v. Powers, 173 Ind. 105, 88 N. E. 1073, 89 N. E. 485.

[3] Under these circumstances, even if we assume that there was any negligence on the part of defendant in respect to the matters alleged in either count, a complete answer to plaintiff's action is to be found in the law relative to assumption of risk, as it existed in this state at the time he received his injuries. With full knowledge of the alleged defect in the matter of the machinery, and with full understanding and appreciation of the dangers therefrom attendant upon the performance of his duties as oiler, he voluntarily entered upon the employment and continued therein to the time of his accident, a period of nearly two months, without making any complaint as to the conditions. As to such a situation, under the law as it was at the time of the accident, there is practically no disagreement among the authorities. The employé assumes the risk, and cannot recover for injuries resulting therefrom. This rule is recognized by section 1970 of the Civil Code, where it is provided that mere knowledge by an employé of the defective or unsafe character or condition of any machinery, etc., shall not be a bar to recovery, unless it shall also appear that the employé fully understood, comprehended, and appreciated the dangers incident to its use, and thereafter consented to use the same, or continued in the use thereof. It was not until the act of April 8, 1911 (Stats. 1911, p. 796), was enacted that any attempt was made to abolish the defense of assumption of risk. The rule and its limitations have been fully discussed in various decisions of this court. See Long v. Coronado R. R. Co., 96 Cal. 269, 31 Pac. 170; Limberg v. Glenwood Lumber Co., 127 Cal. 598, 60 Pac. 176, 49 L. R. A. 33; Murdock v. Oakland, etc., Co., 128 Cal. 22, 60 Pac. 469; Anderson v. Seropian, 147 Cal. 201, 208, 81 Pac. 521; Sanborn v. Madera Flume, etc., Co., 70 Cal. 261, 266, 11 Pac. 710; Vestner v. Northern Cal., etc., Co., 158 Cal. 284, 289, 110 Pac. 918; Bush v. Wood, 8 Cal. App. 647, 655, 97 Pac. 709. See, also, 1 Labatt on Master and Servant, §§ 388, 393. As was said in Brett v. Frank & Co., 153 Cal. 272, 94 Pac. 1052: "The requirement that the place of employment shall be reasonably safe is itself always to be considered in connection with the rule of law as to the assumption by the employé of known and understood risks." There is nothing in the facts of this case, as disclosed by the complaint, to take it out of the operation of the rule precluding recovery. The facts shown by a fair construction of the allegations of the complaint present a case where the only inference that can reasonably be drawn is that plaintiff knew that the gearing over which he was to reach in doing his work was uncovered and unguarded, and understood and appreciated the risk and danger attendant upon the performance of his work under such conditions, and that he nevertheless voluntarily assumed his employment without any complaint as to the conditions, and continued therein to the time of the injury, a period of nearly two months, without any complaint or criticism of such conditions.

[4] In view of what has been shown as to the obviousness of the danger, it is also clear that the defendant was not guilty of negligence productive of injury in failing to instruct plaintiff as to such danger. There was nothing to tell him in this regard that he did not already know, or must be presumed to have known. In this connection, the language of the Supreme Court of Massachusetts, in Wilson v. Mass. Cotton Mills, 169 Mass. 67, 47 N. E. 506, is pertinent. The court said: "The plaintiff's contention is that he was set to work on a dangerous machine without proper instructions. But it is difficult to see what the defendant's officers could have told him that he did not already know. It was apparent that the wheels were uncovered. They were certainly not bound to tell him that if he got his hand in the cogs he would be hurt. This any child of 10 would know."

[5] While, as to the matters alleged in the second count, it may be assumed that, even although there was no statute in this state requiring guards on such machinery as was here in use, a conclusion that defendant was guilty of negligence in failing to provide guards for the protection of its employés could be sustained, the answer to any claim of liability on account thereof is to be found in what we have said regarding the rule of assumption of risk.

[6] We have examined the cases cited by learned counsel for plaintiff, and find nothing therein in conflict with the views we have stated. For instance, in Larson v. Bloemer, 156 Cal. 752, 106 Pac. 62, a case specially relied upon, this court substantially said that the testimony was conflicting upon the question of the ignorance of plaintiff as to the dangers of her employment, and, in reply to the claim that the peril was so obvious that she must be presumed to have been fully cognizant of it, said that from the photograph of the mangle, and the explanation of its mechanism contained in the record, it appeared that plaintiff could not see the

heated cylinder which produced so much of the damage suffered by her. Substantially, the case was held to be one where the evidence was of such nature as to support a conclusion that plaintiff did not appreciate the danger of her employment under the existing conditions. Similarly, in other cases earnestly relied upon by appellant, including that of Ingerman v. Moore, 90 Cal. 410, 27 Pac. 306, 25 Am. St. Rep. 138, there were circumstances sufficient to make the question of the plaintiff's want of knowledge and full appreciation of the danger and risk, under the existing conditions, one upon which reasonable persons might differ. In Jacobson v. Oakland Meat Co., 119 Pac. 653, likewise, there were special circumstances clearly avoiding the conclusion, as matter of law, that plaintiff had been guilty of contributory negligence. The cases cited by appellant from other jurisdictions are all distinguishable from the case at bar, with the possible exception of Thompson v. Edward P. Allis Co., 89 Wis. 523, 62 N. W. 527. The views expressed in the later case of Renne v. United States, etc., Co., 107 Wis. 305, 83 N. W. 473, on the question of the assumption of risk of an obvious peril, are not at all in conflict with our conclusion. The law, as we understand it, was correctly stated to the jury in that case in an instruction declaring that, if the danger "was such an open and obvious danger as that, considering his age, intelligence, experience, judgment, and discretion, he ought, in the exercise of reasonable and ordinary care, to have known and appreciated it, then the law is that the plaintiff assumed the risk of such danger, and that he cannot recover."

[7] We see no escape from the conclusion that the second amended complaint presented such a case as a matter of law, and that it therefore failed to state a cause of action. We are not to be understood as holding that it is essential for a plaintiff to anticipate in his complaint, either the defense of contributory negligence, or assumption of risk, by alleging facts negativing either, but are simply applying the well-established rule that, where the allegations of the complaint do affirmatively show contributory negligence or assumption by the plaintiff of the peril producing injury, the pleading fails to state a cause of action for damages.

The judgment is affirmed.

We concur: SLOSS, J.; SHAW, J.

(162 Cal. 54)

GILBERT v. PECK. (L. A. 2,738.)

(Supreme Court of California. Jan. 25, 1912.)

1. Appeal and Error (§ 699*)—Record—Instructions—Review.

Error assigned to the refusal of instructions cannot be considered, where there is no reference to the instructions in the substantive or narrative part of the bill of exceptions, and where in the specification of errors it merely appears that the court erred in refusing to give instructions set forth, since such a record does not afford evidence that the instructions were requested or refused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2928-2930; Dec. Dig. § 699.*]

2. Landlord and Tenant (§ 278*)—Summary Removal of Tenant—Grounds.

Where a tenant ceased using the premises for a house of ill fame, the landlord could not thereafter summarily remove the tenant's property on the ground of the maintenance of a nuisance.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 278.*]

3. Landlord and Tenant (§ 278*)—Summary Removal of Tenant—Grounds.

A tenant, entering into possession of the premises in April, began at once to use them for a house of ill fame. In August she made preparations to move to another place, where she intended to open a similar establishment. On August 3d she went to that place to secure a location, returning three days later. During her absence she left two persons in charge of the premises. Three days later she again departed, leaving the premises unoccupied and locking the door. They were so unoccupied until August 13th, when the landlord's agents entered and removed the tenant's property. *Held*, that the removal was at the risk of the landlord, and he was liable for the destruction of the goods by fire at the place where they were stored.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1179; Dec. Dig. § 278.*]

4. Appeal and Error (§ 1066*)—Harmless Error—Erroneous Instructions.

Where, in an action against a landlord for summarily removing the tenant's property, the evidence showed that the tenant's unlawful use of the premises had ceased at the time of the removal, the error, if any, in an instruction that the tenant's use of the premises for immoral purposes terminated her possession under the lease and rendered her a tenant at will and did not justify the landlord in going on the premises during the tenant's temporary absence and removing her property therefrom, was not prejudicial to the landlord.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

5. Landlord and Tenant (§ 278*)—Termination of Tenant's Right of Possession.

A past unlawful use of premises by a tenant does not, in the absence of notice, demand, or other action on the part of the landlord, evidencing an intent to claim a forfeiture, terminate the tenant's right to possession so as to justify a forcible entry and invasion of her property rights during the term of the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 278.*]

6. Landlord and Tenant (§ 278*)—Summary Removal by the Landlord of the Tenant's Property — Damages—Actions.

Where the complaint, in an action by a tenant against the landlord for his summary removal of the tenant's property on the leased premises, stated a cause of action for the conversion by the landlord of the tenant's property, the tenant could recover therefor, though the complaint contained allegations of facts warranting a summary proceeding under Code Civ. Proc. § 1159 et seq.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 278.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

7. Action (§ 35*)—Exclusive Remedies—Forcible Entry—Statutory Remedy.

Code Civ. Proc. § 1159 et seq., defining forcible entry and detainer and authorizing summary proceedings, does not make a forcible entry proceeding the exclusive remedy, where facts show a cause of action independent of the Code.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 35.*]

8. Landlord and Tenant (§ 278*)—Summary Removal by Landlord of Tenant's Property—Damages—Punitive Damages.

A landlord unlawfully removed from the leased premises personal property of the tenant consisting of furniture, jewelry, and a certificate of deposit. The furniture was stored in a warehouse, where it was later destroyed by fire. The jewelry and the certificate of deposit were subsequently restored to the tenant, who made repeated demands for restitution. The landlord made no claim of any right to retain the jewelry and certificate of deposit, but did not surrender them until about three months after the removal, and not until the tenant had sought the aid of the district attorney, who communicated with the landlord. *Held* to authorize punitive damages against the landlord.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 278.*]

Department 1. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Grace Gilbert against George H. Peck. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

Miner P. Goodrich and Frank Karr, for appellant. W. A. Anderson, for respondent.

SLOSS, J. The action was brought against four defendants to recover damages for the unlawful taking and withholding of personal property belonging to the plaintiff. At the trial there was a dismissal as to all the defendants except George H. Peck. The plaintiff had a verdict against him in the sum of $2,200. From the judgment entered on this verdict and from an order denying his motion for a new trial Peck appeals.

It appears in the record, without dispute, that in April, 1909, Peck, who was the owner of a three-story building in San Pedro, rented the third floor and a part of the second floor of the building to plaintiff at a monthly rental of $75. The tenancy was from month to month, running from the first to the last day of each calendar month. Plaintiff went into possession, and remained in possession until August, 1909. The rent for May and June was paid by her. She had, in the premises, a piano and certain furniture, as well as some jewelry and a certificate of deposit for $5,000. On the 13th of August, while the plaintiff was absent from San Pedro, and the premises were unoccupied, the defendant Peck, through his agents, entered the premises and removed therefrom the personal property above described. The furniture and piano were stored in a warehouse, where, some days later, they were destroyed by fire. The jewelry and the certificate of deposit were ultimately restored to the plaintiff. By her amended complaint the plaintiff alleged that the defendant, notwithstanding a demand for the return of the property, refused to return the same. She also charged oppression and malice, as a foundation for a claim for punitive damages. The jury returned, in addition to its general verdict, a special finding that the value of the furniture and the piano destroyed by fire was $1,200, leaving the balance of $1,000 to be accounted for as punitive damages.

[1] The defense was based on the ground that the plaintiff was using the premises as a house of prostitution. That she had so used them for a time was admitted. It was and is claimed by the appellant that such use of his property constituted a nuisance which he had a right to abate by taking possession of the rented premises and removing the plaintiff's property therefrom. Among the errors assigned is the refusal of the trial court to give to the jury various instructions embodying this theory. But such alleged refusal cannot be considered here. There is no reference to the instructions in question in the substantive or narrative part of the bill. All that appears is a series of declarations, in the specification of errors, to the effect that "the court erred in refusing to give the jury instruction 2 [and other numbers] offered on behalf of defendant, as follows" (quoting the alleged instruction). Such a record does not afford evidence that the instructions in question were requested or refused. Goldman v. Bashore, 80 Cal. 146, 22 Pac. 82; Ferrier v. Ferrier, 64 Cal. 23, 27 Pac. 960; Estate of Higgins, 156 Cal. 257, 104 Pac. 6.

[2] But this somewhat technical consideration is of no great importance here, since the propositions of law underlying the instructions claimed to have been refused are presented for decision on the defendant's exceptions to instructions shown to have been given by the court. Instruction 4 was as follows: "It appearing without dispute here that, at the time of the removal of plaintiff's property therefrom, the premises were not used for the purposes which she admits she had theretofore used them, there was not, then, at the time of such removal, in existence a nuisance which could justify the defendant or his agent in summarily removing plaintiff's property from the premises." If the facts were as stated by the court, we think there can be no criticism of the rule of law declared. The mere occupancy of the premises by the plaintiff and the presence therein of her household effects did not constitute a nuisance. The nuisance, if there was one, was created by the use of the premises for immoral purposes. When that use ceased, there was no longer any ground

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

for claiming that a nuisance was being maintained. Whether or not the past misconduct of the plaintiff would have authorized the defendant to terminate the tenancy by proper legal procedure is a question not presented here. No such attempt was made. A notice to quit was served on plaintiff on July 7th, long before the defendant, as he claims, had any knowledge of the use to which the premises were being put. It was not put upon the ground of such use. As a notice of intention to terminate the lease, under either section 789 or section 1946 of the Civil Code, it was served too late to bring the plaintiff's tenancy to an end prior to the time of the entry complained of.

[3] The record shows that the court was fully justified in stating as an undisputed fact that at the time of the removal of plaintiff's goods she was no longer using the premises for purposes of prostitution. It appeared that she had gone into possession in April, 1909. That she at once commenced to maintain a house of ill fame was admitted. In August, 1909, she began to make preparations to move to Coalinga, where she intended to open a similar establishment. On August 3, 1909, she went to Coalinga to secure a location, returning on the 6th. During this absence she left a maid and one other person in charge of the premises. On the 9th she again departed for Coalinga, and on this occasion left the premises unoccupied, locking the door. They were so unoccupied until the 13th, when the defendant's agents entered and removed the plaintiff's property. These facts being uncontradicted, it appeared that, at the time of the taking of her property, the plaintiff had discontinued her unlawful use of the premises, and it necessarily followed, as declared by the court, that the defendant was not justified in removing her effects. Such removal was at his risk, and the destruction of the goods by fire threw the loss upon him.

[4] Complaint is made of instruction 2, in which the court told the jury, among other things, that plaintiff's use of the premises for immoral purposes terminated her possession under the lease, and rendered her a tenant at will. It may be questioned whether this was an entirely accurate definition of her status. But in view of the established fact that the unlawful use of the premises had ceased, the instruction cannot have been prejudicial to the appellant.

[5] The past unlawful use of the premises did not, in the absence of notice, demand, or other action on the part of the lessor evidencing an intent to claim a forfeiture, terminate the tenant's right of possession so as to justify a forcible entry and invasion of her property rights during the term of the hiring. Almy v. Greene, 13 R. I. 350; 18 Am. & Eng. Ency. of Law (2d Ed.) 379, 380. If she was rightfully in possession, it is not material whether she was correctly described as a tenant at will. Instruction 2 further declared that plaintiff's use of the premises for immoral purposes would not justify the defendant in going upon the premises during plaintiff's temporary absence and removing her effects therefrom. If this declaration referred to an unlawful use which had ceased at the time of the entry, we think, for the reasons above stated, that the court was right. If, on the other hand, the court was undertaking to declare the rights of the parties during the actual period of an immoral use of the premises, the instruction if erroneous, cannot have had any effect here, since the fact was, as the court in instruction 4 declared, that such use no longer existed at the time of the entry.

[6] The defendant objected to the introduction of any evidence on the ground that plaintiff's exclusive remedy was by an action under the forcible entry and detainer provisions of the Code of Civil Procedure. Section 1159 et seq. The objection was properly overruled. The complaint stated a good cause of action for the conversion of personal property. If there were also allegations of facts which would have warranted a summary proceeding under the code sections referred to, this would not bar the plaintiff of her right to maintain an ordinary action for damages.

[7] The Code itself does not undertake to make the forcible entry proceeding the exclusive remedy where facts showing a cause of action independent of the Code provisions are alleged, and we are cited to no authority supporting appellant's claim in this regard. Walker v. Chanslor, 153 Cal. 118, 94 Pac. 606, 17 L. R. A. (N. S.) 455, 126 Am. St. Rep. 61, relied on by appellant, merely holds that where the owner of real property, having the right of possession, makes a forcible entry expelling the person in wrongful possession without using more force than is necessary, the wrongful occupant cannot maintain an action of trespass, but is limited to his remedy under the statute for making forcible entry. See, also, Canavan v. Gray, 64 Cal. 5, 27 Pac. 788; Burnham v. Stone, 101 Cal. 165, 35 Pac. 627. This is based upon the ground that at common law the person so ousted had no right of action at all, and the statute gives him no new rights beyond those embraced in its terms. The doctrine has no application to an action brought by one in rightful possession. The complaint here alleged that plaintiff was entitled to the possession of the premises, and the objection to the reception of evidence in support of her claim for damages occasioned by an invasion of her right of property was without merit.

The testimony regarding the value of the property destroyed was conflicting. Without reciting it, we may say that there was substantial evidence to sustain the finding of the jury that the goods were worth $1,200.

[8] The award of punitive damages was also justified by the evidence. The plaintiff, notwithstanding repeated demands, was unable to obtain prompt restitution of her property. She was put off from time to time with excuses which the jury may well have viewed as mere pretexts. The defendant made no claim of any right to retain the jewelry and the certificate of deposit, but did not surrender these articles until October. In that month plaintiff sought the aid of the district attorney, who communicated with the defendant. The latter then deposited the certificate and the jewels in a bank, where he caused them to be attached on an alleged demand against the plaintiff. These circumstances, together with other matters which appear in the record, were ample to authorize the jury to infer that the defendant, in taking and retaining the property, was actuated by a spirit of malice and was seeking, not merely to enforce his rights, but to oppress the plaintiff. There is no merit in the point that, because no actual damages were recovered for the taking of the jewelry and the certificate, there could be no exemplary damages. The argument assumes that the exemplary damages were based on the taking of these items alone. But the taking of all the property was, as the jury may well have concluded, a single transaction, and the fact that part of it was returned does not prevent a recovery for exemplary damages in addition to the value of the part lost to plaintiff. Besides, the conduct of defendant with reference to the jewelry and the certificate might properly have been regarded by the jury as indicating the motive and spirit which actuated his taking of the other property. We see no error in the instructions on the subject of exemplary damages, and there is no ground for holding that the award was excessive.

The alleged errors in overruling objections to offered evidence were unimportant. They could not have worked any substantial injury to the appellant.

The judgment and the order denying a new trial are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

(162 Cal. 81)

Ex parte COOPER. (Cr. 1,718.)

(Supreme Court of California. Jan. 26, 1912.)

1. ADULTERY (§ 1*)—CONSTRUCTION OF PENAL STATUTES.

The definition of adultery constituting cause for divorce, defined by Civ. Code, § 93, as the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife, has been adopted in the construction of penal statutes including the word "adultery."

[Ed. Note.—For other cases, see Adultery, Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 1, pp. 212–214].

2. ADULTERY (§ 1*)—ELEMENTS OF OFFENSE—UNMARRIED WOMAN.

In the absence of statute sexual intercourse on the part of an unmarried woman does not constitute "adultery" on her part, but amounts simply to fornication; and hence an unmarried woman cannot be guilty of an offense under Pen. Code, § 269a, as amended March 21, 1911 (St. 1911, p. 426), providing that every person who lives in adultery is guilty of a misdemeanor; Civ. Code, § 93, defining adultery as the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife.

[Ed. Note.—For other cases, see Adultery, Cent. Dig. §§ 1–6; Dec. Dig. § 1.*]

3. ADULTERY (§ 3*)—AIDER AND ABETTOR—ACCOMPLICE—"PRINCIPAL."

Where the idea of guilt, on the part of an unmarried participant, of the offense of living in adultery is excluded by the terms of the statute defining the offense (Pen. Code, § 269a, as amended March 21, 1911 [St. 1911, p. 426]), it follows that such participant cannot be held punishable as being an aider and abettor in the offense, even though she be held to be an accomplice under Pen. Code, § 31, defining "principals" as all persons concerned in the commission of a crime, or who aid or abet its commission.

[Ed. Note.—For other cases, see Adultery, Dec. Dig. § 3.*

For other definitions, see Words and Phrases, vol. 6, pp. 5552–5557; vol. 8, p. 7763.]

In Bank. Application by Grace Cooper for writ of habeas corpus, directed against the Chief of Police of the City of Los Angeles. Petitioner ordered discharged from custody.

Charles Scholz and William Freeman (S. S. McCahill, of counsel), for petitioner. Guy Eddie, City Prosecutor, and Frank W. Stafford, Deputy, for respondent.

PER CURIAM. The petitioner is held in custody on a charge of violating the provisions of section 269a of the Penal Code, as amended March 21, 1911, which provides that "every person who lives in a state of cohabitation and adultery is guilty of a misdemeanor and punishable by a fine not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding one year, or by both." The prosecution was instituted against her and one Claud C. Miller jointly, and the deposition upon which the warrant of arrest was issued and upon which the commitment for examination was based stated as follows: "That on the 27th day of December, 1911, at and in Los Angeles city, in the county of Los Angeles, state of California, the crime of cohabitation and adultery was committed by Claud C. Miller and Grace Cooper, who at the time and place last aforesaid did willfully and unlawfully live and cohabit one with the other in a state of cohabitation and adultery; the said defendant Claud C. Miller being then and there a married man, and the said Grace Cooper being then and there an unmarried woman; and the said Claud C. Miller and the said Grace Cooper not being married one to the other; and the said Grace Cooper at all times herein mentioned did know that he, the said Claud C. Miller, was a married man, and was married to a woman other than herself." The question upon which a decision is sought is whether upon these facts petitioner, being an unmarried woman, is guilty of the offense defined by the section above quoted.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Section 269b, Penal Code, as amended March 21, 1911, by the same act that amended said section 269a, provides: "If two persons, each being married to another, live together in a state of cohabitation and adultery, each is guilty of a felony and punishable by imprisonment in the state prison not exceeding five years." The origin of these two sections is an act entitled "An act to punish adultery," approved March 15, 1872 (Stats. 1871–72, p. 380), section 1 of which was the same as section 269a, except that the words "open and notorious" were contained therein, immediately preceding the words "cohabitation and adultery," and section 2 of said act was the same as the portion of section 269, above quoted, with the same exception. By act approved March 21, 1905 (Stats. 1905, p. 656), these two sections were incorporated in the Penal Code as sections 269a and 269b, and by an act approved March 21, 1911 (Stats. 1911, p. 426), the two sections were amended by striking out the words "open and notorious." We have thus referred to the history of the legislation on this subject for the purpose of showing that the only purpose of the amendment of 1911 was to dispense with the element of the notoriety of the adulterous relation, which, under the law as it formerly existed, was as essential as the adulterous relation itself (People v. Salmon, 148 Cal. 303, 83 Pac. 42, 2 L. R. A. [N. S.] 1186, 113 Am. St. Rep. 268); and that, so far as the question before us is concerned, viz., whether an unmarried person can live in a state of "cohabitation and adultery," within the meaning of section 269a, we are in the same position that we would be, were we construing and ascertaining the intention of the Legislature in adopting the original act of 1871–72.

[1] It is to be observed that neither of the sections attempts any definition of the term "adultery," and we are without any definition thereof in the statutory law of this state, other than such as is found in section 93 of the Civil Code, where the adultery constituting cause for divorce is defined as follows: "Adultery is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife." This definition has been adopted in this state in the construction of penal statutes including the term "adultery." In People v. Stratton, 141 Cal. 604, 606, 75 Pac. 166, it was said: "Adultery is the sexual intercourse of a married person with a person other than the offender's husband or wife. Fornication is distinguished from adultery by the fact that the guilty person is not married." Again, in People v. Salmon, 148 Cal. 303, 305, 83 Pac. 42, 43 (2 L. R. A. [N. S.] 1186, 113 Am. St. Rep. 268), it was said: "Adultery is, as is well understood, sexual intercourse of one spouse with any one other than the other spouse." And it was expressly held by the District Court of Appeal of the Second district that, in view of this definition, an unmarried man could not live in a state of cohabitation and adultery, within the meaning of section 269a of the Penal Code. In re Sullivan on Habeas Corpus, 119 Pac. 526. It is to be borne in mind that section 93, Civil Code, which was a part of the original Code adopted in 1872, was enacted at the same session of the Legislature as that at which the original act to punish adultery, approved March 15, 1872, was enacted; and it is only reasonable to assume that the word "adultery" was used with the same meaning in both laws. As we have seen, section 93, Civil Code, has already been held to furnish the definition of adultery in the construction of penal statutes.

[2] We are satisfied that the overwhelming weight of modern authority is to the effect that, in the absence of statutory provision to the contrary, participation in an act of sexual intercourse on the part of an unmarried woman does not constitute "adultery" on her part, but amounts simply to fornication. See Bishop on Statutory Crimes, § 654; 2 McClain on Crim. Law, § 1086; Bashford v. Wells, 18 L. R. A. (N. S.) 580, note; 1 Bouvier, Law Dic. 105; Buchanan v. State, 55 Ala. 154. This is not the rule favored in Wharton's Criminal Law, although the learned writer gives it as a definition obtaining in many jurisdictions; but it is expressly stated in a note to section 1720 of his work that, where the offense is restricted as it is by our Civil Code (section 93), an unmarried person cannot be guilty thereof by reason of mere participation in the act, either as principal or accessory. In many of the states, the Legislature has by express provision inserted in the statute making adultery a crime a declaration that an unmarried participant in illicit intercourse shall also be deemed guilty of the offense, thus recognizing the necessity of making some such provision, in order to bring such a participant within the meaning of the statute. Most of the decisions holding an unmarried participant guilty of the offense are based on such statutes. In view of our definition, such an unmarried participant, whatever the extent of his or her moral delinquency, is not guilty of "adultery." We think it very clear that our original act to punish adultery cannot be reasonably construed otherwise than as designed solely against the person guilty of "adultery," and no different design can reasonably be attrib-

uted to the amendments, in view of the obvious fact that the only object thereof was, as already shown, the elimination of the element of notoriety. It is to be borne in mind, too, that the latest amendments to this law were adopted by the Legislature after the decisions of this court as to the meaning of the term "adultery" in criminal statutes had been rendered, and presumably with full knowledge of such decisions. So far as the question we are considering is concerned, there is no material difference between "adultery" and "living in a state of adultery." It is only the adulterer who can live "in a state of adultery." The plain purpose of the whole act was simply to make the adulterer guilty of a public offense in all cases of living in a state of illicit intercourse, but to make the offense only a misdemeanor where the other participant was unmarried, and a felony where such other participant was also married.

[3] It is earnestly contended in the able brief filed by learned counsel for the state that, even if petitioner was not herself guilty of adultery, she was nevertheless a principal in the crime defined by section 269a, by reason of the fact that by her participation in the illicit intercourse she willfully and knowingly aided and abetted her married codefendant in the commission of his offense. In view of the provisions of section 31 of the Penal Code, we think that this would be true, if the section defining the offense (section 269a) did not exclude the idea of any criminal offense on the part of the unmarried participant in the illicit intercourse on account of such participation alone. Of course, an unmarried person might be guilty as a principal of this offense, under section 31 of the Penal Code, by aiding and assisting in its commission in some other way than by living in a state of illicit intercourse with a married person; but we are considering here simply such aid and assistance as are involved in the mere fact of participation in the illicit intercourse. The question in this connection is, not whether the unmarried party willfully and knowingly participating in such illicit intercourse is an accomplice of the married party thereto, but whether, assuming that he or she is an "accomplice," within the meaning of that term as used in our statute, it was nevertheless the design of the Legislature not to make such participation criminal and punishable. We are of the opinion that a fair and reasonable construction of the provisions of sections 269a and 269b of the Penal Code requires this conclusion. It is recognized both by Bishop and Wharton that such unmarried participant cannot be held, merely by reason of such participation, to be guilty as an aider or abettor, if the statute is in such terms as to exclude the consequence that both parties are to be punished. Bishop on Statutory Crimes, § 659; 2 Wharton, Crim. Law, § 1721. As Mr. Wharton puts it: "Of course, when, as in Pennsylvania, the offense is limited by statute to married persons, this reasoning fails." Learned counsel for the state quotes the Pennsylvania statute involved, as follows: "If any married man shall have carnal connection with any woman not his lawful wife, or any married woman have carnal connection with any man not her lawful husband, he or she so offending shall be deemed guilty of adultery." So far as the question we are considering is concerned, this statute is not materially different from our own, which makes only the person "who lives in a state of * * * adultery" guilty of the public offense therein defined, thus impliedly excluding the idea of any guilt of such offense on the part of the unmarried participant, whose only part in the affair has been to live with the married party in the state forbidden to him by the law. Where the idea of guilt on the part of an unmarried participant of such an offense as this is thus excluded by the terms of the statute defining the offense, we think it must be held to follow that such participant cannot be held punishable as being an aider and abettor in the offense, even though he or she be held to be an accomplice under the provision of section 31 of the Penal Code. There is nothing in People v. Coffey, 119 Pac. 901, in conflict with this view.

We conclude, therefore, that upon the facts stated petitioner is not guilty of any public offense created by statute of this state.

It is ordered that petitioner be discharged from custody.

162 Cal. 51

In re DARGIE'S ESTATE. (S. F. 6,015.)

(Supreme Court of California. Jan. 24, 1912.)

DIVORCE (§ 170*)—INTERLOCUTORY JUDGMENT —EFFECT.

Under Civ. Code, § 131, providing for the entry of an interlocutory judgment in actions for divorce, and section 132, providing that when one year has elapsed the court on motion of either party, or upon its motion, may enter the final judgment, and that such final judgment shall restore the parties to the status of single persons and permit them to marry after the entry thereof, the marriage is not dissolved by the mere lapse of one year after the entry of the interlocutory judgment, but is only dissolved when the court has rendered and pronounced final judgment, since the statute does not declare the marriage dissolved at the expiration of one year, but merely declares in effect that it becomes dissolved when, after the expiration of that period, the court shall so declare.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 552, 553; Dec. Dig. § 170.*]

In Bank. Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

In the matter of the estate of William E. Dargie. From an order granting a family allowance to Erminia P. Dargie, the widow,

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Thomas M. Dargie, a legatee, appeals. Affirmed.

Peter F. Dunne and Edgar D. Peixotto, for appellant. A. A. Moore and Stanley Moore, for respondent.

PER CURIAM. An order was made for the payment of a family allowance to Erminia P. Dargie, as widow of the decedent. The appellant, a nephew and legatee of the decedent, objects to this allowance on the ground that Erminia P. Dargie was not the wife of the decedent at the time of his death and is not his widow. The decedent and Erminia intermarried in 1881. In March, 1906, in a suit for divorce by said Erminia against the decedent, in the superior court of Alameda county, an interlocutory decree was entered declaring that said Erminia P. Dargie was entitled to a divorce from said William E. Dargie, and that at the expiration of one year from the entry thereof she would be entitled to a final judgment dissolving said marriage, and that such final judgment should then be entered by the court of its own motion or on motion of either party. No final judgment was ever pronounced or entered in the case. The parties afterward became reconciled and lived together as husband and wife. William E. Dargie died on February 10, 1911.

The appellant contends that, when an interlocutory decree is made under the provisions of sections 131 and 132 of the Civil Code, in an action for divorce, declaring that the plaintiff is entitled to a divorce, the marriage is dissolved at the expiration of one year from the date of the entry of such decree, and that this dissolution takes place at that moment, by force of law, without the making or entry of any final judgment or any further order or action of the court regarding it.

[1] We cannot agree to this interpretation of the statute. It declares that, "when one year has elapsed after the entry of such interlocutory judgment, the court on motion of either party, or upon its own motion, may enter the final judgment granting the divorce, and such final judgment shall restore them to the status of single persons, and permit them to marry after the entry thereof." Clearly there is here contemplated and required further judicial action as a condition precedent to the making and entry of the final judgment. The language is that the "entry" of the final judgment is to be by "the court." This shows that the word "entry" is not used to describe the mere clerical act by the clerk of writing such judgment in the judgment book, but that it was employed to describe and include the action of the court in rendering or pronouncing the final judgment. Whether a formal entry in the judgment book is necessary or not we need not inquire. The statute at least requires that the court shall again act in the case by declaring the final judgment. Unless it so acts, there is no authority for the entry of any final judgment. The clerk cannot, in the absence of such action, enter it of his own motion.

It is the final judgment that grants the divorce. The interlocutory judgment does not have that effect. It merely declares the right: That the party is "entitled" to a divorce, a divorce to be afterwards adjudged. By the terms of the statute, it is the final judgment alone that grants the divorce, dissolves the marriage, restores the parties to the status of single persons, and permits each to marry again. The statute does not itself declare the marriage dissolved at the expiration of the year from the interlocutory judgment. It merely suspends for one year the power of the court to dissolve it, and, in effect, provides that it becomes dissolved only when, after the expiration of that period, the court has, by its final judgment, so declared. In the meantime the parties remain in the legal relation of husband and wife. This is in harmony with the decisions in Deyoe v. Superior Court, 140 Cal. 484, 74 Pac. 28, 98 Am. St. Rep. 73, Grannis v. Superior Court, 146 Cal. 250, 79 Pac. 891, 106 Am. St. Rep. 23, and Periera v. Periera, 156 Cal. 9, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107. There is nothing inconsistent with this in Claudius v. Melvin, 146 Cal. 257, 79 Pac. 897. The question here involved did not arise and was not discussed in that case. It follows from what we have said that, at the time of the death of the decedent, Erminia P. Dargie was his wife, and that she is now entitled to such rights as the law confers upon her, under the circumstances, as his widow, including the right to a family allowance.

The order is affirmed.

(162 Cal. 61)

FIRST NAT. BANK OF MONROVIA v. MARYLAND CASUALTY CO.

(L. A. 2,647.)

(Supreme Court of California. Jan. 25, 1912. Rehearing Denied Feb. 21, 1912.)

1. PLEADING (§ 433*)—CONSTRUCTION—OBJECTIONS BELOW—SUFFICIENCY OF COMPLAINT.

An insurance policy covered loss by burglary of money by abstraction from the "safe or safes," described in the schedule attached, by any person making entry into such "safe or safes" by the use of "tools or explosives directly thereupon," but not for loss from a burglar-proof safe containing an inner steel, burglar-proof chest, unless the same shall have been abstracted from the chest after entry into the chest by the use of tools or explosives directly thereupon. The safe described in the schedule was of the latter kind, containing an inner steel, burglar-proof chest. *Held*, that a complaint on the policy, alleging that certain persons feloniously abstracted money "from the safes owned by said plaintiff, and described in the said schedule in said policy,

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

* * * by making entry into such safes by the use of tools directly thereupon," was sufficient against an objection, first raised on appeal, that it did not allege facts showing that the entry into the burglar-proof steel chest was effected by the use of tools directly thereon.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 433.*]

2. Insurance (§ 665)*—Burglary Insurance—Actions—Sufficiency of Evidence.

Evidence, in an action by a bank on a burglary insurance policy, *held* not to sustain a finding that the inner steel chest of the safe was entered by the use of tools directly thereupon, within the terms of the policy, but by operation of the combination.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 665.*]

3. Insurance (§ 146*)—Actions—Proof.

To recover on an insurance policy, plaintiff must bring himself within its express provisions.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292–298; Dec. Dig. § 146.*]

4. Insurance (§ 146*)—Construction of Policy.

While doubtful provisions of an insurance policy are construed in insured's favor, if its terms are unambiguous, no forced construction can be indulged to pass liability on the company.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292–298; Dec. Dig. § 146.*]

5. Insurance (§ 425*)—Burglary Insurance—Construction of Policy.

A burglary insurance policy covered loss in consequence of the abstraction of money from the "safe or safes," described in the attached schedule, "by any person or persons who shall make entry in such safe or safes by the use of tools or explosives directly thereupon," and provided that the company should not be liable for loss from a burglar-proof safe containing an inner steel chest, unless the money was taken "from the chest after entry also into the said chest effected by the use of tools or explosives directly thereupon." *Held*, that the company would not be liable on the policy for money taken from the inner steel chest by the use of the combination furnished the burglar by an employé, without having made entry into such inner chest by the use of tools directly thereupon.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 425.*]

6. Appeal and Error (§ 209*)—Review—Objections in Trial Court.

Failure to object to the evidence or move for a nonsuit or request specific findings does not preclude appellant from attacking, on appeal, a finding as not sustained by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 209.]

7. Appeal and Error (§ 173*)—Grounds of Defense—Estoppel.

That an insurance company, sued on a bank burglary policy which required that entrance into both the outer safe and the inner steel chest contained therein be made directly by tools, disputed the manner in which the burglar effected an entrance, in attempting to show that even his entry into the outer safe was not effected by tools thereon, would not estop it, on appeal, from asserting that a finding that the entrance into the inner chest was made with tools directly thereupon was not supported by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 173.*]

Department 2. Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by the First National Bank of Monrovia against the Maryland Casualty Company. From a judgment for plaintiff, defendant appeals. Reversed.

John Murray Marshall and J. W. McKinley, for appellant. Shankland & Chandler, for respondent.

LORIGAN, J. This action is brought to recover the sum of $20,000 on four burglary insurance policies of $5,000 each, known as the "Peerless Bank Burglary Policy," issued in favor of the plaintiff, and under which defendant agreed to indemnify the plaintiff from loss by burglary, accomplished through entry into the bank safe of plaintiff "by the use of tools or explosives directly thereupon." In the complaint, four causes of action against the defendant are stated; each counting on one of the policies issued. Each policy had attached to it a schedule, showing the location and character of the vault within which the bank safe of plaintiff was constructed, the character of the safe itself—being burglar proof—and that within the safe (there was but one) was contained an inner steel, burglar-proof chest. The policies, each identical in terms and conditions, were, with the schedules thereto attached, made by proper reference, and in extenso, parts of the complaint.

Each policy provided, considering its provisions solely with reference to a burglarious entry of safes, which is alone material here, that the defendant would indemnify the plaintiff, "subject to the following special and general agreements which are to be construed co-ordinately, as conditions: Safe Burglary. A. For all loss by burglary of money, bullion, bank notes, * * * in consequence of the felonious abstraction of the same from the safe or safes described in the said schedule and located in the banking room also described in the said schedule * * * by any person or persons who shall make entry into such safe or safes by the use of tools or explosives directly thereupon, in the sum of $5,000. * * * Special Agreements. A. The company shall not be liable: (5) for the loss of money, bullion, bank notes * * * from a combination fire and burglar-proof safe or from a burglar-proof safe containing an inner steel burglar-proof chest, unless the same shall have been abstracted from the chest after entry also into the said chest effected by the use of tools or explosives directly thereupon."

The complaint, in charging the liability of defendant in each of said counts under each policy, alleged that on the 14th day of December, 1908, "during the night of said day, certain persons, to wit, George Allen Beatty, Ernest W. Sundin, ——— Hatfield, and C. S.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Martin, feloniously abstracted from the safes owned by said plaintiff, and described in the said schedule in said policy, and located in the banking room of plaintiff, * * * by making entry into such safes by the use of tools directly thereupon, the sum of $29,725.50."

No demurrer to the complaint was interposed by defendant. The answer denied that the persons mentioned in the complaint feloniously abstracted any sum of money from "the safe owned by plaintiff, and described in any of the schedules in the policy set forth, * * * or from any safe owned by plaintiff, by making entry into such safe, or any safe, in any manner whatsoever," or "that any person made entry into any of the safes mentioned in plaintiff's complaint by the use of tools, or any tools, directly thereupon, or by the use of tools, or any tool, in any manner whatsoever." Certain special defenses arising under some of the provisions of the policy were set up, namely, that C. S. Martin had been an employé of plaintiff in making repairs about the vault and safe of plaintiff, and while so employed had acquired knowledge of the combinations of the vault and safe, had disarranged the time lock, and had concocted the burglary in conjunction with the others, who were alleged in the complaint to have participated in it; also that the entry into the safe and abstraction of the money therefrom was wholly the result of the undue exposure of the safe on the part of plaintiff while Martin was employed in making the repairs upon it.

The cause was tried by the court. Its findings were against the special defenses interposed by defendant, and also against it upon the main issue; the court, as to the latter, making two findings: (1) That on the day named in the complaint, Beatty, Sundin, and Hatfield feloniously abstracted the sum of $29,725.50 from the "safe owned by plaintiff, and described in the schedules in the burglar policies in controversy, * * * by making entry into such safes by the use of tools directly thereupon, to wit, a screw-driver, a sledge hammer and a key"; the other that said money was feloniously abstracted by said persons "from said safes described in the schedules * * * by making entry into such safes by the use of tools directly thereupon, to wit, by the use of" the same instrumentalities.

Judgment was entered in favor of plaintiff for $19,500.68; the court finding, as the evidence showed, that, subsequent to the burglary, and before the trial of the action, the perpetrators above named were apprehended, and money and property of the value exceeding $10,000 was received from them and turned over to plaintiff. No motion for new trial was made by defendant, but it appeals directly from the judgment on a bill of exceptions.

The principal grounds urged for a reversal are: (1) That the complaint fails to state a cause of action against the defendant; and, (2) that the findings of the court that the safe, or safes, described in the schedules and covered by the policies was, or were, entered by the use of tools directly thereupon, is not sustained by the evidence.

[1] As to the attack on the complaint. In this regard, it is insisted that as, by the terms of the policies, the defendant could only be liable where tools were used, not only on the safe itself, but upon the inner burglar-proof chest contained in the safe, it was necessary, in order to state a cause of action against defendant, to allege facts showing that the entry into the safe, and into the burglar-proof chest in which the money was contained, was effected by the use of tools directly upon the safe, and directly upon the burglar-proof chest; that the schedules attached to the policies show that there was but one safe, and that it contained an inner burglar-proof chest, and that an allegation that the "safes" of plaintiff were burglariously entered by the use of tools directly thereupon is not an allegation that the chest was so entered. We do not think this point well taken, or, at least, in the absence of any special demurrer to the complaint, that defendant can be now permitted to make it. The policies insured the plaintiff against burglary by entry into the safe and the burglar-proof chest. It is true that in the policies the safe and the inner burglar-proof chest are mentioned as separate and distinct from each other, and in seeking to fix liability on defendant for a burglarious entry into the safe and chest it would have been more correct to describe the entry to have been made into the safe and chest, rather than to have described it as an entry into the "safes." But, as the policies covered an entry into both the safe and the chest, we do not think an allegation that the entry was made into the "safes" of the plaintiff was radically a failure to state a cause of action, within the terms of the policy. The complaint alleged the entry to have been made into the "safes" described in the policies, and the answer referred to them in the same terms. The case was tried on the theory that the complaint sufficiently described the thing or things which were burglarized, and for which plaintiff claimed defendant to be liable under the policies; and while, to bring it exactly within the terms of the policies, the complaint should have alleged the entry to have been made, both into the safe and inner chest contained therein, still the failure to do so cannot, after trial and judgment, be made the basis of attack on the sufficiency of the complaint. The defendant should have taken advantage of this point by special demurrer for ambiguity or uncertainty.

[2] The second point is on the sufficiency of the evidence to sustain the findings that entry was made into the safe or safes of plaintiff, described in the schedule and referred to in the policies, by the use of tools directly thereupon. There is practically no

dispute as to how the burglary was effected. The banking business of the plaintiff is conducted at Monrovia, Los Angeles county. In June, 1908, the president of the bank entered into a contract with the Parcells Safe Company, engaged in the business of supplying safes, vault doors, and in doing bank contract work, to furnish vault lining, doors, and safes, and properly install them on premises in Monrovia, to which the bank contemplated moving its banking business. In consideration of this contract for the new work, the Parcells Safe Company agreed to do certain work about the vault and safe on the old bank premises—to make certain repairs on the vault and safe doors, plumb them up, and renovate and clean them generally, including the locks and bolts, and repaint the safe with aluminum. The vault on the old premises was of brick, with an outer vault door secured by a combination lock. Inside the vault was another door with a vestibule, or space, between it and the outer vault door; this second door opening with a key. The safe was inside the vault beyond this inner or vestibule door, and the door thereof was secured by a combination lock and a time lock. Inside the safe was an inner steel burglar-proof chest in which the money of the bank was kept, and this was secured only by a combination lock. The safe and time lock were of a pattern in use a great many years ago.

The Parcells Company contracted with one Charles S. Martin, George A. Beatty and E. W. Sundin to do the work of installing the vault and safes in the new bank building, and the renovating and repairing of the vault and the safe just described in the old one. Martin was a well-known safe and vault expert, and the agent of the Parcells Company took him to the bank and introduced him to the president thereof as the man who would attend to the repairing, renovating, and cleaning of the vault and safe then in use by the bank. Martin went to work about the vault and safe, and was engaged there during the banking hours from the 1st to the 10th of December, and performed for the Parcells Company the work which they had contracted with him to do. While so employed, his movements and work about the premises were supposed to be constantly under observation by some of the officers of the bank working in the banking room, and who had been instructed to make note of them. Beatty and Sundin at no time, until the night of the burglary, were upon the old bank premises. They were working, installing the vault and safe in the new bank premises. Notwithstanding the precautions taken by the bank officers to observe the movements of Martin, the latter, while at work about the vault and safe and the locks and bolts connected therewith, secretly acquired knowledge of the combinations upon the doors of the vault and safe and the combination of the inner steel chest. He, also, while cleaning up the time locks and bolts on the inner side of the safe door, removed from the time lock a pin which he shortened and replaced. His object in shortening the pin was so that a hook, which is suspended from the pin while the time lock is running and in operation, could be jarred off the pin by heavy blows directed upon the outside of the safe door, thereby releasing the dogging or locking bar from the bolts of the safe, and allowing the door thereof to be opened by the combination. Martin also fashioned a key, whereby the inner vestibule door of the vault could be opened. Having acquired this information as to the combinations, and manipulated the time lock, Martin entered into an arrangement with Beatty and Sundin, who, like himself, had practical expert knowledge of the safe and lock business, and with another party named Edward Hatfield, to burglarize the bank. He furnished his associates with a card, upon which he had written the combinations of the vault, safe, and inner chest doors, gave them the key to the vestibule door, and instructed them how the time lock had been manipulated by him, so that it could be rendered ineffective by the use of a hammer.

Supplied with this information, on the night of December 14, 1908, Beatty, Sundin, and Hatfield proceeded from Los Angeles to Monrovia to carry out their scheme of robbing the bank. Martin did not accompany them, having left several days previously for Ventura, so as to be able to prove an alibi, should suspicion be directed to him on account of his recent employment about the bank premises. Reaching Monrovia, Beatty effected an entrance to the bank premises through a window, carrying with him a bag, containing a screw-driver, plyers, other small tools, and two heavy hammers. He alone entered the bank premises, and alone actually perpetrated the burglary. With the combinations furnished by Martin, he readily opened the vault door, entered and turned on the electric light in the vault. He then, for the purpose of preventing any one from entering the vault while he was at work, changed the combination on the vault door and locked it. He opened the inner vestibule door with the proper key therefor, which he found hanging up within the vault. He then tried the combination on the safe door, but was unable, as he testified, to open it on account of the time lock being set, and then proceeded to operate, as directed by Martin, on the time lock. He struck the handle of the doors several times with a large hammer, but noticing that the handle was being slightly bent without producing any effect upon the time lock, he ceased his attack at this point. He was desirous of accomplishing the burglary without, if possible, leaving any indications or marks of how it was effected. Observing several depositor passbooks in the vault, he took one and placed it over a point opposite the time lock dial, struck several blows upon it with the hammer, with the result that the hook on the time lock was jarred off the pin which held it in position, and which had been manipulated by Martin, so that this might be accomplished. The bolts being thus released from the operation of the time lock, he then worked the combination and opened the safe door, which brought him into the presence of the inner steel burglar-proof chest, containing the money of the bank. This was secured by a combination lock only, which Beatty readily worked from the information of the combinations furnished by Martin, opened the chest, took out the money deposited therein—$29,725.50—and placed it in his tool bag. Beatty had been directed by Martin, after he had secured the money from the inner chest, to readjust the time lock and put it in running condition, so that suspicion might be cast on some of the employés of the bank familiar with the various combinations thereof that they had abstracted the money. Beatty unfastened the rim of the time lock and proceeded to do this, but while doing so, as he testified, his conscience revolted against throwing the blame on some innocent man, so that, while he readjusted the hook and left the time lock in apparent proper condition, he, however, effectually disarranged another portion of its mechanism, so as to indicate to any expert safe and lock man, who might be called in to examine the time lock, that the job had been done by some one familiar with safes and locks. Having so adjusted the time lock from the inside, Beatty shut the burglar-proof chest, from which he had taken the money, and locked it. He locked, also, the safe door, and having readjusted the original combination on the vault door, which he had changed when he first entered the vault, went out and locked that also. Leaving the bank premises, Beatty and his companions returned to Los Angeles. The money was divided equally between the four participants in the burglary—Martin subsequently receiving his share—and Beatty, Sundin, and Hatfield immediately left Los Angeles for other localities.

The officials of the bank the next morning discovered that the money of the bank had been abstracted from the inner chest, but were unable to ascertain how it had been accomplished. Some days afterward an expert safe and lock smith, who was called in to examine the safes and the time lock, discovered that the time lock had been tampered with, but no definite information upon the subject of who tampered with it or why it was done was obtained until after the arrest of Beatty, Sundin, and Martin. It does not appear what became of Hatfield. Beatty, Sundin, and Martin were convicted and sentenced to terms in the state prison. After their arrest and before conviction, Beatty confessed to his participation in the burglary and the respective parts therein taken by Martin and his other associates, and pointed out and demonstrated to the authorities and the officers of the bank how the time lock had been fixed by Martin and operated on by him in securing an entrance to the safe. He and Sundin were also witnesses on behalf of plaintiff to the same effect on the trial of this cause, and the details of the burglary are recited here from their testimony, which was the only direct evidence on the subject.

In addition to the above, there is evidence that, when some safe and lock experts examined the safe and time lock and the inner burglar-proof chest after the burglary had been committed, one of them discovered, inside of the burglar-proof chest, some marks like file marks—two of them—from which one would be enabled to line up the dial on the inside of the chest.

[3] This being the evidence in the case, it is insisted by appellant that the findings of the court that the safes of plaintiff, mentioned in the schedules and referred to in the policies, were entered by the use of tools directly thereupon (considering the safe proper and the inner steel burglar-proof chest as embraced within the descriptive term "safes" mentioned in the findings) is not sustained by the evidence, because the evidence all shows that entry into the inner steel burglar-proof chest was not effected by the use of tools directly thereupon, but solely by the use and operation of the secret combination thereof. We think this point is clearly well taken.

[4] Before one is entitled to recover upon a policy of insurance, it is essential that he bring himself within the express provisions of the policy. While, in the construction of insurance policies, the rule is that doubtful provisions are to be construed in favor of the insured and in aid of his right to recover thereon, the rule is equally well established that, where the terms of the policy are plain and explicit, the court can indulge in no forced construction of the contract to cast a liability upon the insurance company which it has not assumed. The policies which were issued to the plaintiff were not general policies against burglary, but against burglary committed by the use of tools or explosives, not only upon the safe itself, but, if it contained an inner burglar-proof chest, by the use of tools also upon such chest. There can be no question of this, as the policies clearly so declare.

[5] Now, as the policies and schedules attached to the complaint show that there was an inner steel burglar-proof chest within the safe, it was necessary for the plaintiff, before it could fix any liability on the defendant under the plain terms of the policies, to show that the entry was made, not only into the safe itself, but also into the inner burglar-proof chest, from which the money was taken, by the use of tools or explosives direct-

ly upon that chest. This the evidence not only fails to show, but, on the contrary, it is clearly shown that the entrance to the inner steel chest was effected by Beatty solely by the use of the combination thereof which had been furnished him by Martin. But the risk assumed by the appellant was not for loss sustained through use of the secret combination on the safes or chest of the insured, whether it was by somebody connected with the business of the insured, or surreptitiously and secretly acquired and used by some one unconnected therewith. The policies are burglary policies—so specifically designated—and when, under them, the respondent assumed risk for an entry made, not only into the safe, but also into the inner chest, by means of tools or explosives directly thereupon, it meant an entry effected by the employment of violence—the use of burglar's tools or explosives, such as are employed by burglars to force an entrance into safes and chests of the character described in the policies. The risk which the insurance company assumed was not against burglary, however accomplished, but only against burglary by the use of tools or explosives. It may, of course, be conceded that the entry into the safe itself was effected partially by the use of the hammer operating to disarrange the time lock after it had been adjusted by Martin, so that this might be accomplished, and partly by the use of the combination which could be used after the time lock had become ineffective. And, for present purposes, it may be conceded that the entry into the safe was made by the use of tools directly upon the safe. But to make the defendant liable under the provisions of the policy it was incumbent on plaintiff to prove that, not only was entry made into the safe by use of tools, but that tools were used directly upon the inner chest itself. Now there is not a particle of evidence that any tools were used to effect an entrance into the chest itself, as the only witness who testified as to the method employed to open it was Beatty, and his evidence is that he opened it by using the combination, knowledge of which Martin had secretly secured and furnished him. His testimony shows clearly and absolutely that no tools were used by him upon the chest at all. This being true, when the court found that the safes mentioned in the policies and schedules, including the safe proper and chest under the comprehensive term "safes," were entered by the use of tools used directly thereon, to wit, a screw-driver, key, and sledge hammer, it made a finding having no sufficient support in the evidence whatever, as far as the entry into the inner chest was concerned; and, as the liability of the defendant was not only for an entry into the safe by such means, but also into the inner chest by the same means, and the entry of the latter was not so accomplished, no liability of the defendant under the terms of the policies attached, and the court undertook to fix by its findings a responsibility, when the evidence showed that none had been proven.

Counsel for respondent, recognizing, as they clearly must, that no liability could be cast on the appellant under the terms of the policies, unless the evidence showed that an entrance was effected, not only into the safe itself, but also into the inner burglar-proof chest as well, by means of tools used to effect an entrance into both, assert that there was in fact evidence in the case of the use of tools upon the inner chest. This claim is based on the evidence of the expert heretofore referred to, called by the respondent after the burglary had been committed to ascertain how it had been accomplished. This witness, testifying generally in the case as to his examination of the safes and the locks and inner chest, stated that he had discovered on the inside of the inner steel chest some marks made by a file, or some other instrument, which would enable a person to line up the dial on the inside of the chest. This, respondent claims, sufficiently shows that entry was accomplished into the chest by the use of tools directly thereon. But it shows nothing of the kind. The instrument with which these marks were made on the chest may have been a tool, and, if a file, it was, of course, one; but it was not a tool through the direct use of which entry into the inner chest was effected. Nor does the testimony of the expert indicate that the entry into the chest was effected by means of these tool marks, because they were on the "inside of the chest," and could afford no advantage to one operating upon the chest when locked by the combination. Aside from this, there is not a particle of evidence of any one as to when or by whom these marks were made, or that an entrance into the chest was effected by the use of the tool with which they were made. There is nothing to show that any tool was used, or the marks made by Martin or Beatty, or that they were made or used in connection with the burglary. How the entrance into the chest was effected is not at all in dispute. Martin gave Beatty the combination to the chest on a card, and Beatty testified that in opening the chest he used the combination that Martin had furnished him.

[6] It is insisted, however, by respondent that appellant is estopped from here asserting that the evidence is insufficient to support the findings that the safes described in the policies and schedules were entered by the use of tools directly thereupon, as far as the findings are addressed to an entrance into the inner steel chest as one of the safes referred to in the findings. In this regard, it is insisted that no objections were made on the trial to evidence offered to show entry into the "safe" or "safes," no motion for a nonsuit on the ground that the entry into the chest was the vital issue, that no finding was

asked for by appellant to distinguish beween a safe and an inner chest, that the pleadings on both sides described the things burglarized as "safes," and the case was tried on the theory that the burglary of the safe was a burglary of each and all of its parts, one of which was the inner chest. We perceive no merit in this claim. It would be idle to attempt to elaborate the proposition that a failure to object to evidence, or to move for a nonsuit, or request specific findings, precludes an appellant from attacking a finding on the ground of insufficiency of the evidence to sustain it.

As to the issues made by the pleadings and the theory upon which the case was tried, the claim of respondent is equally without merit. While we have held that the complaint, in charging a burglary of the safes mentioned in the schedules and policies, sufficiently stated a cause of action to defeat an objection to its sufficiency as a pleading made for the first time on this appeal, this did not obviate the necessity of the respondent proving a case on the trial, bringing the liability of the appellant within the clear terms of the policy as set forth in the complaint, showing an entry into both the safe and the inner chest by the use of tools directly upon both.

[7] Nor was the case tried on the theory that the burglary of the safe and the burglary of the inner chest was one and the same thing, and equally within either one of the clauses of the policy. In making its case, respondent proved by the same witness—Beatty, who was the only witness detailing the circumstances of the burglary—how and by what means entrance into the vault, safe, and inner chest was effected. The appellant did not question the accuracy of the testimony of Beatty as to how he effected an entry into the vault or inner chest. Entry into the vault was not covered by the policies, and entry into the inner chest was shown by the testimony of Beatty not to have been made in a manner which would make the appellant liable under the policies. It is true that appellant undertook to prove that the time lock on the safe had been so tampered with before the night of the burglary as to render it wholly inefficient as a time lock, but in a different manner than as stated by Beatty; that the dogging or locking bar operated by it did not work on that night, so as to lock the safe at all; that the safe was only in fact locked by the combination, and that Beatty's statement of the use of a hammer to disarrange the hook on the pin, thereby releasing the locking bar and permitting the opening of the safe by the combination, was untrue; and that he in fact opened it by the use of the combination alone. But the fact that appellant questioned or disputed the method by which Beatty effected an entrance to the safe, in an effort to show that even his entry into the safe itself was not effected by the means designated in the policies, did not preclude the defendant from insisting that, even if entry into the safe itself was effected by the use of tools, still, as appellant only assumed the risk of the loss of money abstracted from the inner steel, burglar-proof chest contained within the safe, "after entry into such chest effected by the use of tools directly thereupon." that, as the entry into the chest was not effected by that means, no liability against appellant was shown; nor was it precluded from attacking a finding casting such liability on it, when there was no evidence whatever to support it.

The judgment appealed from is reversed.

We concur: MELVIN, J.; HENSHAW, J.

162 Cal. 121

WALKER v. SOUTHERN PAC. CO.

(L. A. 2,729.)

(Supreme Court of California. Jan. 30, 1912. Rehearing Denied Feb. 29, 1912.)

1. Damages (§ 132*)—Personal Injuries—Excessive Damages.

Where a railway mail clerk, who was earning $1,500 per annum, sustained injuries which caused permanent deafness in one ear, and also injuries to his ribs and his right arm, which prevented its further use for delicate work, an award of $4,000 is not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372–385; Dec. Dig. § 132.*]

2. Trial (§ 295*)—Instructions—Construction as a Whole.

In an action for personal injuries, where the jury was charged that the physical pain or mental anguish which the plaintiff has suffered or will necessarily suffer are elements of damage, and that he should be compensated for his injuries, the elements of damage being his loss of earning power and pain and anxiety suffered or to be suffered, a further instruction that the plaintiff should be compensated for the pecuniary loss likely to be sustained by him, when read with the other instructions, was not erroneous in permitting the jury to enter the realm of speculation.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 295.*]

Department 2. Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by William R. Walker against the Southern Pacific Company. From a judgment for plaintiff, and an order denying its motion for new trial, defendant appeals. Affirmed.

J. W. McKinley, for appellant. E. B. Drake, for respondent.

MELVIN, J. Plaintiff, who was a railway mail clerk, was injured in an accident due to the negligence of defendant's servants. He recovered judgment for $4,000. From said judgment and from an order denying its motion for a new trial defendant appeals.

[1] The two points urged by appellant are (1) that the damages were excessive; and (2) that the court erred in instructing the jury. Without going at length into the testimony relating to plaintiff's injuries, we may say that it is sufficient to establish his theory of the case and to support the verdict. According to the testimony of experts, the drum of plaintiff's left ear was perforated, and he was permanently deaf in that ear. He testified that before the accident he could hear perfectly; and, although the experts differed as to the origin of his deafness and the period of its existence, we think that there was sufficient evidence to justify a conclusion of the jury that it was produced by scalding water, which was thrown upon his face and head during the accident. Dr. Pepper discovered a disturbed condition of the articulation of the ninth rib. He also testified that cicatricial tissue on the right arm, resulting from plaintiff's injuries, impeded the action of the muscles to such an extent that plaintiff could never again use that arm for quick or delicate work, and that his strength in that arm would always be impaired. From such evidence the jury would have been justified in concluding that plaintiff could never again follow his business as a mail clerk. Plaintiff was 43 years old at the time of the trial. His salary at the time of the accident was $1,500 per annum. In view of the above facts, we cannot say that the verdict of $4,000 was excessive.

[2] The court instructed the jury upon the various elements of damage which they might properly consider in reaching their verdict, and one of these was "the pecuniary loss likely to be sustained by him (plaintiff) during life." Appellant cites Melone v. Sierra Railway Co., 151 Cal. 116, 91 Pac. 522, as conclusive of the matter. In that case the court held two certain instructions to be erroneous. In one the jurors were told that they might fix damages in favor of plaintiff in any "such reasonable sum as the jury shall award him on account of the pain and anxiety he has suffered or may suffer by reason of his injuries." In the other they were informed that "in estimating the damages to be awarded you may take into consideration * * * how far his injuries are permanent in their character and results, as well as the physical and mental suffering he may have sustained or may undergo in the future by reason of the injuries." The reason for the decision was that the condemned instructions permitted the jury "to enter the realm of speculation regarding such future suffering." We do not think that the instructions read as a whole, as they must be, permit the jury to enter this realm of mere speculation. In the case at bar the jurors were also instructed as follows: "If you find that from the injuries received in the accident set out in the complaint the plaintiff has suffered physical pain or mental anguish, or that he will necessarily suffer such in the future, then you are instructed that you may consider such physical pain and mental anguish, and also the fact, if it be a fact, that he will continue to suffer the same in the future, as elements of damage. The measure of any recovery in favor of the plaintiff herein is called compensatory damages; that is, such a sum as will compensate him for injuries he has sustained. The elements entering into such damages are the following: (1) If the injury has impaired plaintiff's power to earn money in the future, such a sum as will compensate him for such loss of power. (2) Such reasonable sum as the jury shall award him on account of pain and anxiety he has suffered by reason of his injuries, or will certainly suffer in the future."

Taken altogether, the instructions were not, we think, misleading. The instruction of which appellant complains in the case at bar was given in the case of Cook v. Los Angeles P. E. Ry. Co., 134 Cal. 279, 66 Pac. 306 (see folio 256 of the transcript), and in that case the court held that the instructions as a whole stated the law correctly. We have reached the same conclusion in this case.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The judgment and order are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

162 Cal. 91

In re KIRBY'S ESTATE. (S. F. 5,944.)

(Supreme Court of California. Jan. 27, 1912.)

DESCENT AND DISTRIBUTION (§ 51*)—HEIRS—DISQUALIFICATION TO TAKE—KILLING INTESTATE—"MURDER"—MANSLAUGHTER.

One who, as heir, would, under Civ. Code, § 1386, share in the estate of decedent, is not, by reason of his conviction of manslaughter for killing intestate, within section 1409, declaring that no one convicted of "murder" of deceased shall succeed to any of his estate; "murder" not only being a technical word within section 13, requiring such words to be construed according to their peculiar or technical meaning, but being precisely defined by Pen. Code, § 187, so as to exclude manslaughter, and Pol. Code, § 4480, requiring, with relation to each other, the provisions of the four Codes to be construed as though they were all parts of the same statute.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 133; Dec. Dig. § 51.*

For other definitions, see Words and Phrases, vol. 5, pp. 4632–4637; vol. 8, pp. 7726, 7727.]

Department 1. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of Patrick Kirby, deceased. From an order of distribution, James Kirby appeals. Reversed.

Sullivan & Sullivan and Theo. J. Roche, for appellant. Cullinan & Hickey, for respondent.

SHAW, J. This is an appeal from a final order of distribution of the estate of Patrick Kirby, deceased.

Patrick Kirby died intestate on January 18, 1910, leaving neither wife, issue, father, nor mother surviving. His surviving heirs, according to section 1386 of the Civil Code, were two brothers, Michael and James Kirby, one sister, Bridget Mannion, and the children of Ellen Daly, a deceased sister. On December 1, 1910, Michael Kirby transferred his interest in Patrick's estate to one James Kirby, a son of said Michael. Said James Kirby is the appellant herein. On February 23, 1910, Michael Kirby was duly charged by information, in the superior court of the city and county of San Francisco, with the murder of said Patrick Kirby. On July 1, 1910, he was, upon said charge, convicted of the crime of manslaughter. An appeal was taken from the judgment of conviction, and it has been affirmed and has become final. Because of this conviction, the court below refused to distribute the share of Michael Kirby to his assignee, James Kirby, and distributed the entire estate to the other persons above mentioned. It is claimed that this was error.

By section 1386, if a person dies intestate, leaving neither issue, husband nor wife, father nor mother surviving, his estate goes to his brothers and sisters, and to the children or grandchildren of any deceased brother or sister by right of representation. An exception to this rule is declared by section 1409, a new section added to the same title in 1905. It is as follows: "No person who has been convicted of the murder of the decedent shall be entitled to succeed to any portion of his estate; but the portion thereof to which he would otherwise be entitled to succeed descends to the other persons entitled thereto under the provisions of this title." If Michael Kirby was not "convicted of the murder" of Patrick Kirby within the meaning of this section, then James Kirby, the assignee of Michael, is entitled to succeed to one-fourth of the estate. What, then, is the true meaning of the words last quoted?

"Words and phrases are construed according to the context and approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, are to be construed according to such peculiar and appropriate meaning or definition." Civ. Code, § 13. The word "murder" is a technical word. It not only has acquired a peculiar and appropriate meaning in the law of this state, and in the law generally, but it has been precisely defined by our statute. The Penal Code defines it as follows: "Murder is the unlawful killing of a human being, with malice aforethought." Section 187. It is divided into two degrees, the first degree including all premeditated, willful, and deliberate murders, and all killing done in the perpetration or attempt to perpetrate certain lesser crimes, the second including all other kinds of murder. Section 189. Murder of the first degree is punishable by death or imprisonment for life. Murder of the second degree by imprisonment not less than ten years. In ordinary usage and at common law the word has the same meaning. Webster's Dic.; 1 Wharton's Crim. Law, § 303. The word "manslaughter," whether in common usage, at common law, or by our statute, has a very different meaning. The Penal Code defines it as "the unlawful killing of a human being, without malice," and declares it to be of two kinds: First, "voluntary—upon a sudden quarrel or heat of passion;" second, "involuntary—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution or circumspection." The meaning at common law and in ordinary usage is substantially the same. See Webster's Dic.; 1 Whar. Cr. Law, §§ 304, 305. It will be noted that it excludes the element of deliberation and premeditation.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

With relation to each other, the provisions of the four Codes must be construed as though they were all parts of the same statute. Pol. Code, § 4480. From these rules and definitions the conclusion necessarily follows that a conviction of manslaughter is not a conviction of murder. It is a conviction of a different offense, an offense which does not include all the criminal elements of the crime of murder. The distinction has indeed been carried so far that it is well settled that a conviction of manslaughter upon a charge of murder is, in legal effect, an acquittal of the murder charge. People v. Gilmore, 4 Cal. 376, 60 Am. Dec. 620; People v. Backus, 5 Cal. 278; People v. Gordon, 99 Cal. 230, 33 Pac. 901; People v. Muhlner, 115 Cal. 307, 47 Pac. 128. It follows that Michael Kirby has not been convicted of the murder of Patrick Kirby, that he does not come within the exception made by section 1409, and that he was entitled to the share provided by section 1386. Whether this accords with natural right and justice is a question upon which we cannot enter. The right of inheritance in this state does not depend upon the ideas of court or counsel as to justice and natural right. The entire matter is in the control of the Legislature, and depends wholly upon the provisions of the statute, regardless of our notions of natural right and justice. Estate of Wilmerding, 117 Cal. 284, 49 Pac. 181; Sharp v. Loupe, 120 Cal. 91, 52 Pac. 134, 586; Estate of Porter, 129 Cal. 88, 61 Pac. 659, 79 Am. St. Rep. 78. The statute having made the distinction between murder and manslaughter, the courts cannot ignore it or create a definition of the word "murder" different from that declared in the statute and from that of the common-law and ordinary usage. There is no ambiguity in the language and nothing is left to construction. The appellant should have received one-fourth of the estate, and the refusal to give it to him was erroneous.

The order is reversed.

We concur: SLOSS, J.; ANGELLOTTI, J.

(162 Cal. 110)

HERSHEY v. BRISTOL et al. (L. A. 2,654.)

(Supreme Court of California. Jan. 29, 1912.)

APPEAL AND ERROR (§ 616*)—RECORD—UNAUTHENTICATED PAPERS.

Where the transcript on appeal from an order contains no bill of exceptions, and the papers contained in it are not authenticated in the manner required by Supreme Court rule 29 (119 Pac. ——), the record presents no question for review, since the unauthenticated papers are not a part of the record and cannot be considered on appeal, and the order will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2714–2718; Dec. Dig. § 616.*]

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Munroe, Judge.

Action by Mira Hershey against Emma R. Bristol and another. From an order denying a motion to vacate an order for the issuance of a writ of assistance and to recall the writ, defendant Jennie A. Bristol appeals. Affirmed.

William Freeman, Ray L. Chesebro, and Alonzo D. Hitchcock, for appellant. Lynn Helm and E. S. Williams, for respondent.

HENSHAW, J. This is an appeal from an order denying appellant's motion to vacate an order for the issuance of a writ of assistance and to recall the writ.

The transcript contains no bill of exceptions, nor are the papers contained in it authenticated as "the papers and evidence used or taken on the hearing of the motion" in any other way, as required by rule 29 of this court (119 Pac. xiv). "Unauthenticated papers in a transcript, in which there is no bill of exceptions, constitute no part of a record which can be considered on appeal." Nash v. Harris, 57 Cal. 242; Herrlich v. McDonald, 80 Cal. 472, 22 Pac. 299; Melde v. Reynolds, 120 Cal. 237, 52 Pac. 491; Skinner v. Horn, 144 Cal. 278, 77 Pac. 904. The result is that appellant presents no record upon which the order appealed from can be reviewed, and respondent's motion to affirm the order must be and therefore is granted. Skinner v. Horn, supra; Skinner v. Horn, 146 Cal. 62, 79 Pac. 597; Power v. Fairbanks, 146 Cal. 611, 80 Pac. 1075; Wyckoff v. Pajaro R. C. Co., 146 Cal. 681, 81 Pac. 17.

We concur: MELVIN, J.; LORIGAN, J.

(162 Cal. 131)

MAJORS v. CONNOR et al. (L. A. 2,725.)

(Supreme Court of California. Jan. 30, 1912.)

1. MASTER AND SERVANT (§ 277*)—INJURIES TO SERVANT—EVIDENCE.

Evidence, in an action for injuries to a person, caused by a falling wall, *held* sufficient to support a finding that he was a servant, within Civ. Code, § 2009, defining a servant as one employed to render personal service to his employer otherwise than in the pursuit of an independent calling, and who in such service remains wholly under the control and direction of the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 953; Dec. Dig. § 277.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. Negligence (§ 55*)—Injuries to Servant—Independent Contractor.

An independent contractor, injured by a falling wall, which he was building, may recover for his injuries, where the original contractors assumed to direct the work, either personally or through a foreman, as they thereby assumed the responsibility which would otherwise have rested upon such contractor.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 68; Dec. Dig. § 55.*]

3. Master and Servant (§ 185*)—Injuries to Servant — Negligence of Fellow Servant.

A master is liable for the negligence arising from the furnishing of a perilous place to work, even though he has no actual knowledge of such condition, so that, though piers upon which a wall was built were built by fellow servants of a person who was injured by the falling of the wall, where the master's attention was directed to such piers by reason of his having offered a reward to the workman who built the best-looking pier, he is liable for an injury caused by the wall falling on account of their insufficiency.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385–421; Dec. Dig. § 185.*]

4. Master and Servant (§ 235*)—Injuries to Servant—Contributory Negligence—Failure to Investigate Conditions.

Where a workman engaged in building a wall upon an I-beam, supported by piers, was ignorant of the insufficiency of the piers to sustain the wall, he was under no duty to investigate, and was guilty of no negligence in failing to observe the faulty condition of the piers.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 710–722; Dec. Dig. § 235.*]

5. Evidence (§ 471*)—Opinion.

Where a defendant, in an action for injuries occasioned by a falling wall, sought to establish that the person injured was an independent contractor, questions to the plaintiff and other witnesses, as to whose control the workmen whom the plaintiff produced were under, are equivalent to an inquiry as to who gave the orders, and are not objectionable as calling for the opinions of the witnesses.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149–2185; Dec. Dig. § 471.*]

6. Master and Servant (§ 264*)—Injuries—Evidence.

Where, in an action for injuries from a falling wall, the plaintiff had secured workmen for the building of the wall under contract with defendant, the original contractor, and there was a controversy whether plaintiff was an independent contractor or a servant, a question to him, as to whether he gave directions for the building of the piers which supported an I-beam upon which the wall in question was built, was not objectionable as calling for evidence impeaching the contract of the plaintiff, but, on the contrary, supported his theory of the contract, and was proper.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 264.*]

7. Witnesses (§ 286*)—Redirect Examination.

The court may in its discretion, on redirect examination, permit counsel to ask questions not strictly allowable in such examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 930, 994–999; Dec. Dig. § 286.*]

8. Evidence (§ 474*)—Competency—Knowledge of Subject-Matter.

In an action for injuries from a falling wall, brought by a mason employed thereon, another mason, acquainted with the plaintiff and his work, was qualified to testify as to the amount of work the plaintiff could do both before and after the injury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196–2219; Dec. Dig. § 474.*]

9. Evidence (§ 474*)—Competency—Relation.

A son of a person injured may, in an action for such injuries, testify as to the capacity of the plaintiff for work, both before and after the injury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196–2219; Dec. Dig. § 474.*]

Department 2. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by A. Majors against M. W. Connor and another. From a judgment for plaintiff, defendants appeal. Affirmed.

J. Wiseman Macdonald, for appellants. H. T. Gordon, A. P. Thomson, and F. McD. Spencer, for respondent.

MELVIN, J. Plaintiff was injured by the falling of a brick wall in course of construction, upon which he was working at the time as a mason. The wall in question was a part of an addition to the Hotel Melrose in Los Angeles, and its fall was due to the collapse of faultily constructed piers on the north half of said addition. The Connor & Perry Investment Company was sued as the contractor, and defendant Connor as manager of said company. A verdict in favor of Majors, the plaintiff, for $1,250 was returned by the jury, and judgment was entered accordingly. From said judgment, and from an order denying their motion for a new trial, defendants appeal.

Two general propositions are stated by appellants as bases of their argument on this appeal. One is that the evidence, without question, proved plaintiff to be an independent contractor. The other is that, if he was not an independent contractor, then his injuries were due to the negligence of his fellow servants.

[1, 2] Regarding the terms upon which Majors was to work, there was a conflict of evidence. It is not disputed that he was to employ the men to assist him in the brickwork, and was to furnish the tools, wheelbarrows, mixing bins, and other things necessary for the use of the bricklayers, and was to be paid a certain sum per thousand brick laid as compensation for himself and his assistants. Nor is there any question that the materials used in the construction of the addition to the hotel were to be furnished by the defendant, and that the bricklayers and laborers hired by Majors were to be actually paid by defendants from amounts due Majors under the contract. There is a

sharp conflict, however, in the testimony of the witnesses who spoke with reference to the authority to direct the work. Connors said that he reserved no right of supervision nor dictation of the manner in which the work was to be done. He had a foreman, named Crow, whose duty, he said, was merely to see that Majors followed the proper lines in laying the foundations, and erected the piers of the size and at the places indicated in the specifications. Plaintiff testified, however, that as a part of his agreement he was to do whatever Crow told him to do. At least three of the men employed on the building testified that they were working, not under the supervision of Majors, but were directed in their labors by either Crow or Connor. Majors also said that he worked under the directions of Connor or Crow. There was abundant evidence, therefore, to justify the jury in concluding that Majors did not occupy the position of an independent contractor, but that he was a servant, as that term is defined in section 2009 of the Civil Code. As counsel for respondent phrase it, "This was one of those simple work contracts often favored by close-figuring owners who do their own building. * * * They adopt the device of buying so much labor in gross from a single workman; the latter taking the chance of thereby making a slight increase in his own day's wages." Even if the agreement as originally made could be considered as one whereby Majors became an independent contractor, nevertheless Connor, by assuming to direct the work, either personally or through his foreman, took the responsibility upon himself and his codefendant which might have rested otherwise upon plaintiff. 1 Thompson on Neg. § 658; 2 Bailey on Personal Injuries, § 2581; Giacomini v. Pacific Lum. Co., 5 Cal. App. 220, 89 Pac. 1060.

[3] Plaintiff's son and another mason built the faulty piers that finally collapsed under the weight of the wall constructed upon the I-beam, which rested upon said piers. It is undisputed that plaintiff had nothing to do with the actual construction of these piers. He also testified that he was unaware of the method used in building them. Was plaintiff, under such evidence, which the jury had the right to accept, in a position to deny that he was injured by the carelessness of a fellow servant? We must answer this question affirmatively. There was abundant testimony showing that the piers were mere tapering circular chimneys of half bricks, filled in with mortar and "sprawls" or fragments of brick. So constructed, they were totally inadequate to carry the weight of the wall which was to be built above the I-beam. George Adele, one of the masons, testified that this method of construction was followed by reason of the express direction of Connor, who promised a dollar to the man who would build the best-looking pier. Wolf, one of the carpenters employed on the building, corroborated Adele in this statement. Connor admitted that he offered a dollar to the man who should construct the best pier, and that after the north piers were built he gave each of the workmen a dollar. He denied giving any direction for the building of the piers in the manner described by Adele; but upon the conflict of evidence the jurors might well conclude that Connor ordered the men to construct the piers in a manner to leave them inadequate for the weight which was to be placed upon them, and that after they were so built his attention was particularly directed to them by reason of his promised reward to the builder of the most sightly column. According to the testimony of the plaintiff, Connor ordered him to proceed with the building of the wall after the I-beam had been placed on top of the north piers. Such a state of facts would not support the "fellow servant" doctrine. The place upon the wall where plaintiff was working at the time of the accident was unsafe, and the negligence arising by reason of furnishing such a perilous place for the workman is chargeable directly to the master; and this is the rule even when the master has not, as here, actual knowledge of the danger. The piers, topped by the I-beam, constituted a means or appliance furnished for the prosecution of further work. In other words, this case is clearly within the doctrine of those which hold that a tunnel, as fast as it is completed, becomes an appliance, furnished by the master, by which the remaining work is to be prosecuted. Hanley v. California Bridge Co., 127 Cal. 237, 59 Pac. 577, 47 L. R. A. 597; McRae v. Erickson, 1 Cal. App. 326, 82 Pac. 210. Essentially the same rule is also expressed in Mullin v. California Horseshoe Co., 105 Cal. 83, 38 Pac. 535, and Galasso v. Natl. S. S. Co., 27 App. Div. 169, 50 N. Y. Supp. 417.

[4] The jury was also justified in finding plaintiff guilty of no negligence in failing to observe the faulty condition of the piers. If he was, as he testified, actually ignorant of existing conditions, he was under no obligation to investigate. Starr v. Kreuzberger, 129 Cal. 124, 61 Pac. 787, 79 Am. St. Rep. 92; Silveira v. Iversen, 128 Cal. 187, 60 Pac. 687; Dolan v. Sierra Railway Co., 135 Cal. 439, 67 Pac. 686.

[5] Appellant calls our attention to the court's rulings in the admission of certain evidence. Plaintiff was asked this question: "When you produced the labor, the men, and put them on the job, under whose control and management were they?" An objection, on the ground that the question called for the conclusion of the witness, was overruled, and he answered, "Mr. Crow and Mr. Connor." Similar objection was interposed without success, and the same answer was given, to the question asked of witness Adele, "Under whose control did you do the work?" We do not see that either question called for a conclusion. Both were tantamount to an

inquiry, "Who gave the orders?" Questions calling for answers much nearer the border line of conclusion have been held not erroneous. Kaltschmidt v. Weber, 145 Cal. 598, 79 Pac. 272; Bunting v. Salz, 22 Pac. 1133; Nathan v. Dierssen, 146 Cal. 66, 79 Pac. 739.

[6] The court committed no error in overruling the objection to the question propounded to plaintiff: "Did you give those men that built the piers, the north piers, instructions how to build them?" The ground of the objection was that the plaintiff was seeking to impeach his own contract. On the contrary, we think the question called for a fact, which the answer revealed, tending to support the plaintiff's theory of the contract.

[7-9] During the examination of Newton Majors, he was asked the following question: "Now, you say you worked with your father, both before and since the accident. What was his capacity for work before the accident, as compared with it since the accident?" To this question there was an objection, on the ground that the witness was not qualified to testify, and on the further ground that it was not proper redirect examination. The court said, "Oh, he may answer," and witness replied: "Well, I don't think he could do near the work. I know he could not do the work now that he could do before this thing happened." Even if the latter part of the objection were timely, the court's remark was equivalent to a ruling that discretion would be exercised in permitting counsel to propound a question not strictly allowable on redirect examination. Such discretion may always be used. The rest of the objection is entirely without force. In the first place, the witness was himself a mason, and qualified to speak with reference to the amount of work which his father could do at his trade as compared with that which he could accomplish before the accident. But, even if the witness had not been an expert in this matter, his relation to and intimate acquaintance with plaintiff would have been sufficient to qualify him to answer. Robinson v. Exempt Fire Co., 103 Cal. 5, 36 Pac. 955, 24 L. R. A. 715, 42 Am. St. Rep. 93.

The instructions fully and fairly delivered the law to the jury, and were without material error.

The judgment and order from which the defendants have appealed are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

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162 Cal. 87

CIMPHER et al. v. CITY OF OAKLAND.
(S. F. 5,766.)

(Supreme Court of California. Jan. 27, 1912. Rehearing Denied Feb. 24, 1912.)

1. ADVERSE POSSESSION (§ 7*)—TIDELANDS—ACQUISITION BY PRESCRIPTION.

Tidelands on any navigable estuary, over which the tides regularly ebb and flow, are charged with a public trust for purposes of navigation and fishery, and so cannot be acquired by prescription by a private person.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 24-42; Dec. Dig. § 7.*]

2. MUNICIPAL CORPORATIONS (§ 225*)—DISPOSITION OF PROPERTY.

A mere resolution of a city council, not signed by its mayor or shown to have been passed over his veto, purporting to grant property of the city, is ineffectual, not being in accordance with the method provided by its charter (St. 1862, pp. 338, 342, 353, §§ 4, 8, 51, 53) for disposing of its property.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 225.*]

3. NAVIGABLE WATERS (§ 37*)—TIDELANDS—GRANT TO CITY—"PRIVATE PERSONS, PARTNERSHIPS, OR CORPORATIONS."

Const. art. 15, § 3, providing that certain tidelands shall be withheld from grant or sale to "private persons, partnerships, or corporations," does not prohibit its grant to a municipal corporation, "private" qualifying each of the three words following it; though, when granted to a city, the prohibition protects it from grant or sale by the city to privates, except as it may be properly disposed of in furtherance of the trust on which it is held—that is, to subserve the public uses of navigation and fishery.

[Ed. Note.—For other cases, see Navigable Waters, Dec. Dig. § 37.*]

4. STATUTES (§ 77*)—LOCAL SPECIAL LEGISLATION.

Act March 22, 1909 (St. 1909, p. 665), granting to a city all the state's interest in certain tidelands, is not within the inhibition of the Constitution against local special legislation.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 77.*]

Department 1. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Etta G. Cimpher and another against the City of Oakland. Judgment for defendant. Plaintiffs appeal. Affirmed.

J. C. Bates, for appellants. John W. Stetson, City Atty., William H. O'Brien, Asst. City Atty., and Ben. F. Woolner, for respondent.

SHAW, J. The plaintiffs appeal from a judgment in favor of the defendant. The controversy between the parties is over the title to the premises in the city of Oakland known as the Lake Merritt Boathouse, being an area 75 feet square of the waters of Lake Merritt. Plaintiffs claim title by prescription and also under a resolution of the city council of Oakland, adopted December 7, 1874, purporting to grant the right to use said space for a boathouse, forever and exclusively, to Samuel Merritt. Plaintiffs have succeeded to whatever right or title Merritt obtained by the resolution.

[1] It was admitted on the trial that the space in question is tideland situated upon a navigable estuary, and over which the ordinary tides regularly ebb and flow. This

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

being the case, it was charged with a public trust for the purposes of navigation and fishery, and no title thereto could be obtained by any private person by prescription. People v. Kerber, 152 Cal. 731, 93 Pac. 878, 125 Am. St. Rep. 93. The title by prescription therefore fails. The fact of possession by plaintiffs is good to defeat the defendant's claim only in case the defendant shows no title or right thereto.

[2] The resolution of the Oakland city council was ineffectual to grant or convey title. The act of 1852, incorporating the town of Oakland, purported to grant to said town the lands lying within its limits, as therein specified, situated between high tide and ship channel. The grant was made to facilitate the construction of wharves and other improvements. Stats. 1852, p. 180. The city of Oakland succeeded to all the rights and properties belonging to the town when it was changed to a city. Stats. 1854, p. 187, § 12. We cannot ascertain, from the boundary line as defined in these acts, whether the premises in controversy are within the limits of the town as then existing, or not. If not, of course the city could not grant any right to them. For the purposes of this decision we assume that they were included in the city limits and in the grant to the town. The city charter empowered the city council to "pass all proper and necessary ordinances for the regulation and sale of city property, and to give deeds therefor." Stats. 1862, p. 338, § 4. Ordinances were required to be presented to the mayor and to be signed by him, unless passed over his veto. Id. p. 342, § 8. It provided that all sales of property belonging to the city should be made by public auction to the highest bidder, upon such terms as the council should, "by ordinance," direct. Id. p. 353, § 51. Ordinances were required to be posted or published, and to begin as follows: "The council of the city of Oakland do ordain as follows." Id. p. 353, § 53.

The resolution purporting to grant this property to Merritt did not comply with any of these requirements. It did not purport to be an ordinance at all, nor was it in the form prescribed for ordinances. It purported to be a mere resolution of the council. It was not signed by the mayor, and it does not appear that it was ever presented to him, or that it was passed over his veto. No ordinance providing for a sale of such property or fixing the terms thereof was ever passed, and there is no evidence that the sale to Merritt was at public auction, or to the highest bidder. If it be conceded that the city had power to grant or sell the tidelands for what appears to have been a private use, or to dispose of them at all, except in aid of the public rights of navigation and fishery, it could do so only in the manner prescribed by its charter. As an attempted disposition of such land, the resolution was a wide departure from the prescribed mode and was wholly ineffectual.

[3] The city did not rest its claim upon the fact, which we assumed as above stated, that the premises were included in the boundaries of the town of Oakland and were granted to it by the act of 1852, aforesaid. It based its claim wholly upon the act of March 22, 1909. Stats. 1909, p. 665. That act grants to the city of Oakland all the interest of the state in certain described tidelands. It is admitted that this grant includes the area in controversy. Appellants claim that such grant is forbidden by section 3 of article 15 of the state Constitution. That section provides that all tidelands within two miles of any incorporated city of this state and fronting on the waters of any estuary or bay used for navigation "shall be withheld from grant or sale to private persons, partnerships, or corporations." The claim is that this prohibits such grant to a municipal corporation. We do not so understand the language we have quoted. The word "private" is an adjective which, in the connection in which it is there used, qualifies all the nouns following it in that sentence. It withholds such lands from grant or sale to private corporations, but not to municipal corporations. When granted to a city, the prohibition still protects it from grant or sale to private persons, private partnerships, or private corporations, except as it may be properly disposed of in furtherance of the trust upon which it is held; that is, to subserve the public uses of navigation and fishery. Ward v. Mulford, 32 Cal. 372; Oakland v. Oakland W. F. Co., 118 Cal. 184, 50 Pac. 277; People v. Kerber, 152 Cal. 736, 93 Pac. 878, 125 Am. St. Rep. 93. The constitutional policy is not violated by the grant to Oakland, and it must be deemed to be within the general powers of the Legislature. Oakland v. Oakland W. F. Co., 118 Cal. 185, 50 Pac. 277.

There having been no attempt made, and no steps taken by any public authority, to abandon the public use of these tidelands and convert them into proprietary lands not dedicated to public use, the statute of limitations does not apply in favor of the plaintiffs, either against the state or the city. People v. Kerber, 152 Cal. 734, 753, 93 Pac. 878, 125 Am. St. Rep. 93.

[4] The act of 1909 clearly does not come within the constitutional inhibition of local special legislation. There is no other point worthy of notice.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

(162 Cal. 111)

FILIPPINI et al. v. HEWLETT et al.

(S. F. 5,643.)

(Supreme Court of California. Jan. 29, 1912.)

1. APPEAL AND ERROR (§ 1033*)—HARMLESS ERROR—FAVORABLE DECISION.

A party in a suit between lower and upper riparian proprietors to determine their rights to the waters of a stream cannot complain of a judgment because it gives him no more than the law, independent of the judgment, secures to him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052–4062; Dec. Dig. § 1033.*]

2. WATERS AND WATER COURSES (§ 49*)—JUDGMENT.

Where, in a suit by a lower riparian proprietor against an upper proprietor to determine their rights to the waters of a stream, defendant asserted a right by appropriation to all of the waters, and a right of appropriation by user and prescription to certain waters, he could not complain of a judgment defining his precise rights.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 49.*]

3. APPEAL AND ERROR (§ 882*)—RIGHT TO ALLEGE ERROR.

Where, in a suit by a lower riparian proprietor against an upper proprietor to determine their rights to the waters of a stream, defendant declined to show the amount of water required for his use during the dry season, though the court gave him an opportunity to do so, he could not complain of a judgment on the ground of uncertainty in not awarding to him a quantum of water.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591–3610; Dec. Dig. § 882.*]

4. WATERS AND WATER COURSES (§ 49*)—RIPARIAN RIGHTS—JUDGMENT.

The judgment which declared that defendant might take all the water which he required for indicated purposes, and that, so long as he took a portion of it from a branch, he might take the remainder from the main stream, did not compel defendant to continue to take water from the branch, but gave him the first right to all the water which he might require for the indicated purposes; and, while the rights of a riparian owner are not limited by the quantum of water he may happen to use, the judgment was not erroneous as against defendant.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 49.*]

5. WATERS AND WATER COURSES (§ 43*)—RIPARIAN RIGHTS—JUDGMENT.

Where the court, in a suit by a lower riparian proprietor against an upper proprietor to determine their rights to the waters of a stream, found that plaintiff, as riparian owner, needed and used the water for domestic purposes, and that in the dry season there was never any surplus in the stream above such needs, a judgment awarding to defendant, as riparian proprietor, all of the water of the stream which he might require for domestic purposes appurtenant to his lands, including water for household and domestic use, watering stock, and irrigating lawns and gardens adjacent to the dwelling house on the land, was sufficiently favorable to defendant.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 43.*]

Department 2. Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by Charles Filippini and another against Cleora M. Hewlett and another. From a judgment granting relief, and from an order denying a new trial, defendants appeal. Affirmed.

E. E. Hewlett, F. E. Johnston, H. L. Johnston, L. E. Johnston, and Hewlett, Bancroft & Ballantine, for appellants. A. J. Hull, John V. Filippini, and John T. York, for respondents.

HENSHAW, J. This controversy is between the plaintiffs, lower riparian proprietors, and defendants Hewlett, upper riparian proprietors, over the use of the waters of Huichica creek. The appeal is from the judgment and from the order denying defendants a new trial.

The waters of Huichica creek, flowing first through the lands of defendants Hewlett, were used by them, and the unused portion passed on to the lower lands of plaintiffs, where they were consumed for domestic purposes and for the watering of stock. In the warm and dry months of June, July, August, September, and October of each and every year, there was never a surplus of water above what was required for these purposes, and in many years a deficiency and shortage. The Hewletts had originally taken their water from the main stream, but subsequently they had availed themselves of the waters of the west branch of the creek. Shortly before the commencement of this action, they dammed the main stream, posted notice of appropriation of all the waters in it, filed the notice for record, dug a ditch, and proceeded to carry these waters to their lands for the irrigation of alfalfa. The result was the immediate cessation of the flow below, complaint by the lower riparian proprietors, with the statement by the Hewletts that they would find their claim presented in the recorder's office, and if plaintiffs desired to stop them from so diverting the waters they would have to proceed by injunction. This they did, and the injunction was granted.

Against the judgment, it is first contended that the portion defining the rights of Cleora M. Hewlett, owner of the upper riparian land, is indefinite and uncertain. That portion of the judgment so attacked is in the following language: "That the defendant, Cleora M. Hewlett, is justly entitled to take and use such a quantity of water flowing in said creek, through the lands of the said defendant, which, in addition to the water now taken from said west branch thereof, shall be required for all the natural or domestic uses and purposes appurtenant to the lands of said defendant which are within the watershed of and drained by and riparian to said Huichica creek (which said lands are described in the complaint in this action, and are the lands upon which the said defendant now resides), including water for household and domestic uses and purposes, for watering stock, for irrigating lawns and gardens adjacent to the dwelling house on said lands."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1, 2] It is said that the judgment does not mean anything, so far as the defendant is concerned; that she possesses the right adjudged to her, independent of the judgment, by virtue of her riparian proprietorship. But if the court by solemn judgment has given to this defendant exactly what she says she is entitled to by law, her voice should be lifted in approbation, and not in complaint. In contemplation of the fact that what the court was called upon to decide were the twofold contentions of the Hewletts, the first an asserted right by appropriation to all of the waters of the creek, the second an asserted right of appropriation by user and prescription to certain of the waters of the creek, it was not only not a useless declaration for the court thus to define the precise rights of defendant, but it was a declaration and judgment made necessary by the very issues in the case.

[3] Nor can the complaint be entertained that the judgment is fatally uncertain in failing to award a definite quantum of water to defendants. Defendant's own conduct made this impossible; for the court vacated the submission of the cause to give the defendants an opportunity of showing the amount of water required for their use during the dry season, and defendants declined to produce such testimony. They are not in a position to complain of any uncertainty in this respect. Bathgate v. Irvine, 126 Cal. 135, 58 Pac. 442, 77 Am. St. Rep. 158; Strong v. Baldwin, 154 Cal. 150, 97 Pac. 178, 129 Am. St. Rep. 149.

[4] Nor is it perceived that this judgment in any sense compels defendants to continue to take water from the west branch. It declares in effect that they may take all the water which they require for the indicated purposes, and, so long as they are taking a portion of it from the west branch, may take the remainder from the main stream. And while it is true that the rights of a riparian owner are not limited by the quantum of water he may happen to be using, this judgment gives defendants the first right to all which they may require for the purposes of their superior use.

[5] Certain minor propositions are urged upon the appeal which have been examined, and which, it may be declared, without elaborate discussion, are not well founded, or, where well founded, are not of the essence of the controversy. These complaints go to an asserted absence of findings; that the findings are not responsive to the issues; and that the findings do not support the quantity of lands of the plaintiffs found to be riparian. But the findings show that plaintiffs as riparian owners need and use the water for domestic purposes and for the watering of domestic stock; that in the dry season of the year there is never any surplus of water in the stream over and above these needs. The judgment then awards to the defendants Hewlett, as riparian proprietors, all of the water of the stream which they may require "for all the natural and domestic uses and purposes appurtenant to the lands, * * * including water for household and domestic uses and purposes, for watering stock, for irrigating lawns and gardens adjacent to the dwelling house on said lands." Here is a most liberal award. It may involve the consumption and use of all the waters. It is the remainder, after such use, which is to be permitted to flow onto the lands of plaintiffs, and, as the court finds that in the dry months there is no surplus water above the needs of these plaintiffs, it follows that there can be none for the enlarged purposes of irrigation to which defendants purposed to devote it. The findings are therefore sufficiently complete and explicit, and the judgment is supported by the findings.

For these reasons, the judgment and order appealed from are affirmed.

We concur: MELVIN, J.; LORIGAN, J.

162 Cal. 105

BELL v. SOLOMONS et al. (S. F. 5,673.)

(Supreme Court of California. Jan. 29, 1912.)

1. Appeal and Error (§ 876*)—Scope of Review.

On appeal from an order refusing to set aside an order dismissing an action for want of prosecution, which latter had become final by failure to appeal, plaintiff cannot attack the dismissal on the grounds that material parts of the record had not been supplied after destruction in the earthquake fire, that the dismissal was beyond the power of the court or clerk, or that plaintiff was not in good faith notified of the intent to move for dismissal, as each of these matters could have been reviewed on appeal from the order of dismissal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3549–3559; Dec. Dig. § 876.*]

2. Appeal and Error (§ 876*)—Appealable Orders.

On an appeal from an order refusing to set aside a dismissal for want of prosecution, the court will not attempt to determine whether the pleadings and records show that the plaintiff is entitled to a judgment, as the dismissal of an action for lack of prosecution is without regard to the merits or demerits.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3549–3559; Dec. Dig. § 876.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. DISMISSAL AND NONSUIT (§ 60*)—WANT OF PROSECUTION.

The power of a court to dismiss a cause for lack of prosecution does not depend upon the completeness of the rcords, and it cannot be attacked on the ground that at the time the order was made certain portions of the record which had been destroyed had not been replaced.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140–152; Dec. Dig. § 60.*]

4. DISMISSAL AND NONSUIT (§ 79*)—FORM OF JUDGMENT.

A judgment of dismissal for lack of prosecution that the plaintiff take nothing is proper, as the court cannot undertake to determine the merits.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 174; Dec. Dig. § 79.*]

5. DISMISSAL AND NONSUIT (§ 60*)—FAILURE TO PROSECUTE—EXCUSE.

That a judge who had formerly tried a cause was sick and unable to attend to his duties will not excuse a failure to prosecute, where the judge was but one of twelve judges of the court, as an application should have been made to the presiding justice to reassign the cause.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140–152; Dec. Dig. § 60.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Teresa Bell against Lucius L. Solomons and others. From an order denying a motion to vacate an order dismissing the action for want of prosecution, plaintiff appeals. Affirmed.

T. Z. Blakeman, for appellant. Edmund Tauszky and Wallace A. Wise, for respondents.

HENSHAW, J. This is an appeal by plaintiff from an order of the superior court of the city and county of San Francisco denying her motion to vacate an order, made on the motion of defendants, dismissing the action for want of prosecution. Code Civ. Proc. 583. The action was commenced in November, 1899, and was tried in October, 1900. Judgment for defendants was entered in February, 1901. Plaintiff appealed to this court from that judgment and from the order denying her motion for a new trial. On November 19, 1904, the judgment and order were reversed, and the cause remanded for a new trial. The remittitur was filed in the superior court on January 16, 1905. On August 26th of that year, plaintiff filed a supplemental complaint, and upon October 10th following defendants answered thereto. The record in the superior court was destroyed by fire on April 18, 1906. No steps were taken by plaintiff for more than two years, either to restore the record, or to bring the action to trial. Finally, upon August 12, 1908, defendants procured a certified and attested copy of the transcript, and a certified copy of the remittitur, and filed a petition, for an order that this copy of the transcript be made the basis of any further proceedings, and that the certified copy of the remittitur be filed. This was in conformity with the provisions of the act in relation to the restoration of court records. Stats. 1906, p. 37. Notice of the application was served on plaintiff's attorney, and, without objection on his part, the application itself was granted on September 4, 1908. No suggestion was made at that time by plaintiff's attorney that the record was incomplete, or that he desired the restoration of the supplemental complaint and answer thereto above referred to. On September 8, 1908, defendants served upon plaintiff notice of a motion to dismiss the action for want of prosecution; the grounds of the motion being plaintiff's failure to bring the action to trial for more than two years after defendants had answered and for more than three years after the remittitur from the Supreme Court had been filed. The hearing of this motion was had, and on September 18, 1908, it was granted, and judgment of dismissal entered upon September 24, 1908. No appeal was ever taken from this judgment of dismissal. Thereafter, on October 9, 1908, plaintiff filed a petition for the restoration of the supplemental complaint and answer thereto. It was argued to the court that, as a judgment of dismissal of the action had been entered, these supplemental pleadings should be restored to the record nunc pro tunc as of the date of the restoration of the transcript. The court adopted this view, and, plaintiff refusing to accept it, the court denied her motion. No appeal was taken from this order. Thereafter, on January 19, 1909, plaintiff gave notice of a motion to vacate the order and judgment of dismissal, and this motion was denied on March 17, 1910. It is from this last-mentioned order that plaintiff prosecutes her appeal.

The propositions advanced upon this appeal are: (1) That the judgment of dismissal was irregular and void, because material and necessary parts of the pleadings had not been restored to the record; (2) that the judgment as entered was beyond the power of the court or clerk to make or enter, because of the following language in which the judgment is couched: "It is ordered, adjudged, and decreed that Teresa Bell, plaintiff, do take nothing by this action against the defendants, but that judgment of dismissal be and the same is hereby entered herein"; (3) that under the facts disclosed the plaintiff was not guilty of negligence in the prosecution of the action; (4) that plaintiff was a necessary party and an actor in the proceeding instituted by defendants to have the certified transcript filed made the basis of further proceedings, and that good faith required defendants to notify plaintiff of their intention to move for a dismissal; (5) that the pleadings and the records show that the plaintiff is entitled to a judgment against the defendants in a sum exceeding $1,000.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] It is at once apparent from a reading of these grounds that, one and all, they existed and were within the knowledge of plaintiff at the time of the hearing of defendants' motion to dismiss for lack of prosecution. Thus plaintiff knew that the record had not been completely restored. Plaintiff knew any and all of the facts which would justify her neglect and failure to restore the record and bring the action to trial. And as to the other propositions, if the judgment of dismissal was void, because the record had not been completely restored, or if the judgment of dismissal entered was in excess of the power of jurisdiction of court, or clerk, or if good faith required defendants to notify plaintiff of their intention to move for a dismissal, each and all of these matters were reviewable upon direct appeal from the judgment of dismissal, which appeal was never taken.

[2] The fifth proposition, that the records show that plaintiff is entitled to a judgment, is entirely beyond any consideration which here may be entered into. The dismissal of an action for lack of prosecution is without regard to the merits or demerits of the cause of action. The motion is granted as to a meritorious cause of action, as well as to one without merit, because in either case there has been a failure upon the part of the plaintiff to use the diligence which the law requires to make an end to litigation.

It is apparent, therefore, that this case is not an exceptional case like those of Moore v. Thompson, 138 Cal. 23, 70 Pac. 930, and De La Montanya v. De La Montanya, 112 Cal. 101, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165, where the facts subsequently arising or subsequently known may control the facts upon which the court exercised its discretion in granting or refusing to grant a particular order; but it is the typical case represented by Reay v. Butler, 69 Cal. 572, 11 Pac. 463; Goyhinech v. Goyhinech, 80 Cal. 409, 410, 22 Pac. 175; Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103; Estate of Gregory, 122 Cal. 483, 55 Pac. 144; Mantel v. Mantel, 135 Cal. 315, 67 Pac. 758; Alpers v. Bliss, 145 Cal. 565, 79 Pac. 171; Kent v. Williams, 146 Cal. 3, 79 Pac. 527. In the last-cited case, it is said: "The appeal from the order refusing to vacate the judgment does not present any facts for the consideration of the court, other than those which are presented upon appeal from the judgment itself; and the rule is well established that an order refusing to vacate a prior order or judgment from which an appeal may be taken is not appealable, unless there is a record which presents matters for consideration that could not be presented upon the appeal from the original order or judgment."

[3] But, aside from this, the contentions of the appellant are without merit. The judgment of the court was a dismissal of the action. Its power to dismiss the action did not depend upon a restoration of the records. The jurisdiction was not lost by a destruction of the records nor regained by their restoration. The jurisdiction of the court was always there, and with that jurisdiction it had power, under the law, to dismiss the action.

[4] As little merit is there in the attack on the form of the judgment. It was clearly a judgment of dismissal for lack of prosecution, and nothing more. In the nature of things, it could not and did not undertake to determine the merits of the action. Indeed, the court, by the judgment of dismissal, refused to consider them at all. Rosenthal v. McMann, 93 Cal. 509, 29 Pac. 121; Pyle v. Piercy, 122 Cal. 384, 55 Pac. 141.

[5] Nor is the failure of the plaintiff to restore the records and set the cause for trial in any wise excused by the circumstance, upon which reliance is placed, that Judge Hebbard, who had formerly tried the case, was ill and unable to attend to his duties. Judge Hebbard was but one of the twelve judges of the superior court. The application could and should have been made to the presiding justice to reassign the cause, and the application to restore the records could have been made at any time, and before any judge.

The order appealed from is therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

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162 Cal. 136

DOW v. SUNSET TELEPHONE & TELEGRAPH CO. et al. (S. F. 5,641.)

(Supreme Court of California. Jan. 31, 1912. Rehearing Denied March 1, 1912.)

1. Contribution (§ 5*)—Joint Wrongdoers—Statutes.

Code Civ. Proc. § 709, providing that when several persons are liable to execution, and more than a due proportion of the judgment is satisfied from the property of one of them, the person so paying may compel contribution from the others, etc., merely fixes a rule of procedure, and does not allow contribution between joint tort-feasors.

[Ed. Note.—For other cases, see Contribution, Cent. Dig. §§ 6-9; Dec. Dig. § 5.*]

2. Contribution (§ 5*)—Joint Wrongdoers.

Where a telephone company strung its wires too close to those of an electric light company, and the telephone wire sagged so that it came in contact with an uninsulated wire of the light company, and that company, though knowing of the danger, made no effort to correct it, both the light company and the telephone company were joint wrongdoers, and as such there was no right of contribution between them.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Contribution, Cent. Dig. §§ 6–9; Dec. Dig. § 5.*]

Department 2. Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by George W. Dow against the Sunset Telephone & Telegraph Company and the Oakland Gas, Light & Heat Company. There was a judgment for plaintiff against both defendants, which was wholly satisfied by the defendant light company, and from an order overruling its motion to direct execution against the telephone company that defendant appeals. Affirmed.

John J. McDonald, Samuel Rosenheim, and Bernard Silverstein (Garret W. McEnerney and Wm. B. Bosley, of counsel), for appellant. Pillsbury, Madison & Sutro, for respondent.

MELVIN, J. On a former appeal in this case a judgment against both defendants was sustained. Dow v. Sunset Telephone & Telegraph Co., a Corporation, and Oakland Gas, Light & Heat Co., a Corporation, 157 Cal. 182, 106 Pac. 587. Plaintiff thereafter collected the entire judgment from the Oakland Gas, Light & Heat Company. That corporation, pursuant to the provisions of section 709 of the Code of Civil Procedure, filed with the county clerk of Alameda county a notice of payment of the judgment, with instructions that he make an entry of its claim for one-half of the amount of said judgment and costs against the Sunset Telephone & Telegraph Company. Subsequently a motion was made for an order directing the issuance of execution against the said telephone company for the amount claimed, and this appeal is prosecuted by the Oakland Gas, Light & Heat Company from an order denying said motion.

[1] The question, and the only question, presented by this appeal is this: Do the facts of this case place it within an exception to the general rule that there can be no enforced contribution from one of two joint tort-feasors to the other after the latter has been compelled to satisfy the judgment? There is no question with reference to the scope of section 709 of the Code of Civil Procedure, for it has been held by this court that a rule of procedure, and not a maxim of substantive law, is announced by that statute. It simply provides a convenient method of enforcing contribution by a judgment debtor who has paid a judgment as against a codefendant or codefendants liable for a proportion of the debt. It does not enlarge the general rule against contribution by joint tort-feasors. Forsythe v. Los Angeles Ry. Co., 149 Cal. 572, 87 Pac. 24.

[2] Appellant contends and respondent concedes that in many jurisdictions the general rule regarding contribution among joint tort-feasors after payment of a judgment by one of them is subject to numerous exceptions. We need not, however, review the many interesting cases illustrating these exceptions which are cited and discussed in the briefs, because we think the law is settled in California regarding cases like the one at bar.

Plaintiff, Dow, was an employé of the telephone company defendant. He was sent to investigate some trouble with one of the telephone wires, and was assured by his superior that the wire was not "hot"; that is, not supercharged with electricity. While making an investigation, however, he was seriously injured by an electric shock received from one of the telephone wires which by the joint negligence of both defendant corporations had been permitted to come in contact with an electric light wire heavily charged with electricity. The telephone company had been, it is true, the original wrongdoer by stringing its wire in too close proximity to that of the other corporation, but, after dangerous contact had been caused by the sagging of the telephone wire upon the improperly insulated wire of the electric light company in such a way as to produce an occasional or "bouncing" contact, a servant of the latter company discovered the danger and reported it to his superior, but no steps were taken either to change the position of the electric light company's wire or to notify the telephone company of existing conditions. Both companies were liable, but appellant insists that it was only passively guilty of a tort, and that, therefore, it comes within an exception to the general rule above stated. With this view we cannot agree. It was the separate duty of each to take thorough precautions. Any accident due to neglect of such duty made the corporations jointly liable. As was said by the court in Fowden v. Pacific Coast Steamship Co., 149 Cal. 157, 86 Pac. 180, a case in which judgment had been rendered against two joint tort-feasors: "When we consider the nature of the liability of two or more persons jointly engaged in the commission of a tort, it is apparent that any such wrongdoer cannot at any stage of the proceedings insist that any or all of his associates in the act shall bear with him the burden of defending against the claim of the injured party or of compensating him for the injury. There is no right of contribution among them. They are all jointly and severally liable, as the injured party may elect. The injured party may sue all or any of them jointly, or each separately, or, having secured a joint judgment against all, enforce such judgment by execution against one only, the only limitation being that he can have but one satisfaction for the injury that he has received.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Each of the joint tort-feasors being liable for all the damage, without regard to their different degrees of culpability, when his cause of action is satisfied as to one, it is satisfied as to all."

Forsythe v. Los Angeles Ry. Co., supra, is also authority for the doctrine that, as between two tort-feasors, there can be no enforced contribution. In that case the evidence showed that one Forsythe, a passenger on an electric car, received the injuries from which he afterwards died by reason of a collision between the car and a wagon belonging to the Los Angeles Hay Storage Company. The administratrix of Forsythe's estate sued the railway company and the owner of the wagon. Judgment was rendered in her favor against the railway company, but judgment against her for costs was given in favor of the Hay Storage Company. From this judgment plaintiff and the railway company both appealed. Mr. Justice McFarland, who wrote the opinion of this department (and we may say parenthetically that hearing in bank was denied), used this language: "This appellant further contends that, even if the judgment against it could be considered as right, still the court erred in not also rendering judgment against the other defendant, the storage company, because, as it claimed, the evidence showed that the said other defendant was also guilty of negligence which contributed to the injury. But the appellant is not a party aggrieved by the refusal of the court to give judgment against the storage company, even if such refusal could be considered erroneous as against plaintiff. It is beyond doubt the well-established general rule that there is no right of contribution between joint tort-feasors."

The above-cited cases are in their facts sufficiently analogous to the one at bar to make them binding precedents. Nor are the expressions of the rule with reference to joint tort-feasors contained in the opinions in those cases mere dicta, as appellant would have us find. It is true that in the Forsythe Case the court does construe section 709 of the Code of Civil Procedure as not being there applicable because that statute relates in terms only to cases in which judgment has been rendered, but, before discussing section 709 of the Code of Civil Procedure at all, the opinion asserts the law to be that there is no right of contribution between joint tort-feasors in a case like that, and the declaration was absolutely basic and necessary to the conclusion reached by the court in the determination of the vital question then before it, namely, was the judgment in its essence of no avail unless granted against all who proximately contributed to the injuries which caused Forsythe's death. In the Fowden Case this court decided that the general rule with reference to joint tort-feasors applied when a new trial had been granted to one of them. It was not a conclusion upon a collateral matter—not a dictum, but a necessary element in the decision of the case on appeal. If the opposite rule had been declared, the cause necessarily would have been decided the other way.

The law being thus settled in California, we need not examine the decisions in other states, wherein the general rule which we have been discussing is given many shades of variation and exception.

From the foregoing, it follows that the order denying execution is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

162 Cal. 124

BRIGGS v. CRAWFORD. (L. A. 2,734.)

(Supreme Court of California. Jan. 30, 1912. Rehearing Denied Feb. 29, 1912.)

1. MORTGAGES (§ 372*)—FORECLOSURE—PURCHASER.

One purchasing property under foreclosure sale becomes the owner of the record title, and succeeds to all the rights of the mortgagor.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1102; Dec. Dig. § 372.*]

2. MORTGAGES (§ 256*)—ASSIGNMENT—RIGHTS OF ASSIGNEE.

The mortgagor may set up any defense, including failure of consideration, against an assignee of the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 678; Dec. Dig. § 256.*]

3. MORTGAGES (§ 256*)—ASSIGNMENT—RIGHTS OF ASSIGNEE.

Where a mortgage was given in consideration of a verbal agreement to construct a building upon the mortgaged premises, a breach of such agreement constituting a failure of consideration may be set up against one to whom the mortgage is assigned.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 678; Dec. Dig. § 256.*]

4. FRAUDS, STATUTE OF (§ 129*)—AGREEMENTS RELATING TO LAND—PART PERFORMANCE.

The excavation of a cellar upon land on which a party verbally agreed to construct a dwelling is sufficient part performance to take the contract out of the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 287–292; Dec. Dig. § 129.*]

5. MORTGAGES (§ 257*) — ASSIGNMENT — KNOWLEDGE.

Where a purchaser of land, to defraud the seller, executed a mortgage to one of his employés without consideration, and this mortgage was later assigned to the purchaser and by him assigned to his attorney, the attorney was charged with constructive knowledge of its invalidity.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 684; Dec. Dig. § 257.*]

6. PLEADING (§ 9*) — CONCLUSIONS FROM FACTS ALLEGED.

Where facts of which an assignee of a mortgage was charged with notice were alleged in a complaint to set aside the mortgage, notice need not be alleged.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 29; Dec. Dig. § 9.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Sidney L. Briggs against Hugh J. Crawford. From a judgment for defendant, and an order denying his motion to set it aside, plaintiff appeals. Reversed and remanded, with directions.

Arthur L. Hawes, E. A. Meserve, and John D. Pope, for appellant. D. K. Trask and George P. Adams, for respondent.

MELVIN, J. The plaintiff prosecutes this appeal from the judgment and from an order denying his motion to set aside the judgment as not supported by the findings of fact. According to the allegations of the complaint, the Briggs Real Estate Company, a corporation, held title and possession of a lot of land in Los Angeles for owners who are named in the pleading. It is also alleged that on December 1, 1908, the Briggs Real Estate Company entered into an agreement for the sale of this property to the Jones & Ryder Land Company, a corporation, by the terms of which the notes of the latter corporation for $2,500, secured by a deed of trust to the Title Insurance & Trust Company, were to be taken in payment for the land; that as part of the consideration for the sale the Jones & Ryder Land Company agreed to cause to be constructed on the land a residence building at a cost of not less than $3,500, of which the sum of $3,000 was to be borrowed by the Jones & Ryder Land Company and secured by a mortgage on the property, the lien of said mortgage to be superior to the rights evidenced by the deed of trust; that, in pursuance of said agreement, the Briggs Real Estate Company on December 1, 1908, executed its deed to the Jones & Ryder Land Company, and received the promissory notes of the latter corporation for $2,500, secured as agreed by a deed of trust; that at or about the same time the Jones & Ryder Land Company executed its mortgage on the property for $3,000 to one R. D. Edwards, one of its employés, representing to the Briggs Real Estate Company that it had contracted with Edwards for a loan of $3,000 to be actually used in building the house on the lot in question; that L. E. Jones at all times acted in the transactions for the Jones & Ryder Land Company, and that both that corporation and Edwards were under his control; that the note and mortgage executed to Edwards were without consideration, and made fraudulently, for the purpose of inducing the Briggs Land Company to believe that the agreement with reference to the construction of a house on the land was being carried out; that on December 8, 1908, in pursuance of the fraudulent scheme, L. E. Jones caused R. D. Edwards to execute and deliver to him, without consideration, an assignment of the mortgage and notes; that the very slightest improvements had been placed on the property for which, if the court should find them of any value, the plaintiff offered to pay; that plaintiff was also prepared to surrender the notes executed by the Jones & Ryder Land Company, secured by the deed of trust, for any balance unpaid; that plaintiff had purchased the property about May 1, 1909, for $2,000 upon its sale under the provisions of the deed of trust; that he held title for the original owners; and that on April 1, 1909, L. E. Jones assigned the note and mortgage which he had received from Edwards to defendant Crawford, who paid no consideration therefor. The complaint also contains this language: "That said defendant at the time of said assignment to him had knowledge of the facts hereinbefore alleged." The prayer is for cancellation of the mortgage and for general equitable relief.

The answer traversed all of the material averments of the complaint. Upon the trial the court found the agreement for the sale to have been substantially as alleged in the complaint, except that the execution of the mortgage to Edwards and its assignment to Jones were both without fraud and with the knowledge of the Briggs Real Estate Company; the understanding having been that Jones was to raise the necessary $3,000 on said mortgage. There was a finding that the construction of a building on the property was commenced in good faith and with the approval of the Briggs Real Estate Company, but upon this particular lot only the cellar was excavated before the work was abandoned, and the value of the property was thereby increased $25. There are findings that no money was ever raised on the mortgage for the construction of the building; that the mortgage to Edwards and the assignment by him to Jones were without consideration; that prior to February 16, 1909, the defendant had rendered to L. E. Jones and the Jones & Ryder Land Company valuable services as an attorney at law which were reasonably worth $1,000, and that he had received cash payments on account amounting to $250; and that the assignment to him of the note and mortgage aforesaid were in consideration of this indebtedness. There are also the following findings: "At the time of the assignment of said note and mortgage to the defendant Crawford, and ever since on or about the 15th day of February, 1909, the said L. E. Jones had absented himself from the said county of Los Angeles, leaving no known address, and leaving no information from which he could be located. This fact last stated was known to the defendant, Crawford, when he received the said assignment of said note and mortgage, and said assignment was made by and through Harriet C. Jones as attorney in fact for said L. E. Jones. On said 1st day of April, 1909, the said L. E. Jones by Harriet C. Jones, his attorney in fact, as aforesaid, in addition to executing the assignment of said note and mortgage and indorsing said note to said defendant, also, at the same time, assigned and indorsed another $3,000 note and mortgage held under like conditions to the said Hugh J. Crawford, said two assignments and indorsements together constituting the satisfaction and payment of said indebtedness then existing of said L. E. Jones to said Hugh J. Crawford. At the time of receiving said assignments the said Hugh J. Crawford had no knowledge of the agreement above mentioned between the Jones & Ryder Land Company and the Briggs Real Estate Company, and had no knowledge that no money whatsoever had been loaned by R. D. Edwards to the Jones & Ryder Land Company, or that no money whatsoever had been borrowed on said note and mortgage, or that, in fact, no indebtedness existed thereon, and had no actual knowledge of the transactions between the Briggs Real Estate Company and the Jones & Ryder Land Company." As conclusions of law the court found that the mortgage of defendant was a valid lien on the property superior to the rights and claims of plaintiff, and that plaintiff should take nothing by his complaint.

Appellant's theory upon which he bases his argument herein is that, by purchasing the interest in the property at the sale under the trust deed, he became entitled to set up any defense to the mortgage which might have been urged by the Jones & Ryder Land Company; that want of consideration and failure of consideration are good defenses in an action to foreclose a mortgage; that such defenses are available by a mortgagor or by his successor in title; that, whether Crawford brings an action to foreclose the mortgage or Briggs seeks to have the cloud of the apparent lien removed, the validity and enforceability of the mortgage in the hands of Crawford is the decisive matter in the case; that a note and mortgage simultaneously executed, the note referring to the mortgage, constitute one transaction, and are to be taken together; that such note and mortgage are nonnegotiable, and, when assigned, are subject to all defenses that might be made if there were no assignment; that, therefore, the defense of failure of consideration may be urged by him as against Crawford; and that the circumstances under which defendant obtained the note and mortgage were sufficient to place him on inquiry, and to emphasize his position as an assignee with notice of the equities.

Respondent insists that this case comes within the rule of Lawrence v. Gayetty, 78 Cal. 126, 20 Pac. 382, 12 Am. St. Rep. 29, but, as appellant indicates in his brief, there was in that case no question of foreclosure of a mortgage. It was there held that where an unqualified conveyance is made upon consideration of a promise to perform certain work and place certain improvements upon the property conveyed, and to pay the purchase price in the future, there can be no cancellation of the deeds unless fraud be established. Respondent concedes that a note secured by a mortgage is a nonnegotiable instrument, within the law merchant, under the decisions of this court, but insists that there are many instances, of which the present case is an example, where defenses available between parties to the instrument may not be sustained against an assignee who has purchased for a valuable consideration. In this behalf he cites such cases as Mohr v. Byrne, 135 Cal. 88, 67 Pac. 11, and others holding that the purchaser of a chose in action takes in subordination to the existing equities of the parties to the original contract, but not with implied knowledge of the claims of third parties of which the purchaser has no actual notice.

[1, 2] But appellant contends that, by becoming the owner of the record title by his purchase at the sale under the deed of trust, he became not a "third party" as that term is used in the authorities cited, but a successor in interest of the mortgagor, entitled to assert all of the latter's equities against the mortgagee or his assignee. We think this contention must be sustained. This case comes within the principles announced in Meyer v. Weber, 133 Cal. 682, 65 Pac. 1110. In that case the Webers had given a note and mortgage to the Woodbridge Canal & Irrigation Company in consideration of an agreement upon the part of the mortgagee to construct a ditch from its main canal to the land described in the mortgage. The Woodbridge Canal & Irrigation Company assigned this note and mortgage to the plaintiff, and then became insolvent. The ditch was never built. Meyer sued to foreclose, and this court held that the defense of failure of consideration was available against the assignee. After discussing the nonnegotiability of the instrument, the court said: "The assignment and transfer of the note and mortgage in question, therefore, was without prejudice to any set-off or other defense existing in favor of the defendants Weber, the same as though there had been no assignment, and the action had been brought by the company to whom they were given. Civ. Code, § 1459; Code Civ. Proc. § 638. As the findings of the court show an utter failure of consideration as between the original parties, judgment properly followed in favor of the defendants." See, also, Higgins v. McDonald, 17 Cal. 290. If Edwards, the original mortgagee, had sued to foreclose the mortgage as against the Jones & Ryder Land Company, the original mortgagor, the partial failure of consideration would have been available as a defense, and it is equally potent in this action as between the successors of the original mortgagor and mortgagee. Anglo-Californian Bank v. Field, 154 Cal. 516, 98 Pac. 267. The rule is thus

stated in 27 Cyc. at page 1324: "One about to take an assignment of a mortgage is bound in his own interest to inquire of the mortgagor as to the validity of the instrument and of the transaction on which it was founded and as to the amount due, and whether the mortgagor has any defenses or set-offs to interpose against it. If he neglects to do this, he takes the mortgage subject to all infirmities or objections which could have been set up against it in the hands of the original mortgagee, being charged with knowledge of all facts which such an inquiry would have disclosed."

[3] We do not think that, because the agreement to build was a verbal one, the force of the rule charging the assignee with knowledge of the equities is lessened. There is no provision of law that has been called to our attention requiring such a contract to be in writing. Where a consideration for a mortgage fails in whole or in part, that fact is the essential matter to be established by the defendant in an action to foreclose or by the plaintiff in a cause like the one at bar. Whether the failure is due to breach of a written or a verbal agreement is immaterial.

[4] Even if, as respondent asserts, the agreement to build the house were one required to be in writing, the court found that it was partially executed and in good faith, by the excavation of the cellar. This would take the transaction out of the statute of frauds.

[5] We are of the opinion that even if, as the court found, Crawford took the mortgage without actual knowledge of the partial failure of consideration as between the original parties, he was charged with notice of the equities in favor of plaintiff.

[6] Nor was it necessary that notice be alleged in the complaint, as the facts were fully set forth showing the want of consideration for the original mortgage. In view of this conclusion, it will be unnecessary to review appellant's argument based on the peculiar circumstances under which defendant took the assignment of this and another mortgage from his long absent client, by the latter's attorney in fact, for notes, supported by mortgages, amounting in all to about ten times the just amount of his claim as found by the court. Nor need we consider the respondent's contention that an order denying a motion to set aside a judgment is not appealable.

The judgment is reversed, with instructions to the lower court to enter a judgment to the effect that, upon payment by plaintiff of $25 into court for the benefit of the defendant, the lien of the latter's mortgage be decreed to be satisfied.

We concur: LORIGAN, J.; HENSHAW, J.

(162 Cal. 164)

LOS ANGELES GAS & ELECTRIC CO. v. LOS ANGELES COUNTY.

(L. A. 2,560.)

(Supreme Court of California. Feb. 2, 1912.)

1. Taxation (§ 446*) — Assessment — Collateral Attack.

The conclusion of assessing officers as to the value of property for the purposes of taxation, when honestly arrived at, and not made in pursuance of some fixed rule, the result of which is necessarily discriminatory and inequitable, cannot be attacked collaterally in the courts.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 785; Dec. Dig. § 446.*]

2. Taxation (§ 446*)—Assessment—Inequality—Relief.

A taxpayer may collaterally attack an assessment made fraudulently and corruptly, with the intent of discriminating against him, where such discrimination results from inequality of valuation, the same as from any other cause.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 785; Dec. Dig. § 446.*]

3. Taxation (§ 446*) — Assessment — Collateral Attack.

Where an assessment for taxation is fraudulent, but the assessment has been reviewed by the board of supervisors, acting as a board of equalization, and it has fixed the same value as the assessor, the assessment cannot be attacked for fraud without showing that the board of supervisors participated in the fraud, since its review of the assessment is judicial, and its decision is an independent and conclusive judgment, taking the place of that of the assessor; and by fixing the valuation at the same amount as the assessor it renders the fraud of the assessor immaterial.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 785; Dec. Dig. § 446.*]

4. Taxation (§ 446*)—Assessment—Review—Conclusiveness.

The fact that an assessor intentionally uses a different method in reaching the value of one person's property from that used in all other cases involving similar property, where the only result of such action is an overvaluation of the property of that person, does not change the rule that the review by the board of equalization is conclusive, in the absence of fraud, since the question for the board is a pure question of fact whether the property had been overvalued.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 446.*]

5. Taxation (§ 543*) — Recovery of Tax Paid—Evidence—Sufficiency.

In an action to recover back a tax, claimed to have been illegally assessed, evidence *held* insufficient to show that, on the hearing before the board of equalization, by reason of the noise and confusion in the manner of conducting the proceedings, the members of the board could not hear and understand the testimony of the witnesses.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1013; Dec. Dig. § 543.*]

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by the Los Angeles Gas & Electric Company against the County of Los Angeles. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

J. D. Fredericks, Dist. Atty., and Hartley Shaw, Chief Deputy Dist. Atty., for appellant. Wm. A. Cheney and Geo. P. Adams (Le Roy M. Edwards, of counsel), for respondent.

ANGELLOTTI, J. This is an appeal from a judgment and from an order denying defendant's motion for a new trial, in an action brought by plaintiff to recover $11,728.12 state and county taxes paid by plaintiff under protest for the fiscal year 1906–07. The judgment was in favor of plaintiff for the full amount claimed.

The amount sought to be recovered was a portion of the taxes paid by plaintiff upon certain tangible assets, such as its gas pipes, meters, regulators, electric service, poles, wire, electric underground system, gas works plant, electric works plant, etc., and was the amount claimed to have been illegally collected by reason of an overvaluation of such property by the assessor of Los Angeles county. Recognizing the general rule that no remedy can be had in the courts for mistakes honestly made in the valuation of property for purposes of taxation by the assessing officers and tribunals appointed by law for the review of assessments, such as our county boards of equalization, the theory of plaintiff's complaint was that the excessive valuations of its property were the result of an arbitrary plan adopted by the assessor for the valuation thereof, varying from that employed by him with reference to the property of other taxpayers, and resulting in placing upon its property an unequal burden of taxation, which plan was willfully and designedly adopted by him for the purpose of discriminating against plaintiff. The result was, it is claimed, not that the property was assessed for a sum exceeding its cash value, but that it was assessed at a greater proportion of such value than any other property, and especially the property of its two competitors in business, thus bringing about inequality of taxation, and denying plaintiff the equal protection of the laws. While the trial court found that the allegations of the complaint to the effect that the assessor acted with corrupt or malicious motives or fraudulently were untrue, it did find that "the extreme disparity between the valuation of plaintiff's property and other property of substantially the same character and value * * * all arose from a design on the part of the assessor to discriminate against plaintiff, and the adoption and use by said assessor of an intentionally radical different method in arriving at the value of plaintiff's property from that used in all other cases involving property of the same character and similarly situated, and from an entire failure on the part of the assessor to make any examination whatever of any of the properties of plaintiff so assessed, and that by reason of said intentional discrimination and the use of said radically different method plaintiff was inevitably assessed upon a very much larger proportion of its properties' value than were other taxpayers and property owners in the county of Los Angeles, and than were its competitors in business in said county."

There was no attempt to state in the complaint or to prove on the trial anything in the nature of willful fraud on the part of the county board of equalization, to which application was made by plaintiff for a reduction of its assessment, and by which such application, so far as the particular property here involved is concerned, was denied. The only allegation in this behalf was as follows: "Plaintiff alleges that so many other protests and petitions for reductions of assessments were filed after plaintiff's said protest and petition (alleged to have been filed July 13, 1906) were filed, heard, and submitted, and the time of the said board of supervisors in which to hear and pass upon the same was so short, that the said board of supervisors did not have time in which to consider in detail said protest of plaintiff, and by reason thereof refused to reduce or alter said assessment values in any manner whatsoever." It is possible that after judgment this allegation might properly be construed in support of the judgment as alleging that the board refused to reduce or even consider the assessment, solely because it did not have time to give it any consideration; but there was no evidence in the record tending to support any such conclusion. The trial court found that "said board did not take time in which to consider in detail said protest of plaintiff, and said protest was not fully heard or considered by said board, and plaintiff was not given time and opportunity to introduce fully all evidence offered by it in support of its protest, and said board did not act with fairness and justice in the matter, and failed and refused to give plaintiff's application careful and proper consideration, and the action of said board in passing upon said protest and claim of plaintiff, and refusing to reduce or alter said assessment values in any manner whatsoever, was merely perfunctory in character and hardly more than a mere form, and did not constitute a hearing of plaintiff's protest."

[1] It is not disputed that the conclusion of assessing officers as to the value of property for purposes of taxation, when honestly arrived at, and when not made in pursuance of some fixed rule or general system, the result of which is necessarily discriminatory and inequitable, is conclusive on the courts, however erroneous the conclusion of those officers may be. The law necessarily leaves the determination of the question of fact of value to certain officers, and when it appoints tribunals for that purpose, as in this state primarily the assessor, and, for purpose of review, the board of supervisors, acting as a county board of equalization, the

conclusion of those tribunals on such a question of fact constitutes a judgment that is not collaterally assailable in the courts. This is the universal rule, and it has been so held in this state. San Jose Gas Co. v. January, 57 Cal. 614; Henne v. Los Angeles Co., 129 Cal. 297, 61 Pac. 1081. See, also, Gray on Limitations of Taxing Power, § 1460. As put in Taylor v. Louisville, etc., R. R. Co., 88 Fed. 350, 31 C. C. A. 537, such an attack will not lie in the courts, "where the injury complained of arises only from the erroneous but honest judgment of the lawfully constituted tax tribunal."

[2] But it is likewise universally held that a taxpayer may so assail an assessment in the courts, where it was "fraudulently and corruptly made, with the intention of discriminating against him, and for the purpose of causing him to pay more than his share of the public taxes," and it has that effect, or where there is something equivalent to fraud in the making of the assessment, producing such effect. See County of Los Angeles v. Ballerino, 99 Cal. 593, 32 Pac. 581, 34 Pac. 329; Pacific, etc., Co. v. Dalton, 119 Cal. 604, 51 Pac. 1072; Oregon, etc., R. R. Co. v. Jackson Co., 38 Ore. 589, 599, 64 Pac. 307, 65 Pac. 369, and cases there cited. This is as true where the injurious effect so produced is caused by inequality of valuation as by any other cause, for, as said in Judson on Taxation, at page 608: "It is obvious that, where taxation is upon property that requires valuation, inequality of taxation is produced as surely by inequality of valuation as by inequality of the rate of tax."

[3] We are, however, satisfied that it should be held, even if we assume that there is enough in the evidence to warrant a conclusion that there was anything equivalent to fraud in the matter of the valuation of this property by the assessor, that to enable plaintiff to prevail it must be made to appear that the county board of equalization in some manner participated in the fraud when the matter came before it on application for reduction. Under our law, the county board of supervisors is a county board of equalization, invested with the power, after giving notice in such manner as it may by rule prescribe, "to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said roll, and make the assessment conform to the true value of such property in money." Pol. Code, § 3673. When completed, the assessment roll must be delivered to its clerk, who must give notice of the time at which the board will meet to equalize assessments. Pol. Code, § 3654. The board must meet on the first Monday of July in each year for equalization purposes and continue in session until such business is disposed of, but not later than the third Monday in July. Pol. Code, § 3672. No reduction can be made, except upon the verified application of the taxpayer, showing the facts upon which it is claimed the reduction should be made (Pol. Code, § 3674), and on the hearing the board must examine, on oath, the taxpayer or his agent, and may subpœna witnesses and hear and take such evidence as in its discretion it may deem proper. Pol. Code, §§ 3675, 3676. Upon such hearing, it is the duty of such board to determine the value of the property under consideration for assessment purposes upon such basis as is used in regard to other property, so as to make all the assessments as equal and fair as is practicable. In discharging these duties, the board is exercising judicial functions, and its decision as to the value of the property and the fairness of the assessment, so far as amount is concerned, constitutes an independent and conclusive judgment of the tribunal created by law for the determination of that question, which abrogates and takes the place of the judgment of the assessor upon that question. Where the only alleged effect of the fraud of the assessor is excessive valuation of the property of the taxpayer for assessment purposes, the conclusion of the board of equalization that the fair value for such purposes is the amount fixed by the assessor would appear to render the fraud of that officer immaterial; for it is in no way injurious. According to the conclusion of the board, the property is assessed at the same value proportionately as all the other property in the county. Unless that determination can be avoided, it is conclusive on the question of fairness of the valuation; hence on the question of injury. Under the authorities, it cannot be avoided, unless the board has proceeded "arbitrarily and in willful disregard of the law intended for their guidance and control, with the evident purpose of imposing unequal burdens upon certain of the taxpayers" (Oregon, etc., R. R. Co. v. Jackson Co., supra), or unless there be something equivalent to fraud in the action of the board. Mere errors in honest judgment as to the value of the property will not obviate the binding effect of the conclusion of the board. Such a board is, "in the absence of fraud or malicious abuse of its powers, * * * the sole judge of questions of fact and of the values of property." La Grange, etc., Co. v. Carter, 142 Cal. 565, 76 Pac. 243.

The precise question under discussion has never been determined by this court, but what we have said not only appears to be true on principle, but is supported by ample authority. In State v. C. P. R. R. Co., 21 Nev. 178, 26 Pac. 225, 1109, an action to recover taxes, it was said that, while fraud in the assessment is a good defense, it clearly must be such fraud as works some damage; that a fraudulent overvaluation of property, attempted by the assessor, can do no harm, if corrected by the board of equalization; and that, "if the board bring their honest judgment to bear upon the matter, and determine that the property has not been overvalued, this determination is conclusive that the assessor's attempted fraud has done the defendant no damage." In Southern Oregon Co. v. Coos Co., 39 Or. 185, 64 Pac. 646, the complaint was similar to the complaint made here, namely, fraudulent discrimination on the part of the assessor resulting in an overvaluation of plaintiff's property as compared with the valuation put upon other property of equal value and similarly situated. The court said that, "when the assessment is attacked because arbitrarily and fraudulently made, the charge must go further than to inculpate the assessor," and "that it must likewise involve the board of equalization and the county court, sitting as an equalizing body, as the judgment of the latter is paramount." In Burton, etc., Co. v. Traeger, 187 Ill. 9, 58 N. E. 418, where the board of review had full power to correct the assessment, if unjust in any respect, but, after hearing, had allowed the assessor's valuation to stand, it was held, no fraud being charged on the part of the board, that, even if there was fraudulent conduct on the part of the assessor in making the valuation, "such * * * fraud is purged by the hearing, review, and action of the board of review." See, also, California, etc., Co. v. Los Angeles, 10 Cal. App. 185, 191, 101 Pac. 547; Crawford v. Polk Co., 112 Iowa, 118, 83 N. W. 825; volume 27, Ency. of Law, p. 728; Cooley on Taxation (3d Ed.) p. 1459, note. No case cited is opposed to our views on this point. The question was not considered in either County of Los Angeles v. Ballerino, supra, or Pacific Postal Co. v. Dalton, supra, and apparently could not have been involved in the latter case.

[4] Learned counsel for plaintiff appear to concede that the judgment of the board of equalization, honestly given, "is conclusive on value, a matter of fact," but say that this is "not a case of excessive valuation, * * * but a plain case of the intentional use, for the purpose of discrimination, of a different method of assessment." But, in view of the fact that the only alleged effect of the assessor's action was an overvaluation of plaintiff's property as compared with the valuation of other property, the question was simply whether there was such an overvaluation of plaintiff's property—a pure question of fact for the board of equalization to determine. As said in Crawford v. Polk Co., supra: "An error in overvaluation, * * * if fraudulent, differs from others [errors] only with respect to the motive of the assessor. The same remedy is available." The case just cited is also authority for the proposition that in such a case fraud on the part of the assessor does not make the assessment void; but that the taxpayer must pursue the method pointed out by statute for any review thereof. The cases of Columbia Savings Bank v. Los Angeles Co., 137 Cal. 467, 70 Pac. 308, and Board of Commissioners v. Wilson, 15 Colo. 90, 24 Pac. 563, are not at all in point, as is shown by the quotations therefrom contained in plaintiff's brief. In neither case was there any question of valuation of property concerned. In one the assessment was upon United States bonds, which could not be assessed at all, and was absolutely void, and in the other the questions raised were regarding the construction and validity of statutes and the legality of a tax imposed, none of which questions could be conclusively determined by the board of equalization. In the Colorado case, it was said: "If the right to tax property was unquestioned, and the only questions were those of valuation and amount of tax, we might hold their [the board's] action conclusive."

We have already set forth the finding of the trial court regarding the proceedings before the board of equalization. In so far as it may be held to imply any lack of opportunity to plaintiff to fully present its case on the application for a reduction to that body, or any lack of diligence or fairness on the part of the members thereof in the hearing, consideration, and decision, or that the action of the board was hardly more than a mere form, not constituting a hearing of plaintiff's protest, we are satisfied that it must be held to be without sufficient support in the evidence. By reason of the fact that plaintiff's application was not filed until three days before the time when the board of equalization must finally adjourn, and that there were numerous other applications for reduction of assessment, the time for the consideration of plaintiff's application was necessarily short. It is also apparent that the proceedings before the board were not and could not be conducted with the same degree of order and formality that is ordinarily attained in a well-regulated court of justice. But there is no pretense that plaintiff did not introduce all the evidence that it offered, or that it was deprived of opportunity to offer all the evidence it desired, or that the members of the board did not do their best to arrive at a fair and honest decision in the matter.

[5] There is some complaint to the effect that, by reason of noise and confusion in the manner of conducting the proceedings, the members of the board could not hear and understand all that was said by the witnesses; but this claim appears to be based solely on the expressed doubt of one of the representatives of plaintiff whether they could, under the circumstances, hear all that was said. An official stenographer heard all the evidence and took it down in shorthand, and all of the members of the board who testified (four of the five members) said that they heard such evidence and considered it. It appears from the evidence that when it came to a decision the application of plaintiff for a reduction of its assessment was granted in part upon some property, but denied as to the property involved in this case. The record does not show what evidence was given before the board of

equalization as to the value of the property here involved. The finding as to the action of the board being properly attacked by specifications of insufficiency of evidence, and the statement on motion for a new trial purporting to contain all the evidence given in the lower court on all matters covered by such specifications, there is absolutely no warrant for holding that the decision of the board was not an absolutely fair and correct decision upon the evidence introduced before it—a decision to the effect that, applying the same method as was applied in the ascertainment of the value for assessment purposes of all the property in the county, the value apportioned to plaintiff's property was not excessive. We can find no warrant in the record for avoiding the decision of the board of equalization, and that being so it must be held that it is an adjudication that the valuations placed upon plaintiff's property here involved were not excessive, and that such property was not assessed at a greater proportion of its value than any other property in the county—an adjudication which is conclusive upon the courts. The conclusion we have reached renders it unnecessary to consider any other proposition discussed on this appeal.

The judgment and order denying a new trial are reversed.

We concur: LORIGAN, J.; SLOSS, J.; ALLEN, J., pro tem.; HENSHAW, J.

Justice ALLEN, of the District Court of Appeal of the Second district, participates herein, under order of the Supreme Court, in place of Justice LUCIEN SHAW, who deemed himself disqualified by reason of relationship to one of the attorneys.

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162 Cal. 161

SECOMBE v. LOUIS PHILLIPS' ESTATE et al. (L. A. 2,749.)

(Supreme Court of California. Feb. 2, 1912.)

1. TAXATION (§ 573*)—NATURE OF PROCEEDINGS—STRICT COMPLIANCE WITH STATUTE.

Notwithstanding the change in the law, whereby property delinquent for taxes is struck off, in the first instance, to the state, the doctrine that tax proceedings are in invitum, and must be in strict accord with statutory requirements, still obtains.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1141–1144; Dec. Dig. § 573.*]

2. TAXATION (§ 734*)—ASSESSMENT—SHOWING AMOUNT OF TAX.

An assessment of land, and so the tax sale based thereon, is void; there being no dollar mark or other indication on the assessment roll showing the meaning of the figures in the column for statement of amount of tax.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1470–1473; Dec. Dig. § 734.*]

Department 2. Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by A. H. Secombe against Louis Phillips' Estate, a corporation, and others. Judgment for defendants; plaintiff appeals. Affirmed.

C. A. Stice, for appellant. O. B. Carter, Carter, Kirby & Henderson, and Frank L. Perry, for respondents.

MELVIN, J. Plaintiff, who was the grantee named in certain tax deeds, sued to quiet title to the lots which were described in said deeds. Separate trials were had, and judgments given in favor of defendants John Stigers and Julia A. Ivers, quieting their titles, as against plaintiff, to the parcels claimed by them respectively. It was stipulated at the trial that plaintiff's only claim of title was under his tax deeds and that, unless said deeds were sufficient to vest title in him, John Stigers was the owner of lot 28 and the northwest 20 feet of lot 29 in block 172 of the city of Redondo Beach, as per map recorded in Book 39, p. 1 et seq., Miscellaneous Records of Los Angeles county, and Julia A. Ivers of lot 24 in block 10 of Elysian Heights, in the city of Los Angeles, as per map recorded in Book 83, p. 55, Miscellaneous Records of said county. Both defendants offered to pay, and did pay into court for plaintiff, the amount of the taxes, penalties, interest, and costs due on each piece of property at the time of its sale by the state. The plaintiff appeals from the judgments and from the orders denying his motion for a new trial.

[1] Appellant's counsel makes the general statement that tax proceedings can no longer be said to be in invitum, and that the court "as jealously guards the title of the state now as it formerly did the rights of delinquent taxpayers." In this regard, he cites Miller v. Williams, 135 Cal. 184, 67 Pac. 788, Davis v. Pacific Improvement Co., 137 Cal. 250, 70 Pac. 15, Best v. Wohlford, 144 Cal. 734, 78 Pac. 293, Fox v. Wright, 152 Cal. 60, 91 Pac. 1005, Bank of Lemoore v. Fulgham, 151 Cal. 236, 90 Pac. 936; and he insists that under the authority of these cited cases the informalities appearing in the record are but trivial, and should not by this court be held to invalidate his asserted title. A reading of any one of the cases cited, however, will demonstrate the fallacy of his conclusion that proceedings culminating in the sale of property for delinquent taxes are no longer in invitum. While it is true that the change in the law, whereby the property delinquent for taxes was struck off, in the first instance, to the state, made inapplicable some of the reasoning of the earlier cases, the doctrine that such proceedings must be in strict accord with statutory requirements has never been abandoned. When we consider, for example, that in Miller v. Williams, supra, the reason for sustaining the judgment was that the lands were sold for eight cents more than was due for taxes, and that in Fox v. Townsend, 152 Cal. 51, 91

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Pac. 1004, 1007, the assessment on one lot was held void, because a dollar mark or other sign was not used to explain the figures in that column of the assessment roll designed to show the value of the property and the amount of the taxes, the existence of the requirement of strict compliance with the statute is emphasized.

[2] Respondents urge a number of reasons in support of the court's conclusion in their favor. One of these is that the assessment on each parcel of land was void, and that the tax sales, based upon such assessments, were likewise nullities, because there was no dollar mark or other abbreviation or indication on the assessment roll showing what the figures meant which appeared in the column prepared for the statement of the amount of the tax on each lot. An examination of the transcript shows that this objection to the sufficiency of the deeds is well taken. This brings the case at bar within the rule of such authorities as Fox v. Townsend, supra, and therefore justifies the decrees entered herein.

Numerous other arguments are made by respondents in support of the judgments; but as appellant has filed no reply brief, and as the one reason above given seems to be sufficient, it will not be necessary to review the other points made by respondents' counsel in their brief.

It follows that the judgments and orders must be, and they are hereby, affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

162 Cal. 94

MARDIS v. McCARTHY, Mayor, et al.

(S. F. 6090.)

(Supreme Court of California. Jan. 29, 1912.)

1. Constitutional Law (§ 63*)—Division of Governmental Powers—Delegation of Legislative Power.

If, by the approval by the electors, pursuant to Const. art. 11, § 8, of a freeholder's charter or an amendment thereto, vesting in a city authority to legislate concerning local matters, the Legislature delegates legislative power, such delegation is not objectionable, being specially authorized by such provision of the Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 108–114; Dec. Dig. § 63.*]

2. Municipal Corporations (§ 300*)—Public Improvements — Procedure—Validity of Ordinance.

If a freeholder's charter, adopted pursuant to the Constitution, may define the procedure for tunnel or street improvements, it may authorize the board of supervisors of the municipality to enact the mode of procedure by ordinance; the ordinance having the same binding effect as if its terms had been incorporated in the charter.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 300.*]

3. Municipal Corporations (§ 450*)—Public Improvements — "Assessment" — Districts.

St. 1911, p. 1686, amending the charter of the city and county of San Francisco, adds to article 6 a chapter numbered 8, which by section 1 empowers the board of supervisors to order the construction of a tunnel and levy the expenses thereof upon private property "in the manner and under and subject to the proceedings, powers, * * * and limitations of chapter 2, of this article, providing for street work and street improvements." Chapter 2 of the charter, by section 5 (St. 1899, p. 295), authorized the board of supervisors to define the districts benefited by a proposed improvement and to be assessed to pay its expense, and St. 1911, p. 1691, added to chapter 2, art. 6, of the charter, a section numbered 33, which provides the methods of procedure for constructing tunnels and "for the assessment of expenses thereof * * * on private property." *Held*, that the charter provisions authorized the assessment of the cost of construction of a tunnel upon a special district; the word "assessment," as here involved, meaning a burden imposed upon property to pay the cost of the improvement made with reference to the supposed benefit.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 450.*

For other definitions, see Words and Phrases, vol. 1, pp. 549–555; vol. 8, p. 7583.]

4. Municipal Corporations (§ 485*)—Public Improvements—Assessments—Certificates—Validity.

An ordinance, enacted by the city and county of San Francisco, providing the procedure for the construction of tunnels, etc., and authorizing the issuance of certificates by the auditor bearing interest at the rate determined by the board of supervisors, payable out of the assessments levied against the property within the assessment district, was not objectionable, as authorizing the city to borrow money for the work, the certificates not being obligations of the city, and was authorized by St. 1911, p. 1691, adding to Charter of City and County of San Francisco, art. 6, c. 2, a section numbered 33, permitting the board of supervisors to provide for the payment of assessments, in annual installments, interest on the certificates, being properly chargeable to the property owners as incidental expenses in providing a fund for doing the work.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1140–1144; Dec. Dig. § 485.*]

5. Municipal Corporations (§ 269*)—Public Improvements — Authority to Construct — Charter Provisions — Construction.

The charter of the city and county of San Francisco, as amended by St. 1911, p. 1686, adding to article 6 a chapter numbered 8, empowering (section 1) the board of supervisors to order "the construction" of any tunnel, etc., in or under a street, includes the incidental power to lay and pave sidewalks necessary to make the tunnel available for public use.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 718–724; Dec. Dig. § 269.*]

6. Municipal Corporations (§ 413*)—Street Improvements—Expenses.

Even if the construction of a tunnel "in or under" a street be an improvement of the street, Charter of City and County of San Francisco (as amended by St. 1911, p. 1686) art. 6, c. 8, § 1, authorizing the board of supervisors to order the construction of tunnels

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"in, on, or under any accepted or unaccepted street * * * and levy the cost and expenses thereof upon private property," would prevent the application of article 6, c. 2, § 23, of the charter, requiring accepted streets to be improved by the city and county, so that the cost of such tunnel improvements in an accepted street could be levied upon the property benefited.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 413.*]

7. MUNICIPAL CORPORATIONS (§ 269*)—PUBLIC IMPROVEMENTS—IMPROVEMENTS AUTHORIZED.

The power to order "the construction" of a tunnel in any street, etc., given to the board of supervisors by the charter of the city and county of San Francisco, as amended by St. 1911, p. 1686, adding to article 6, c. 8, a section numbered 1, authorized the changing of grades of a street necessitated by the tunnel.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 269.*]

8. MUNICIPAL CORPORATIONS (§ 514*)—PUBLIC IMPROVEMENTS—SUPPLEMENTAL ASSESSMENTS—PROPRIETY.

Where an ordinance authorizing the construction of a street tunnel provided that the "benefits estimated shall not exceed the total of such estimated costs, damages, and expenses," and that the assessments shall be "in accordance with the benefits," a provision authorizing supplemental assessments was not invalid on the ground that an additional assessment could not be made which would exceed the benefits determined when the original assessment was made.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 514.*]

9. MUNICIPAL CORPORATIONS (§ 514*)—PUBLIC IMPROVEMENTS—ASSESSMENTS—SUPPLEMENTAL ASSESSMENTS—TIME OF OBJECTION.

An objection to the provision of an ordinance for a supplemental assessment for street tunnel improvements is premature if made before an attempt to levy such additional assessments.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 514.*]

10. MUNICIPAL CORPORATIONS (§ 304*)—PUBLIC IMPROVEMENTS.

A provision of an ordinance providing for the construction of a tunnel, covering "the incidental expenses" of the work, is not objectionable because the items constituting such expenses are not specifically defined by the ordinance, it giving full opportunity for objections and a hearing thereon if improper items are included in the report upon which the assessment is based.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 811–816; Dec. Dig. § 304.*]

11. MUNICIPAL CORPORATIONS (§ 450*)—PUBLIC IMPROVEMENTS—ASSESSMENT DISTRICTS.

Where a street tunnel, though a single work, united separate districts, each of which was benefited thereby, an assessment upon the lands of both districts was proper.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 450.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by B. A. Mardis against P. H. McCarthy, Mayor of the City and County of San Francisco, and others. From a judgment for defendants on demurrer to the complaint, plaintiff appeals. Affirmed.

Hillyer, Stringham & O'Brien, for appellant. Percy V. Long, for respondents.

SLOSS, J. The plaintiff appeals from a judgment entered in favor of the defendants upon an order sustaining their demurrer to his complaint. The action was instituted to obtain an injunction restraining the mayor, the supervisors, and other officers of the city and county of San Francisco, from proceeding under a certain resolution, adopted by the board of supervisors, declaring the intention of said board to order the construction of a tunnel in or under Stockton street from the northerly line of Sutter street to the southerly line of Sacramento street.

A prior attempt to authorize the construction of such a tunnel, and the assessment of the cost thereof upon a special assessment district was before this court in Gassner v. McCarthy, 116 Pac. 73, where it was held that the charter of the city and county, as it then read, did not authorize the levy of a special assessment to pay the cost of constructing a tunnel. The proceedings here involved were, however, taken under amendments which have been added to the charter since the institution of the proceedings involved in the Gassner Case, and the matters there decided throw no light upon the questions now before us.

The charter amendments in question were approved by the Legislature on February 7, 1911. They consisted in the addition to article 6 of said charter of a new chapter to be known as chapter 8 (Stats. 1911, p. 1686), and of the addition to chapter 2, art. 6, of a section to be known as section 33 (Stats. 1911, p. 1691). Chapter 8 so added to article 6 bears the title "Tunnels, Subways and Viaducts," and is divided into four sections. Section 1 reads as follows: "The board of supervisors are hereby empowered to order the construction of any tunnel, subway or viaduct, in, on, under, or over, any accepted or unaccepted open public street, avenue, lane, alley, place or court, within the city and county, or any other land of the city and county, or in, on, under, or over, any land in which and where the city and county may then have an easement or right of way therefor, and to levy the cost and expenses thereof upon private property, in the manner and under and subject to the proceedings, powers, restrictions and limitations in chapter 2 and chapter 7 of this article provided for street work and street improvement."

Section 2 authorizes the board of supervisors to acquire by purchase or condemnation any land, easement, or property necessary and convenient for any purpose mentioned in section 1, and to levy the damages, costs, and expenses thereof upon private property "in the manner and under and subject to the proceedings, powers, restrictions and limitations in chapter 3 and chapter 7 of this article providing for the opening and extending, straightening or closing up in whole or in part of any street, avenue, lane, alley, court or place." The reference in sections 1 and 2 to chapter 7 is meaningless, since article 6 contains no such chapter.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Section 3 reads: "The board of supervisors may, in its discretion, order that not more than one-half of the whole of the costs and expenses of any of the work or acquisitions in sections 1 and 2 in this chapter mentioned, or the damages resulting therefrom, be paid out of the treasury of the city and county from such fund as the board of supervisors may designate. Whenever a part of said cost or expense is so ordered to be paid before the making of an assessment therefor, the board of public works, in making up the assessment provided for such cost and expense, shall first deduct from the whole cost and expense such part thereof as has been ordered to be paid out of the municipal treasury and shall assess the remainder of said cost and expense proportionately upon the lots, parts of lots, and lands, in the assessment district or liable to be assessed therefor, and in the manner hereinbefore referred to and provided."

Section 4 relates to the use of tunnels by street railroads, and has no bearing upon the present controversy.

Section 33 of chapter 2 of article 6, added to the charter at the same time, reads as follows: "The methods of procedure in this article provided for the improvement of streets or for the construction of tunnels, subways or viaducts and appurtenances thereto, and for the assessment of the expense thereof or any portion of such expense upon private property shall not be deemed exclusive, but the board of supervisors by an affirmative vote of not less than two-thirds of the members thereof, may by ordinance substitute therefor any method of procedure in any general law of the state of California now in force and effect, or as the same may be amended, or that may hereafter be enacted, providing for any such improvements in municipalities, and levying assessments for the expense or portion thereof on private property; or the said board may by a like affirmative vote of the members thereof adopt an ordinance which may from time to time be revised or amended, providing a method of procedure for such improvement and assessment; and, in such ordinance if said board deems it expedient provision may be made for the payment of any assessment levied in pursuance thereof in annual installments covering a term not to exceed ten years upon conditions as to said board may seem reasonable and just, the rate of interest to be paid on such payments not to exceed seven per cent. per annum."

It will be observed that the section last quoted provides three alternative methods of procedure: (1) The method specifically outlined in the charter itself; (2) any method of procedure, provided by general law, which may be adopted by the vote of two-thirds of the members of the board of supervisors; or (3) such method, differing both from the provisions of the charter and from the general laws, as may be provided by an ordinance adopted by a like vote of the board of supervisors. The board of supervisors of the city and county of San Francisco proceeded in the third way and in September, 1911, adopted by unanimous vote an ordinance providing a method for the construction of tunnels and for the assessment of the cost and damages thereof upon private property benefited thereby. In November, 1911, the board by like vote adopted an ordinance amending several sections of such ordinance.

The general scheme of the ordinance as amended is similar to that of the "local improvement act" of 1901 (Stats. 1901, p. 34). It will not be necessary to set forth its various provisions in detail, since the appellant does not question that if the board of supervisors has the power to adopt a method of procedure for levying and enforcing special assessments for the construction of tunnels, the method here adopted was a reasonable and proper one and sufficiently safeguarded the rights of the property owners, except, perhaps, in certain particulars which will be referred to hereafter.

Pursuant to the provisions of this ordinance the board of supervisors adopted a resolution of intention to order the construction in or under Stockton street of a tunnel which with its approaches should extend from the northerly line of Sutter street to the southerly line of Sacramento street, the tunnel itself to extend from the southerly line of Bush street to a line 150 feet southerly from the southerly line of Sacramento street. The resolution of intention described two districts which were to be connected by the said tunnel and upon which, as comprising the lands specially benefited by such improvement, the damages, costs, and expenses of the construction were to be assessed.

Other facts bearing upon the appeal will be mentioned in connection with the particular points upon which they bear.

1. The appellant contends, first, that the provision of section 33 giving to the board of supervisors authority to provide a method of procedure for the improvement and assessment constitutes an unauthorized delegation of legislative power by the Legislature of the state.

[1] It is hardly worth while to discuss the question whether a grant of power contained in a freeholders' charter or an amendment

thereto derives its force from legislative action on the part of the state Legislature. If, by the approval, under section 8 of article 11 of the Constitution, of a charter or an amendment which vests in a local body authority to legislate concerning local matters, the Legislature may be said to be delegating legislative power, such delegation is one that is expressly authorized by the Constitution. In re Pfahler, 150 Cal. 71, 88 Pac. 270, 11 L. R. A. (N. S.) 1092; Platt v. City and County of S. F., 158 Cal. 74, 110 Pac. 304; Hellman v. Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057. That the procedure for constructing tunnels, or making other street improvements, is so far a matter of local concern as to be properly included within the scope of a municipal charter is not questioned by the appellant. See Byrne v. Drain, 127 Cal. 663, 60 Pac. 433.

[2] And if the charter may define such procedure directly, we see no reason why it may not confer upon the legislative body of the municipality (in this instance, the board of supervisors) power to enact a mode of procedure by ordinance. The provisions of the ordinance adopted pursuant to the authorization of the charter have the same sanction and the same effect that they would have had if incorporated in the charter itself. Harrison v. Horton, 5 Cal. App. 415, 90 Pac. 716; Murphy v. City of San Luis Obispo, 119 Cal. 624, 51 Pac. 1085, 39 L. R. A. 444.

[3] 2. It is claimed that in some particulars the ordinance establishing the procedure to be followed is an attempted exercise of powers in excess of those granted. Under this head it is claimed, first, that the charter amendments do not authorize the assessment of the cost of the improvement upon a special district. By section 1 of the new chapter 8 of the charter, the board of supervisors is empowered to order the construction of a tunnel and to levy the cost of the expenses thereof upon private property "in the manner and under and subject to the proceedings, powers, restrictions, and limitations of chapter 2 of this article providing for street work and street improvement." By section 5 of chapter 2, which is thus incorporated into chapter 8, the board of supervisors is expressly authorized to define the districts benefited by a proposed improvement and to be assessed to pay the expense thereof. Stats. 1899, p. 295. Furthermore, section 33 of chapter 2 of article 6, which was also, as we have seen, added to the chapter in 1911, contains language clearly indicating an intent to authorize the assessment of the cost of the improvement upon property specially benefited. The section provides for methods of procedure for the construction of tunnels, and "for the assessment of expenses thereof or any portion of such expenses upon private property." The term "assessment," as used in this connection, means the kind of assessment here involved, i. e., a burden imposed upon property "for the purpose of paying the cost of the improvement, and laid with reference to the benefit which such property is supposed to receive from the expenditure of the money." Taylor v. Palmer, 31 Cal. 241.

[4] Another objection to the ordinance regulating the procedure is that it contains a provision authorizing the issuance by the auditor, in the absence of sufficient money to pay demands upon the assessment fund, of certificates bearing interest at a rate to be determined by the board of supervisors. It is contended that this is an attempt to permit the city to borrow money and that there is no authorization in law for such borrowing. But it is obvious that the certificates so to be issued are not obligations of the municipality. Union Trust Co. v. State of California, 154 Cal. 716, 99 Pac. 183, 24 L. R. A. (N. S.) 1111. They are not a charge against the funds of the city and county, but are payable out of the assessments levied against the property within the assessment district.

The provision for payment of interest on the certificates is not open to objection. The necessity for the issuance of such certificates arises from the provision of section 33, above referred to, permitting the board to provide for the payment of assessments in annual installments. The ordinance, in accordance with this authorization, has provided that property owners desiring an extension of credit may, upon certain terms, obtain the privilege of paying their assessments in installments. No property owner is liable for interest unless he voluntarily seeks and obtains an extension by requesting that he be permitted to pay in installments. But, apart from this consideration, interest upon the certificates is properly chargeable to the property owner as an item of "incidental expenses incurred in providing a sufficient fund for the accomplishment of the work, without exacting in cash from the property owners the necessary sum." Doyle v. Austin, 47 Cal. 353.

[5] 3. The resolution of intention provides that the tunnel is to be "properly bored, lined, faced, paved with asphaltic pavement, curbed with granite curb, and sidewalked with artificial stone, with all appurtenances necessary to make such tunnel fit for public use." The appellant contends that the power granted by the charter to construct tunnels does not include power to pave or sidewalk. We think this is too narrow a construction of the charter provision. The term "construct" has a broad significance. As applied to a railroad, it has been held to cover the doing of everything necessary to make the road ready for operation. De Graff v. St. P., etc., R. Co., 23 Minn. 144; Preston v. Dubuque, etc., R. Co., 11 Iowa, 17. The grant of power to construct tunnels must, on like reasoning, include the power to do the things necessary to make the tunnels fit for use. The paving of a tunnel and the laying of side-

walks are necessary to enable the public to use the tunnel for the purposes for which it was intended. Such paving and sidewalking are therefore a proper incident of the power to construct. This conclusion in no way conflicts with Wilcoxon v. San Luis Obispo, 101 Cal. 508, 35 Pac. 988, where it was held that under the statute providing for opening or widening streets (Stats. 1889, p. 70) the city council had no authority to provide for grading and graveling the lands taken for widening a street. The statute there considered dealt merely with the subject of acquiring lands for opening, widening, or straightening streets, leaving the improvement of the streets when acquired to be covered by other statutes. See San Francisco v. Kiernan, 98 Cal. 614, 33 Pac. 720. The grading of the land added to a street was entirely distinct from the widening, straightening, or extending, which alone were provided for by the act of 1889. An entirely different situation is presented where the charter authorizes the "construction" of tunnels.

[6] In connection with this point it is suggested that, since Stockton street is an accepted street, any repair or improvement thereto must, under section 23 of chapter 2 of article 6 of the charter, be paid for by the city and county. We doubt whether the construction of a tunnel "in or under" a street is fairly to be regarded as a repair or improvement of the street. But, if it be such improvement, the specific grant, by chapter 8 of article 6, of authority to construct tunnels "in, on, or under any accepted or unaccepted street, * * * and to levy the cost and expenses thereof upon private property," certainly takes the construction of such tunnels, with their necessary incidents, out of the operation of the general provision that accepted streets must be kept in repair and improved by the city and county.

[7] 4. It is next contended that the construction of the approaches to the tunnel will involve a change of grade of Stockton street to the extent of the length of the approaches, and that such change has not been authorized by the method defined in chapter 6, art. 6, of the charter, providing for the change of grade of streets. The answer to this point, as to the point raised with reference to the paving of the tunnel, is that the change of grade is a mere incident to the construction of a tunnel. Gassner v. McCarthy, supra. The boring of a tunnel necessarily involves the making of approaches to the mouths of the tunnel. The grant of power to construct the tunnel is therefore a grant of power to do the incidental thing, and the procedure provided for tunnel construction is all that need be followed.

[8] 5. Section 28 of the ordinance, providing the method of procedure, authorizes the levy of a supplemental assessment to complete the construction, in the event that the assessment originally levied should turn out to be insufficient. The section gives to any person interested the right to be heard in opposition to such levy. It also declares that the supervisors may, in lieu of levying a supplemental assessment, provide for the payment by the city and county of the amount required to complete the work.

In Gill v. Oakland, 124 Cal. 335, 57 Pac. 150, this court treated a similar provision in the street opening act of 1889 as valid. It is now, however, argued that since the amount of the benefit to accrue to the property of a private owner is determined at the time of the original assessment, an excess of cost cannot justify the imposing upon such property of a further assessment, exceeding the benefit as thus ascertained. But it is not true that the first assessment necessarily covers the full amount of the benefit. The provision of the ordinance is that the "benefits estimated shall not exceed the total of such estimated costs, damages, and expenses." The assessment is to be "in accordance with the benefits"; that is to say, not equal, but proportional, to such benefits. The property is assessed for only such proportion of the benefits as may be required to meet the estimated cost. If a further assessment becomes necessary, the hearing afforded to the property owner gives him ample opportunity to protect his property against the imposition of a burden greater than the total benefit conferred. He is not harmed by having the amount properly chargeable collected in two assessments rather than one.

[9] But, in any view, the objection is premature. No supplemental assessment has been levied in the case at bar, and it cannot be known whether any ever will be. It may be that the first assessment will produce funds sufficient to complete the improvement, or, if there should be a deficiency, that the supervisors will supply the needed balance out of the treasury of the city and county. The proper time to question the propriety of a supplemental assessment will be when an attempt is made to levy such assessment.

[10] 6. We see no force in the point that the provision in the ordinance for "incidental expenses" is invalid because the items constituting such expenses are not specifically defined by the ordinance. That incidental expenses may properly be made a charge on the property within an assessment district is not questioned. Doyle v. Austin, supra; Burk v. Altschul, 66 Cal. 533, 6 Pac. 393. And no reason is suggested for holding that the elements constituting such expenses must be enumerated in the ordinance. A general provision, like the one before us, was upheld in Brooks v. San Luis Obispo, 109 Cal. 50, 41 Pac. 791. If anything not properly chargeable as an incidental expense is included in the report upon which the assessment is to be made, the owner is, by the terms of the ordinance, given a full opportunity to ob-

ject and to be heard in support of his objection.

[11] 7. In view of the peculiar nature of a tunnel, which, while a single work, serves to unite distinct and separate districts, each of which is benefited, we think there is no force in the suggestion that an assessment upon the lands in two districts is unauthorized. The case is very different from Southwick v. Santa Barbara, 158 Cal. 14, 109 Pac. 610, where it was sought, by levying a single assessment upon two districts, to impose upon the land in one the burden of paying for improvements which benefited only the land in the other.

No other contentions are advanced in support of the appeal.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

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162 Cal. 174

IVES v. CONNACHER. (S. F. 5,785.)

(Supreme Court of California. Feb. 3, 1912.)

1. Husband and Wife (§ 254*)—Community Property—Property Constituting.

Property conveyed to husband and wife, partly paid for with community funds, and mortgaged to secure the balance, was community property, though the wife joined in signing the notes and the mortgage, and though two of the three notes given for the balance of the price were paid from the wife's separate funds.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 897–899; Dec. Dig. § 254.*]

2. Husband and Wife (§ 255*)—Community or Separate Property—Transmutation.

A husband and wife may agree to transmute separate property of either into community property, or vice versa.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 900–902; Dec. Dig. § 255.*]

Department 1. Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by Z. T. Ives against L. C. Connacher, Anna Ives' administrator. Order refusing a new trial, and defendant appeals. Affirmed.

E. E. Shepard and A. B. James, for appellant. J. R. Webb, for respondent.

ANGELLOTTI, J. This is an appeal from an order denying defendant's motion for a new trial, in an action brought by plaintiff against the administrator with the will annexed of the estate of his deceased wife to quiet his title to a lot of land in Selma, Fresno county, being the W. ½ of the S. W. ¼, and the S. E. ¼ of the S. W. ¼ of section 31, T. 15 S., R. 21 E., M. D. M.; the theory of plaintiff being that such property was community property of himself and wife at the time of her death, February 23, 1910, and that therefore the same belongs to him without administration. Section 1401, Civ. Code.

Plaintiff and deceased intermarried December 27, 1903, and continued to be husband and wife to the time of her death. The property in question was purchased from the German Savings & Loan Society on March 6, 1906, and was occupied by the parties as a residence up to the time of the death of the wife. The purchase price was $1,600, payable one-fourth cash, and the balance in one, two, and three years, with interest on the deferred payments. The evidence is such that we must assume, in view of the findings, that the first payment was made by plaintiff from community funds, $50 as a cash deposit at the time of concluding the bargain, and $340 on March 30, 1906. The receipt given for the cash deposit of $50, which also stated the terms of the purchase, named plaintiff as the party paying the money, and named no other person as purchaser. A conveyance of the property, the same bearing date March 6, 1906, was thereupon executed and delivered by the German Savings & Loan Society to "Z. T. Ives and Annie Ives, his wife." This conveyance was recorded April 3, 1906. For the balance of the purchase price, notes, payable, respectively, one, two, and three years thereafter, and signed by both Mr. and Mrs. Ives, were made and delivered to the grantor, and a mortgage of said property to secure the payment of said notes was also executed and delivered by them to said grantor. It was alleged in the complaint, and not denied in the answer, that, while the title to the property was taken in the name of both plaintiff and wife, plaintiff did not intend thereby to make a gift thereof of any part of the real estate to the wife, and did not in fact make such gift, and that there was no contract or agreement between them that the title of any of said property should vest in her as separate property, so that these facts must be taken as established. We shall assume that the evidence must be taken as showing, without conflict, that the first and second notes, maturing in March, 1907, and March 1908, respectively (being the second and third payments), were made from the proceeds of sales of some of the wife's separate property (being property owned by her before her marriage), which were on deposit in a bank to her credit. There is nothing to indicate that such payments were not made on the order of the wife herself, or that there was any agreement or understanding between the husband and wife, whereby the character of any of the property as community or separate property might be affected by reason of the making of such payments from the separate property of the wife. The third note, being for the final installment of the purchase price, has not been paid.

The trial court found, in accord with the allegations of the complaint, that the property was purchased by plaintiff on or about March 6, 1906, "with the community funds of the plaintiff and his wife, Annie Ives," and was community property of the husband and wife at the time of the latter's death, and therefore concluded, in view of the admitted fact as to there being no intent to make any gift to the wife, and no gift in fact, that "the plaintiff is the owner in fee of the property, and that defendant has no interest therein."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The real question on this appeal is whether, upon the facts already stated, the finding that the purchase was made with community funds is sufficiently sustained by the evidence, by reason of the fact that the first and second notes were paid from the separate property of the wife (the money paid by plaintiff at the time of the purchase being community property), for all claims based upon the fact alone that the wife was named as a cograntee in the deed are disposed of by the admissions shown by the pleadings, in view of the decisions of this court in Fanning v. Green, 156 Cal. 279, 104 Pac. 308, and Fulkerson v. Stiles, 156 Cal. 703, 105 Pac. 966, 26 L. R. A. (N. S.) 181; this being a controversy solely between the husband and the legal representative of the wife, and the presumption declared by section 164 of the Civil Code therefore not being conclusive. Fanning v. Green, supra.

[1, 2] As we have seen, the deed for this property was actually delivered and the legal title vested in the purchasers upon the making of the first payment, and at least as early as April 3, 1906, notes, secured by mortgage on the property, being taken by the grantor for the balance due. The property was then acquired. All the money paid being community property, and there being nothing, in view of the admissions made by the pleadings, warranting a conclusion from the fact that the wife was named in the deed as a grantee with her husband that she took any interest therein as her separate property, the mere fact that these notes and the mortgage were executed by the wife, as well as the husband, does not affect the question of community or separate property. See Flournoy v. Flournoy, 86 Cal. 286, 293, 24 Pac. 1012, 21 Am. St. Rep. 39; Martin v. Martin, 52 Cal. 235. The purchase having actually been consummated, the property acquired, and the legal title having vested, the property was then community property of the spouses. It cannot be disputed, we think, that, where property is purchased and partly paid for with community funds, and a note and mortgage on the same are given to secure the unpaid balance, the property is community property. We do not see how the status of this property as community property can be held necessarily to have been changed by the mere fact that the first two notes secured by the mortgage were paid from the separate property of the wife. Mr. Ballinger, in his work on Community Property, in section 19, says: "The root or property source, together with the time when acquired, are alone looked to as the criterion to determine what property is or is not common. * * * Property once impressed with the community character retains that impress during the existence of the community, unless alienated or exchanged," etc. See, also, Noe v. Card, 14 Cal. 577, 606; Morgan v. Lones, 80 Cal. 317, 319, 22 Pac. 253; Carlson v. Carlson, 10 Cal. App. 300, 101 Pac. 923. It is, of course, settled in this state that a husband and wife may agree to transmute separate property of either into community property, or community property into separate property (see Title Insurance & Trust Co. v. Ingersoll, 153 Cal. 1, 94 Pac. 94); but certainly no such agreement is necessarily to be inferred from the mere fact of such payments as are shown in this case. See Carlson v. Carlson, supra, Rather is it to be presumed, nothing else appearing, that the money of the wife was advanced by her for the benefit of the community, to assist in discharging a lien on community property, than that it was intended to give her a separate property interest in the land.

In view of what has been said, it cannot be held that the findings complained of are without sufficient support in the evidence. There is no other point material on this appeal discussed in appellant's brief.

The order denying a new trial is affirmed.

We concur: SHAW, J.; SLOSS, J.

162 Cal. 115

BASSFORD v. EARL et al. (Sac. 1,877.)

(Supreme Court of California. Jan. 29, 1912. Rehearing Denied Feb. 28, 1912.)

1. JUDGES (§ 51*)—BIAS—MOTION.

Under Code Civ. Proc. § 170, which provides that a judge shall be disqualified to act in a proceeding when it appears from affidavits that either party cannot have a fair trial because of his prejudice or bias, and that he shall thereupon secure the services of some other judge to try the case, that the judge to whom a motion to call another judge to hear a motion for a new trial was addressed had already acted in the trial of the cause, raises no presumption that in his opinion he was competent to act, as the matter must be tried on affidavits alone, without reference to the knowledge or state of mind of the judge.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224–231; Dec. Dig. § 51.*]

2. JUDGES (§ 51*) — BIAS — MOTION — SUFFICIENCY OF AFFIDAVIT.

Where an affidavit filed with a motion for the calling of another judge to try a motion for new trial set up that the judge to whom it was addressed had failed of political preferment twice because of the failure of the party making the motion to render requested assistance, the judge alone could make affidavit that such facts would not operate to the detriment of the party, and, where the only affidavit was interposed by an opposing attorney, the response was not sufficient, and the order overruling the motion was erroneous.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224–231; Dec. Dig. § 51.*]

Department 2. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by Henry A. Bassford against Edwin T. Earl and others. From a dismissal of motions for a new trial, plaintiff appeals. Reversed.

William M. Cannon and Jabish Clement (Paul C. Marf, of counsel), for appellant. Guy C. Earl and W. H. Spaulding, for respondents.

HENSHAW, J. Plaintiff's complaint charged that proceedings had been pending to foreclose a mortgage upon his ranch in Solano county; that defendant Edwin T. Earl proposed to plaintiff that he would purchase the land at the foreclosure sale for the benefit of plaintiff, and would thereafter deed the property to him, taking a mortgage for the amount which he might have expended; that plaintiff carried out the conditions so far as he was concerned, but the defendant has repudiated the agreement. Plaintiff expressed his willingness to pay all that might be found due, and prayed that Earl might be considered as a mortgagee, and that there should be an accounting between plaintiff and the defendants Edwin T. Earl, the Earl Orchard Company, and the Earl Fruit Company of the rents, issues, and profits of the land. The action was in equity, and the judge called in a jury from which advisory verdicts were received. The jury found that the defendant Earl did state to plaintiff Bassford that if the latter "would obtain deeds from all his brothers and sisters to the property in question to himself, and that if he would execute a deed therefor to the defendant Earl, he, Earl, would advance the money to buy in said property at sheriff's sale, and, upon obtaining the sheriff's deed therefor, would deed back to the plaintiff said property, and take a mortgage for the amount so advanced by him." The judge set aside this and the other findings of the jury on defendants' motion, and gave judgment for defendants. A motion for new trial was made, and the bill of exceptions to be used thereon was pending settlement; the papers being actually in the office of William M. Cannon, attorney for plaintiff, in San Francisco. They were destroyed by the fire following the earthquake. A motion to dismiss this motion for a new trial for lack of diligence in prosecuting it was brought to a hearing before Judge Harrier, then occupying the bench of Solano county, and, amongst other evidence, was presented an affidavit made by Judge Buckles, the judge who presided at the trial of the cause, which affidavit was offered as tending to show lack of diligence on the part of plaintiff's attorney. It was shown, moreover, that the reporter who took the notes of the trial was dead, and, question having arisen as to the possibility, practicability, and cost of having these notes read and transcribed by another reporter, the hearing of the motion was continued, and, in fact, it was never decided by Judge Harrier. On May 14, 1907, plaintiff filed another motion for a new trial under the act of 1907. Stats. 1907, p. 998. Judge Buckles had returned to the bench. Plaintiff's attorney wrote to him, suggesting that he call in another judge to hear and determine the further proceedings in the case, but his letter remain unanswered. Subsequently a formal motion was made upon affidavit for this purpose, and upon the 18th day of December, 1909, it was denied by Judge Buckles. Thereafter, on the 20th of January, 1910, he dismissed plaintiff's two pending motions for new trial. These appeals are taken from these orders.

The affidavit upon the motion to call in another judge is that of the plaintiff, in which he sets forth the proceedings upon the trial had before Judge Buckles, and that the judge, on motion of the defendants, rejected the special issues, answered in favor of the plaintiff, and rendered judgment against the plaintiff. Here, it may be observed, without regard to the propriety of the judge's ruling in this respect, which is, of course, not before the court, that the finding was in accordance with the testimony of the plaintiff, and the rejection of this finding by the court could not be other than a reflection upon the veracity of his testimony. The circumstances were such unquestionably as to afford a foundation for bias and prejudice upon the part of the plaintiff against the judge. His affidavit proceeds to set forth that subsequently the judge was a candidate for the nomination from a Republican convention for a judicial office; "the plaintiff was a delegate to such convention from Solano county, and was one of the Solano county delegation to such convention; that the said judge, in endeavoring to obtain the nomination to such office for himself, requested this plaintiff, as such delegate, and other members of the Solano county delegation to support a certain person for the office of Governor of the state of California, stating that only by obtaining the support of the Solano county delegation could said judge hope to obtain such nomination for himself; that the plaintiff and other members of said Solano county delegation refused to accede to said request on the part of said judge, and by reason thereof, as plaintiff is informed and verily believes, such judge failed to receive such nomination, and thereafter, upon the expiration of his then existing term as such judge of such appellate court, was forced to retire to private practice, and did remain in such practice for a considerable period of time; that thereafter Judge Buckles sought the nomination for judge of the superior court of Solano county, and requested by letter the plaintiff to support him for the nomination for that office; that the plaintiff refused to support the said judge for such nomination, and said judge did not obtain the nomination for such office, and another person was nominated and elected thereto, which action on the part of the plaintiff contributed toward the defeat of said judge for said nomination; that when the plaintiff's motion for new trial in this action, based upon the statute passed by the Legislature of 1907, came on for hearing before Judge Harrier in the above-named superior court, the said Judge Buckles made and subscribed and swore to an affidavit, which affidavit was used by the defendant in opposition to the plaintiff's said motion, and was read and filed on the hearing of the said motion that if the said Judge Buckles hears and determines the now pending motion in the above-entitled action, or any further proceedings in the above-entitled case, he will be required to pass upon the sufficiency and truth of his own affidavit on file in said action; that within the last month or two affiant's attorney has in writing requested said judge to call in another judge to hear and determine said action, and all matters pending therein, but said judge has failed to answer the said letter; that, by reason of the facts and circumstances set forth herein, affiant states on and according to his information and belief that he cannot have a fair and impartial trial of said action, or any motion or proceeding pending therein before said Judge Buckles, by reason of the prejudice and bias of said Judge Buckles against said affiant."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] The law governing the conduct of a judge upon the hearing and determination of a motion presented by authority of section 170 of the Code of Civil Procedure has often been discussed, and is well settled. The earlier rule announced in Heinlen v. Heilbron, 97 Cal. 107, 31 Pac. 840, that "the fact that a judge has acted in a trial must be held conclusive that in his own opinion he was competent to act, and in such a case he who would attack his right to act therein must show his disqualification by facts of a positive and unequivocal character," by force of section 170 of the Code of Civil Procedure, no longer obtains. The matter must be tried upon affidavits, and upon affidavits alone. Whatever knowledge may repose within the breast of the judge must now appear by affidavit, or it does not appear at all. Inferences or presumptions arising from the judicial decision in no wise control. The judge "must decide upon the facts averred in the affidavits, without reference to his own knowledge of his state of mind." Hoyt v. Zumwalt, 149 Cal. 388, 86 Pac. 600; People v. Compton, 123 Cal. 412, 56 Pac. 44; Morehouse v. Morehouse, 136 Cal. 332, 68 Pac. 976. In the last-mentioned case the affidavit touching the bias and prejudice of the judge was not met by answering affidavit. In the Morehouse Case, as in this, it was set forth that the bias arose out of the opposition of a party to the action to the judge while the latter was a candidate for office. This court said: "It may be admitted, as urged by the respondent's counsel, that from the mere fact of the quarrel alleged it cannot be conclusively, or even probably, inferred that the judge could not fairly try the defendant's case; and we are glad to believe that with most judges the inference would be incorrect. But here there is a direct allegation of the fact of prejudice and bias on the part of the judge; and though the allegation is based, as in most cases it must be based, merely on the belief of the affiant, yet it is accompanied by a statement of the facts on which the belief is based, as complete as the nature of the case admitted of; and this was all that could reasonably be required. The court should therefore have granted the motion." It is argued by appellant that weight is added to this affidavit by the circumstances that the judge, when in private life, made an affidavit hostile to the interests of the appellant, and that he refused to respond to a courteous letter addressed to him by appellant's attorney.

[2] But, aside from these considerations, it is plain that plaintiff entertained a spirit of hostility to the judge, the grounds for which, as above set forth, are apparent. It is shown that he was in a position to thwart the judicial aspirations of the judge, refused the judge's request for his support, and did aid in thwarting them, with the result that the judge twice failed of his nomination, and was relegated to private life. There is in all of this sufficient as a prima facie showing to call for a response from the judge, and it cannot be regarded as without significance that no such response was made. For in answer to the application and to the affidavit of plaintiff, the only showing is contained in the affidavit of Mr. Charles S. Wheeler, one of defendants' attorneys, which first averring want of information or belief sufficient to enable the affiant to make any statement touching the conduct of the plaintiff and of the judge in reference to the judicial nominations proceeds as follows: "That affiant, however, does depose and say, upon his information and belief, that if the facts in relation to said candidacy of said Hon. A. J. Buckles for said offices above named, and to the conversations and requests and acts of the said H. A. Bassford with or towards said judge set forth in said affidavit of said H. A. Bassford did take place, nevertheless the same will in no way operate to the detriment of the said H. A. Bassford nor will the same,

nor have the same, operated to bias or prejudice the said Judge A. J. Buckles, nor to disqualify him in any way to pass upon the proceedings in this cause, and that this affiant states, on his information and belief, that the said H. A. Bassford can have a fair and impartial trial of all proceedings in this action before the Honorable A. J. Buckles, and that the said Honorable A. J. Buckles is not disqualified from acting in this cause by reason of prejudice or bias against the said Bassford, or for any other cause whatsoever." In the nature of things, it is impossible for an affiant occupying the position of Mr. Wheeler to declare that these facts "will in no way operate to the detriment of Bassford, nor will the same, nor have the same, operated to bias or prejudice the said Judge A. J. Buckles." If such a statements was necessary in answer to the Bassford affidavit, and not only do we think it was, but from the affidavit of Mr. Wheeler, it seems so to have been regarded by the respondents to that motion, the one person, who, with an informed mind, could make such a declaration, was the judge himself, and he does not do so. It follows, therefore, that upon the showing made it was the duty of the court to have granted appellant's motion, and the order denying that motion is therefore reversed.

This determination renders unnecessary a detailed consideration of the orders of the court subsequently made dismissing the appellant's motions for a new trial. They were made by a disqualified judge, and are therefore reversed.

We concur: MELVIN, J.; LORIGAN, J.

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162 Cal. 141

STEVINSON v. SAN JOAQUIN & K. R. CANAL & IRRIGATION CO.

(Sac. 1,774.)

(Supreme Court of California. Feb. 1, 1912. Rehearing Denied March 2, 1912.)

1. Appeal and Error (§ 1041*)—Questions Reviewable—Immaterial Questions.

Refusal to allow defendant to amend his answer so as to assert a greater right than asserted in the original answer is immaterial where he acquiesced in the finding of a less right than asserted in the original answer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4106–4109; Dec. Dig. § 1041.*]

2. Equity (§ 158*)—Laches—Pleading—Necessity.

Where the evidence shows that one seeking equity has been guilty of laches, the court will deny relief on that ground, though laches was not pleaded.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 395; Dec. Dig. § 158.*]

3. Waters and Water Courses (§ 87*) — Rights of Lower Riparian Proprietor—Laches.

Where a lower riparian proprietor had no knowledge that a dam and a canal constructed by an upper proprietor would increase the diversion of the water of the stream, and the lower proprietor was assured by the president of the upper proprietor, a corporation, that no increased diversion of water was contemplated, the lower proprietor was not barred by laches, resulting from delay until after the completion of the works of the upper proprietor, from suing to enjoin an increased diversion of the waters of the stream caused by such works.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 77–81; Dec. Dig. § 87.*]

In Bank. Appeal from Superior Court, Merced County; M. L. Short, Judge.

Action by J. J. Stevinson against the San Joaquin & Kings River Canal & Irrigation Company. From a judgment granting insufficient relief to defendant, it appeals. Affirmed.

See, also, 116 Pac. 378.

Edward F. Treadwell, for appellant. Frank H. Short, amicus curiæ. James F. Peck, for respondent. J. P. Langhorne, amicus curiæ.

PER CURIAM. A rehearing was granted in this case in order that we might further consider the contentions of appellant that, in addition to the water to which it was entitled by prescription, it had the right to take a further quantity because plaintiff by his laches had lost the right to object to such diversion, and that plaintiff, by permitting large numbers of irrigators to use the water in excess of 760 cubic feet per second, without any protest on his part, had placed himself in a position wherein he was not entitled to the harsh remedy of injunction, but should be relegated to his action for damages. On further study of the matter, however, the court is satisfied with and hereby readopts the former opinion, prepared by Mr. Justice HENSHAW, which is as follows:

"Plaintiff, a lower riparian proprietor on the San Joaquin river, brought this action to enjoin defendant's alleged unlawful diversion of the waters of the stream. Defendant answered, asserting prescriptive title to the waters of the river to the extent of 900 cubic feet per second, alleged that a portion of this water had been used by defendant for the irrigation of riparian lands, and that the remainder had been supplied and sold to the public and had been used for beneficial purposes. After trial the court found that defendant had prescriptive title to 760 cubic feet of water per second, but to no greater quantity, and enjoined the defendant from diverting more than this quantity.

"The judgment, in so far as it fixes the amount of water to which defendant had acquired prescriptive title against the lower riparian proprietor, is acquiesced in by both parties. This appeal, however, taken by defendant, is addressed to the asserted error of the court in refusing to allow amendments proposed by defendant to its answer after the close of the testimony and before the submission of the cause. These amendments declare, first, that defendant had acquired by continuous and beneficial use a prescriptive title to 1,200 cubic feet of water per second (the answer upon which the action was tried asserting such prescriptive title to only 900 cubic feet per second); second, the amendment alleged the construction of an 'outside' canal which headed in and took water from the main canal about three miles below the intake of the main canal; that in 1898 water was supplied from this 'outside' canal to the owners of land which could not be supplied from the main canal, and this irrigated more than 4,200 acres of land; that in 1898 the 'outside' canal was further extended and furnished water to 500 acres more; that in 1898 the defendant constructed its present weir in the river at about the same location as its earlier brush dam, the purpose of the weir being the better to conserve the water and make more certain the securing of the supply to which defendant was entitled; that at the time of the construction of the 'outside' canal and of the weir plaintiff had notice and knowledge thereof and of the purpose to devote the water to public use upon land nonriparian to the river, and knew that he and his lands would be thereby deprived of that quantity of water; that at no time prior to the 12th day of August, 1899, the date of the commencement of the action, did the plaintiff make to the defendant any objection whatsoever to the construction of the works or the diversion of the water, or give notice of any intention to object to the same, but on the contrary plaintiff acquiesced in the construction and diversion.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] "The defendant was refused permission to file these amendments which were offered as amendments conforming to the proofs in the case. The asserted error of the court's refusal is the sole ground for reversal presented upon this appeal. The proposed amendment asserting prescriptive title to the 1,200 cubic feet per second, instead of 900 cubic feet per second as alleged in the original answer, becomes of no consequence in view of the fact that the court found prescriptive title in but 760 cubic feet, and that this determination has been acquiesced in. Appellant's argument is addressed wholly to the proposition that plaintiff by his laches and delay in commencing his action after knowledge of all the facts deprived himself of any right which he might otherwise have had to an injunction, under the familiar and well-settled principles declared in such cases as Fresno, etc., Co. v. Southern Pacific Co., 135 Cal. 202, 67 Pac. 773; Southern California R. R. v. Slauson, 138 Cal. 342, 71 Pac. 352, 94 Am. St. Rep. 58; Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35; Crescent Canal Co. v. Montgomery, 143 Cal. 248, 76 Pac. 1032, 65 L. R. A. 940; Montecito Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113; Newport v. Temescal Water Co., 149 Cal. 531, 87 Pac. 372, 6 L. R. A. (N. S.) 1098; Miller & Lux v. Madero C. & I. Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A. (N. S.) 391; Barton v. Riverside Water Co., 155 Cal. 509, 101 Pac. 790, 23 L. R. A. (N. S.) 331.

[2] "It is well settled that the defense of laches need not be pleaded, but that, when it appears from the evidence that the seeker of relief in equity has been guilty of laches, the court will deny such relief sua sponte without any pleading. Harris v. Hillegass, 66 Cal. 79, 4 Pac. 987; Bell v. Hudson, 73 Cal. 289, 14 Pac. 791, 2 Am. St. Rep. 791; Sullivan v. Portland, etc., R. R. Co., 94 U. S. 811, 24 L. Ed. 324; Hageman v. Bates, 24 Colo. 80, 49 Pac. 139; Coon v. Seymour, 71 Wis. 346, 37 N. W. 243. Therefore the refusal of the court to permit the amendment charging laches amounted to a declaration and finding to the effect that the plaintiff was not guilty of laches, and the question before this court then is whether the evidence sustains the court's ruling in this regard.

[3] "Defendant's position is that it established (as it did) an unquestionable prescriptive right to 760 cubic feet per second; that, in addition to that 760 cubic feet, it showed that it had been diverting for beneficial use some 350 additional cubic feet by means of its new dam and 'outside' canal, and that plaintiff with knowledge of the construction of its works and of their purpose and of the amount of water which would thus be diverted made no objection until after the use was actually begun, the 'outside' canal beginning its diversion in 1898, and this action not being commenced until August, 1899. Under the peculiar facts of this case if knowledge of the construction of the dam and of the 'outside' canal could be charged to plaintiff, there was nothing in this information to charge him with the further knowledge that there was to be any additional taking of water. Thus, it is shown that the 'outside' canal did not take water directly from the river, but took it from the main canal some three miles from the point where the latter drew from the stream. Moreover, it is shown that there were many laterals, some owned by defendant, some by private persons or corporations, which drew from the main canal, and there was nothing, therefore, in the construction of this new lateral to impute knowledge to plaintiff that his rights were to be subjected to trespass. Knowledge of the construction of the dam, in like manner, did not charge him with knowledge that any more water than formerly was to be drawn from the river. Besides this, it appears that plaintiff hearing a rumor concerning an increased diversion wrote immediately to defendant's president in relation to this rumor and received the

following letter in reply: 'J. J. Stevinson, Esq.—Dear Sir: Yours at hand and contents noted regarding as to putting in a dam in the river. It shall not be done without I can convince you and the neighbors that it will not deprive you nor them of the quantity of water which would otherwise flow in the channel. Either myself or some one who represents me will see you regarding the above. Very respectfully, Henry Miller.'

"Here was not only a distinct declaration from the president of the defendant that plaintiff's rights were not to be invaded, but Mr. Miller himself testified: 'When there is a surplus to give us the water we are entitled to for the canal purposes, and then what water we are entitled to as riparian owners, and, when nobody is injured by not having water for domestic purposes and for irrigation, we take out water enough to the new canal ("outside" canal), to a certain extent, for stock water, but not for irrigation. Sometimes we run a small amount of water down for stock water.' But, in addition to this, there is no evidence that plaintiff knew of the existence of the 'outside' canal before its completion. It was 47 miles from his residence. He was never nearer than 3 miles to it except upon one occasion when he visited the site of the new weir. This was not built until November, 1898, which was after the irrigating season of that year. There was in all ordinary years an abundance of water until August. There was thus not only an absence of actual or imputed knowledge on the part of plaintiff, but there was the assurance of defendant's president that no increased diversion of water was contemplated. The only notice that plaintiff could possibly have, therefore, was by observing the fall of the river as it passed his own lands 50 miles below. When the river was running high in May and June, such an increased diversion would not be noticeable; but, as the water began to fall in July and August, it would be observable. In August it would become apparent, and it was upon the 12th of August that plaintiff commenced his action. Even when he noticed, or was chargeable with notice of the diminution of the ordinary supply, there is yet to be considered the fact that the flow of the stream naturally varies, not only from month to month and season to season, but also from year to year, so that in a given month of one year there may be much more water in the stream than in the same month of a succeeding or preceding year owing to the time, nature, and extent of the rainfalls, the quantity of snow on the mountains, and the weather conditions there which may retain the snow, permitting it to melt slowly or may cause it to melt rapidly with a consequent sudden and high run-off. Moreover, it is disclosed that in the 50 miles between plaintiff's land and defendant's canal there were others drawing from the stream, and it was for the plaintiff to determine by investigation to which of these the shortage was attributable before he could commence his action. Plaintiff's testimony in this regard is: 'I received an ample supply of water up to the time when the new weir was built in 1898. I knew the intention of the San Joaquin and Kings River Canal & Irrigation Company because they took the water away from me. That was just before I commenced the suit.' And, finally, it should be added that the action was tried upon no such theory as that embraced in the proposed amendments. Defendant had stated by letter that it did not intend to make an increased diversion. At the trial it produced witnesses to prove that no such increased diversion had been made, and asserted repeatedly that there was no evidence of such increased diversion and contended for a prescriptive right alone. The case thus presented is similar in its facts to Miller & Lux v. Madera Canal Co., supra, where, as here, it must be held that the facts do not call for the invocation of the principles and rules announced in such cases as Fresno Co. v. Southern Pacific Co., supra, and the other cases above cited.

"Such part of the judgment as is appealed from is therefore affirmed."

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162 Cal. 147

HUFFORD v. DYE. (Sac. 1,781.)

(Supreme Court of California. Feb. 1, 1912.)

1. WATERS AND WATER COURSES (§ 156*)—IRRIGATION DITCHES—CONVEYANCES—TENANTS IN COMMON.

An owner of land constructed an irrigation ditch and thereby appropriated water from a stream. The notice of appropriation specified the quantity of water. Subsequently he conveyed the lower 80 acres of his tract together with an undivided half of the ditch property and the right of way over the land with appurtenances. The ditch of the owner, as actually constructed, did not carry the quantity of water specified in the notice when the conveyance was made. *Held* that, though the conveyance created a tenancy in common between the parties as to the ditch with a right to the grantee to extend it, the deed only gave the grantee as a subsequent appropriator a right to the excess of the water not used on the owner's land.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 156.*]

2. WATERS AND WATER COURSES (§ 143*)—APPROPRIATION OF WATER FOR IRRIGATION PURPOSES—RIGHTS ACQUIRED.

One who makes an appropriation of the waters of a stream acquires no title to the waters, but only a right to their beneficial use to the extent they are employed for that purpose, and his right is not measured by the extent of the appropriation as stated in the notice of appropriation, or by his actual diversion from the stream, but by the extent to which he applies the waters for beneficial purposes, and beyond that the waters are subject to a subsequent appropriation by another for similar beneficial purposes.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 152; Dec. Dig. § 143.*]

3. WATERS AND WATER COURSES (§ 151*)—APPROPRIATION OF WATER FOR IRRIGATION PURPOSES—ABANDONMENT.

Where an appropriator of water of a stream, pursuant to a notice of appropriation of a specified quantity, and his successors for 30 years failed to make any beneficial use of the waters, they lost any right by virtue of the appropriation and the waters became subject to appropriation by others.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 155; Dec. Dig. § 151.*]

4. WATERS AND WATER COURSES (§ 152*)—APPROPRIATION — RIGHTS ACQUIRED — EVIDENCE.

Evidence *held* to show that waters of a stream were not used by an appropriator for irrigation purposes except for occasional periods during the irrigating season, so that another could make an appropriation of the waters for use on his lands at such time as the former had no use for them.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 152.*]

5. WATERS AND WATER COURSES (§ 143*)—APPROPRIATION — RIGHT OF ORIGINAL APPROPRIATOR.

An original appropriator of the waters of a stream for irrigation purposes has a paramount right to the first flow thereof to his land and in a full ditch, and a right to the use of all the waters at such times as is necessary to the extent of the previous use.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 152; Dec. Dig. § 143.*]

6. WATERS AND WATER COURSES (§ 152*)—CONFLICTING RIGHTS—ACTIONS—JUDGMENT.

Where defendant, in an action involving the right to the use of the waters for irrigation, denied the claim of plaintiff to either the necessity for or continuous actual use of all of the waters, and alleged a general right in himself to a use of a part of the waters, and until the suit he actually diverted a part and applied it for beneficial purposes, the court could determine the rights of the parties, though defendant did not in his pleading expressly claim any right to the waters as an appropriator, since plaintiff could not complain that defendant took waters during a time when he allowed them to run to waste or failed to apply them to a beneficial use.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 152.*]

7. WATERS AND WATER COURSES (§ 138*)—APPROPRIATION OF WATER FOR IRRIGATION PURPOSES—IRRIGATION DITCHES—PRESCRIPTIVE RIGHTS.

Where a tenant in common of an irrigation ditch used it only to convey the waters for use on his land, his use did not amount to an ouster of the cotenant as long as the cotenant made no use of the ditch.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 138.*]

8. WATERS AND WATER COURSES (§ 152*)—RIGHTS TO WATERS FOR IRRIGATION—ISSUES —JUDGMENT.

The court, in a suit to determine the right to the use of the waters of a stream for irrigation through an irrigation ditch, must determine, as far as practicable, the amount of water actually diverted by the ditch and the amount necessary and applied by plaintiff to use on his land, and the periods during the irrigating season of the greatest necessity for such use by him, and where there is not water enough to permit a diversion of the stream and a simultaneous use of part by both parties without injury, the court may fix the times when, by rotation, the whole may be used by each at different times in proportion to their respective rights, recognizing the paramount right of plaintiff entitled to the first flow.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 152.*]

In Bank. Appeal from Superior Court, Shasta County; Charles M. Head, Judge.

Action by Louis F. Hufford against James N. Dye. From a judgment for plaintiff, defendant appeals. Reversed.

W. D. Tillotson, for appellant. F. P. Primm and James E. Isaacs, for respondent.

LORIGAN, J. This action involves the ownership and right to the use of the waters of an irrigation ditch commonly known as the "Preadmore" or "Hufford" ditch, taking waters from Oak Run creek in Shasta county.

The ditch was constructed and the waters appropriated in the 1870's by one James A. Preadmore. His appropriation notice was for 2,000 inches under a 4-inch head. The ditch had its head in Oak Run creek, on what is designated in the evidence as the "Alpaugh Place," and prolonged in a westerly direction runs across said Alpaugh land about a quarter of a mile, then about half a mile over the land now owned by defendant, and thence about half a mile over the land now owned by plaintiff, which was then part of the property owned by said Preadmore. After the construction of the ditch and the appropriation of the water thereby, Preadmore in 1873 conveyed to one George W. Brown the lower westerly 80 acres of the main tract of land then owned by him and over which the ditch had been constructed, together with "one undivided half of the Oak Run ditch property; also right of way over J. Preadmore farm, together with the appurtenances," which land and interest in said ditch was subsequently through mesne conveyance from Brown conveyed in the year 1888 to one Alfred Estep, who remained the owner thereof until January, 1906. When the conveyance from Preadmore to Brown was made, the ditch did not run down to the lower 80-acre tract conveyed to the latter, though it ran close to its easterly line. Neither Brown nor his successors in interest, including Estep, ever had the ditch brought upon the land conveyed by Preadmore to Brown, or used the water therefrom, but such water as passed down the ditch as constructed on the land retained by Preadmore flowed down in natural channels—sloughs—upon and through the land so conveyed to Brown and thence back into Oak Run creek. It was never, however, even in its flow through its natural channels upon the Estep land, used upon the land for any beneficial purpose or at all.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Subsequent to the death of James A. Preadmore one Solomon Hufford, in 1883, acquired title from the heirs of Preadmore to a portion of the "Preadmore land," together with the water ditch and water right connected therewith, and, on the death of Solomon Hufford, through mesne conveyances from his successors in interest, the plaintiff in 1907 acquired title to the land now owned by him, including their interest in said water ditch and said water right appurtenant thereto.

In October, 1905, the defendant, Dye, purchased from one Jones the tract of land above and adjoining the land of respondent and on the east thereof, being the tract across which James A. Preadmore constructed the ditch in the '70's, to convey the water of the creek to his land. While the ditch was originally constructed through this tract subsequently purchased by defendant, it does not appear that the predecessors in title of defendant at any time had any interest whatever in the ditch or right to the use of any of the water thereof, on this tract of land. In fact, it appears that when this ditch was constructed the title to the land now owned by defendant was in the government.

The next year subsequent to his purchase of the land from Jones, the defendant on February 2, 1906, purchased from Alfred Estep whatever interest in the ditch and right of way over the Preadmore farm had been conveyed by Preadmore to Brown and to which interest Estep had succeeded. The defendant did not purchase any of the land which was conveyed by Preadmore to Brown and thereafter to Estep, but only whatever interest in the ditch and right of way over the Preadmore farm that Preadmore had conveyed.

On securing such conveyance from Estep, defendant, asserting thereunder that he was entitled to the undivided half of said ditch and the waters flowing therein, opened the ditch where it crossed his land above the Preadmore tract owned by plaintiff and commenced to use upon it one-half of the waters flowing therein.

On September 26, 1908, plaintiff brought this action against defendant, alleging ownership in himself and his predecessors in interest for more than 30 years past and a continuous possession and use during that period of the first flow of all the waters of Oak Run creek not exceeding 2,000 inches measured under a 4-inch pressure conducted to the lands of the plaintiff through a ditch which diverted the same from said creek and conveyed the same down and over plaintiff's land consisting of 280 acres upon which all of said waters are necessary for use in cultivating and raising crops upon said land and are used by plaintiff for that purpose; alleged diversion of the waters from the ditch by defendant and a threatened continuance of such diversion, and facts showing that irreparable injury would result to plaintiff if such diversion by defendant were permitted to continue. The prayer was for a perpetual injunction restraining defendant from interfering with or taking waters from the ditch; that the title of plaintiff be quieted and for damages alleged to have been sustained by the diversion made by defendant.

In his answer, defendant denied ownership or continuous use by plaintiff of all the waters of Oak Run creek, or that all of said waters were necessary for use or were used on the lands of plaintiff for the irrigation and cultivation thereof; asserted ownership in himself of an undivided one-half interest in all the water flowing in Oak Run creek at the head of said ditch and a like interest in said ditch and the waters conveyed therein; admitted his diversion of water as charged in the complaint, justifying it under his claim to an interest therein as asserted, and denied any damages sustained by plaintiff. By cross-complaint defendant set up his same claim of ownership to an undivided one-half interest in the ditch, and water right (which plaintiff by answer denied) and asked that his title thereto be established and quieted.

Judgment went for plaintiff sustaining his claim of ownership to the entire ditch and water right, and awarded him a perpetual injunction against defendant and damages. Defendant appeals from the judgment and the order denying his motion for a new trial, his principal attack on this appeal being against certain findings of the court.

The court found that for more than 20 years prior to the bringing of the action plaintiff and his predecessors in interest had been and were the owners and in the continuous use of said irrigating ditch, taking the water from Oak Run creek and to all the water flowing therein to the full extent and capacity of said ditch; that the whole of said waters diverted by said ditch were necessary for the proper irrigation of land of plaintiff, and that during such period said waters of said ditch had been all used by plaintiff and his predecessors in interest on said lands now owned by plaintiff for irrigation and domestic purposes.

The court likewise found that the plaintiff and his predecessors for upwards of 20 years had been in the open, notorious, and exclusive possession under a claim of right to the whole ditch and all the waters flowing therein to its full capacity; that they had made all repairs on the ditch and paid all taxes assessed against the ditch or water right, and claimed during that entire period the right to the use, possession, and enjoyment of said ditch and all waters flowing therein, adversely to the whole world.

It is quite obvious under the pleadings and the evidence that the finding of the court first referred to is a finding of ownership or right to the entire flow of the waters through the ditch by virtue of the appropriation of the waters of Oak Run creek by Preadmore, and the continuous beneficial use of that entire quantity upon the lands by Preadmore himself or his successors in interest, including plaintiff. The other finding is of a prescriptive title acquired by plaintiff against the asserted claim of defendant to an interest in one-half of the ditch and waters as tenant in common with plaintiff under the conveyance to defendant by Estep.

Appellant attacks both these findings on the ground that they are not sustained by the evidence; his main attack, however, being directed to the finding of prescriptive title against him, acquired by plaintiff and his predecessors.

As against this finding of prescriptive title, the position of appellant, in point of law, is that the conveyance from Preadmore to Brown in 1873 of "one undivided half of the Oak Run ditch property; also a right of way over J. Preadmore farm, together with the appurtenances" had the effect of creating a cotenancy between Preadmore and Brown in the ditch and the waters flowing therein; that through mesne conveyances from Brown defendant succeeded to this half interest as tenant in common with the successors in interest of Preadmore, including plaintiff, and that unless a prescriptive title to the entire ditch and the waters conveyed therein is shown to have been acquired against Brown and Estep, predecessors in cotenancy with defendant, by the plaintiff or his predecessors in title, defendant still retains and is entitled to the benefit of that interest. Appellant, assuming this to be true as a legal proposition, then claims that the finding of prescriptive title, defeating his title as such tenant in common, is not sustained by the evidence because he asserts that there was no proof of ouster by the plaintiff or his predecessors as tenants in common of defendant or his predecessors and no evidence of adverse use by the plaintiff of all the waters of the ditch for the statutory period required, or of any use exceeding one-half of the waters flowing in the ditch at any time.

[1] We do not discuss just now, if we shall at all, the sufficiency of the evidence under this claim, because we are satisfied that no tenancy in common to the use of the waters in controversy was created or intended to be created by the conveyance from Preadmore to Brown. Undoubtedly, the conveyance created a tenancy in common between them as to the ditch, with a right in Brown to extend it onto the property conveyed to him, and it may be assumed, though the conveyance does not so specifically state, that the right was granted to Brown to convey through the ditch, for use upon his land, one-half of the waters which had been diverted by Preadmore under his claim as an appropriator to 2,000 inches of the water of Oak Run creek. But when we take into consideration the terms of the conveyance, the situation and relation of the parties to the subject-matter with which it dealt, and the law defining the only rights which either Preadmore or Brown could acquire in appropriated waters, and the conduct of the parties subsequent to the conveyance, it is quite apparent that the only right and the extent of it, aside from an undivided interest in the ditch itself that Brown took under the conveyance, was the right through the medium of the ditch extended by him onto his land to avail himself of the benefit of Preadmore's appropriation beyond what was necessary for use on the lands of the latter and to allow Brown as a subsequent appropriator to acquire a right to this excess by conveying it to and making beneficial use of it upon his land.

[2] It is the well-settled law of this state that one making an appropriation of the waters of a stream acquires no title to the waters but only a right to their beneficial use and only to the extent that they are employed for that purpose. His right is not measured by the extent of his appropriation, as stated in his notice or by his actual diversion from the stream, but by the extent to which he applies such waters for useful or beneficial purposes. Beyond that his appropriation or diversion of more than can be applied by him gives him no right to the excess, and this is subject to appropriation by any other person who may use it for similar beneficial purposes. While Preadmore had filed a notice appropriating 2,000 inches of water, his ditch, as actually constructed, did not carry that quantity, but it did carry a quantity, when the deed to Brown was made, in excess by one-half of what was being used for beneficial purposes upon his land, and this excess was, at the time he sold the 80 acres to Brown, flowing from the ditch in natural channels through the land conveyed to Brown back into Oak Run creek. In fact, the claim of appellant is that, under the evidence, it is shown that one-half of these waters have been ever since, and still are, flowing down these same channels as natural waste into said creek. As these waters, when Brown purchased his land, were not being devoted by Preadmore to any beneficial use, they were subject to appropriation for use by Brown upon his land without any conveyance from Preadmore. This doubtless explains why, while an undivided half of the ditch was conveyed, there was no specific mention of the water right, probably accounted for by the fact that these waste waters could only practically and effectually be brought upon the lands conveyed to Brown through the extension of the ditch thereover. Be that as it may, however, we are satisfied that under the conveyance to Brown, if it embraced anything more than an interest in the ditch itself as then constructed and a right of way to extend it to

his land, it was only a right to take by means of the ditch one-half of the waters which Preadmore was in fact conveying in the ditch, but to which, under his attempted appropriation, he was not entitled because in excess of any beneficial use upon his land and so afford Brown an opportunity to avail himself of a right to such excess and by applying it to beneficial uses upon his land, acquire a right thereto by appropriation. This neither he nor his successors in title ever did.

[3] For 30 years they failed to make any beneficial use of these waters. Whatever right they may have had to avail themselves of the benefit of the actual diversion by Preadmore in excess of his wants and acquire a right as subsequent appropriators to such excess, they never availed themselves of it and have long since lost any right to do so. Smith v. Hawkins, 110 Cal. 122, 127, 42 Pac. 453. They have permitted the water to go back into the creek where, if not since appropriated by other persons below, they have, at least for years, been subject thereto, and now appellant insists that a tenancy in common was created by the deed to Brown which entitled him as his successor to enter on the ditch above the lands of plaintiff and take one-half of the waters which plaintiff and his predecessors have ever since the appropriation by Preadmore been applying to beneficial uses upon their lands and which is now necessary for use thereon and which measured the extent to which they are entitled to them. The conveyance, we are satisfied, was not intended to and did not vest any interest in cotenancy or otherwise of a right in Brown to the use of any waters which plaintiff or his predecessors were beneficially using on their lands. It simply conferred upon Brown and his successors an interest in the ditch whereby, under Preadmore's actual diversion and by means of the ditch and dam, they might themselves become appropriators by actual use of the excess of water beyond what was applied by Preadmore for beneficial purposes.

So that, as there never existed any cotenancy in the use of these waters, the finding of prescriptive right acquired by respondent against the asserted right of appellant is clearly of no moment.

[4] In reality the material finding in the case is that respondent and his predecessors in interest are entitled to the waters flowing in said ditch by virtue of the appropriation thereof by Preadmore and a continuous necessary and beneficial use of the whole thereof ever since upon the lands now owned by respondent. It was upon this claim, denied by appellant, that respondent based his right to an injunction, and it is the finding in favor of such claim, as well as the finding of a prescriptive right, which appellant attacks, as not sustained by the evidence.

As we have said, the only right which Preadmore acquired, as an appropriator of the waters of Oak Run creek diverted through the ditch, was a flow of such quantity to his land as was necessary for use and which he applied for beneficial purposes thereon. If he or his successors were in fact diverting from the stream a quantity in excess of what was so being beneficially used on their land, they acquired no right to that excess, and any other person had a right to divert from the stream, as an appropriator, such excess beyond what respondent or his predecessors were entitled to through actual use, regard, of course, being had of the rights of respondent as a prior appropriator to the first flow of the stream under such circumstances as would give him full protection to his prior acquired claim.

When this case was before the district court of appeal for the Third district, in affirming the judgment, consideration was given only to the evidence in support of the finding of a prescriptive right against the asserted interest of appellant as cotenant of respondent. No consideration was given to the finding sustaining the claim of respondent as an appropriator, and which appellant also attacked. While, for the reasons heretofore given, we do not think the finding as to prescriptive right is material except as involving the ditch itself to which, as successor in interest to Brown, appellant certainly became a tenant in common by record title with respondent and his predecessors, still, as in all material respects, the same evidence was introduced to sustain both the claim of prescriptive right and a right by appropriation to the use of all the waters, both findings may be considered together and, in our opinion, the evidence sustains neither. This, we think, is apparent from a consideration of the testimony of the respondent himself and the witnesses called in his behalf.

All these testified respecting the use of the water by respondent or his predecessors. The testimony covered a period of some 30 years, dating from about the time Solomon Hufford acquired the Preadmore land in 1883. Plaintiff was a nephew of Solomon Hufford and, after the death of his uncle, was in possession of this land as tenant, and also as an employé, during the years 1893, 1894, and 1895, purchasing it in 1907. His purchase was of 280 acres, but the ditch was only tributary to and there was susceptible of irrigation therefrom some 65 to 70 acres of which not more than 35 acres, consisting principally of meadow and orchard, were ever actually irrigated, the season therefor covering generally the months from July to October of each year.

Now, as to the testimony. Respondent himself, after testifying that he had known the ditch for about 23 years, proceeded: "It will be 3 years next May (the witness was testifying in February, 1909) since I first went on the place. Have used the water during all that time in the summer time, except when Mr. Dye (defendant) had it. * * * I used it for irrigating my meadow, orchard, grain, hay ground, and garden. I have about 30 acres of meadow; if not irrigated, it would dry up. It dried up last year after I cut my hay, and it did not make a second crop. It dried up because it did not get any water. It was turned out of the ditch by Mr. Dye. He turned it out 15 or 20 times, I guess. He cut the banks of the ditch and threw some rocks in it and let it run out. * * * I forbid Mr. Dye to take water from the ditch a year ago last summer. * * * I don't think he turned the water out that season after that time. * * * Sometimes I used all of it, sometimes about a fourth. It was necessary sometimes that I use all of it. The water ought to be put on them (the orchard) twice a week. I think Mr. Estep used the waters in 1905, or Mr. Howell, I don't know which. I don't know what they did with it or how much they used. I saw the water running in the ditch. I don't know how much Mr. Howell used of the water in 1906. I think the water was used in this ranch every year, but I don't say that all of it was used there every year."

Howell, the person referred to in the testimony of respondent, testified that he owned the land subsequently purchased by plaintiff for a short time and was in possession from October, 1905, to October, 1906. He testified that he used the water from the ditch in the irrigation of the land while he owned it, and to the inquiry: "Did you use all this water?" answered, "Well, whenever I needed it. A man don't need it steady on his land. Irrigate your land and take the water off and let it grow and warm up and then it needs it put on again. I didn't irrigate the orchard oftener than every two or three weeks. I used the water to irrigate the meadow or hay land every two or three weeks. When I did not use the water it went down through the old channel (the natural channel on the Estep ranch) into the creek. I used the water one-half the time during the summer of 1906 up to haying. After that I did not need it. Up to that time I used it about once in two weeks. I would irrigate for about a week and then let it rest for 10 days or 2 weeks."

Alfred Estep, owner of the Estep ranch heretofore referred to and from whom appellant purchased his asserted interest in the ditch and water right in 1906, testified that he lived in the neighborhood of the land of the plaintiff for about 30 years, and knew the Preadmore or Hufford ditch for that period of time. He then testified: "It conveys water from the Oak Run creek into the Hufford place. * * * I had the Hufford place rented in 1903, 1904, and 1905. * * * I used the water for making hay, and after haying and until it got cold weather in the fall I used it to bring the grass up. * * * I had the ditch cleaned out the year 1904. * * * No one else used the water that year that I know of. The ditches were full of water when I got the place from Dodd in the fall of 1903. * * * As a matter of fact, that ditch in the summer time needs to be full of water to use on this orchard and meadow. It is necessary to have it all. You don't use it every day, but about half of the time; but in order to get the best results you have to have the ditch full of water. * * * I aimed to irrigate it every 10 or 12 days or 2 weeks. I would turn the water on for 4 or 5 days or a week. I would turn the water on the orchard and let it run there and then on the hay land. I would irrigate the orchard about once a month and the hay land about a week. In order to get the best results you have to have the ditch full of water, but half of the time it would not be needed at all. I used it less than half of the time, but a man who raises alfalfa and garden would naturally use more than I did."

These are the only persons testifying who had ever been in the occupation of the Preadmore land and used the waters from the ditch. Two other witnesses—Alpaugh and Strayer—testified on the subject. Neither of them had ever occupied the Preadmore or Hufford place. They had lived in the vicinity for some 30 years and testified as to their observations of the extent to which the various occupants of the land used the water on it. Alpaugh thought that Solomon Hufford had used all the water the ditch would carry; after his death the respondent occupied the land for three years and used the water about the same as Solomon Hufford did; that various other persons occupied the Hufford place, including Dodd, Howell, and Estep, and used the ditch and waters as the previous tenants and Solomon Hufford had. The testimony of the witness Strayer was addressed to casual observations of the use of the water by respondent and other occupants of the land. He was no more definite in his testimony as to the actual use than Alpaugh, and it is apparent that all his testimony, as well as Alpaugh's was based more on the quantity of water, which in their judgment could have been used on the entire tract if it had all been cultivated, than what was actually used for irrigation of the smaller tract which was alone cultivated. There is nothing in their testimony definitely showing that any more extensive use of these waters on the Hufford place was ever had than as testified to by respondent, Howell and Estep.

Giving the fullest effect to this testimony, all it proves is that plaintiff and his predecessors made an intermittent use of these waters. At such periods as were necessary, they made use of all of them; at other times but a partial use. In the general run they were used but one-half of the time during the irrigating season, in the intervals running off as natural waste down the sloughs on the Estep place back into the creek.

[5] Undoubtedly, the plaintiff under the evidence, as the original appropriator of the water, had a paramount right to the first flow thereof to his land and in a full ditch because the best results through irrigation are attained with the ditch at that capacity, and a right to the use of all the waters at such times as was necessary for him to use them and to the extent of such previous use. But when this is conceded to him he has secured all he is entitled to. He is only entitled to what he needs and when he needs it, and has no right to complain of another appropriator taking it for beneficial purposes when he has no use for it. The use of water in this state is of such great necessity as to preclude its being allowed to run to waste, and its full beneficial and economical use requires that when the wants of one appropriator are supplied another may be permitted to use the flow for his benefit.

In this view, as the evidence shows that neither respondent nor his predecessors have used these waters except for occasional periods during the irrigating season, the finding that all the waters have been appropriated by them and have been and are applied to a continuous beneficial use on land now owned by the plaintiff is not sustained by the evidence, and, this being true, the appellant had a right to make an appropriation of these waters for use upon his land at such times as respondent had no use for them.

[6] We think it of no moment that the appellant did not in his pleading expressly claim any right to these waters as an appropriator. He denied the claim of respondent to either the necessity for, or continuous actual use of all of them and set up a general right of ownership in himself to a use of a portion of them, and it is conceded that until enjoined he was actually diverting a portion and applying it for beneficial purposes upon his land. Whether such diversion is effective between appellant and third parties is not now of consequence. As an appropriator of waters for use, where the paramount right of respondent thereto was not interfering with it, his appropriation was good as against any question of it by the latter. Respondent has no right to complain that the appellant is taking waters during a period when, while assuming to appropriate them, respondent really allows them to run to waste or fails to apply them to a beneficial use.

[7] And while the court found, as far as the ditch is concerned from which appellant was taking the waters, that the respondent had acquired title to it by prescriptive right as against appellant as a cotenant therein, the evidence does not sustain it. The only use which the respondent has made of the ditch has been to convey the waters for use upon the land to the extent that he was entitled to their beneficial use. As a cotenant in possession, respondent had a right to use the ditch for that purpose as long as his cotenant made no use of it and such use did not amount to an ouster or adverse holding.

As we are satisfied, therefore, that neither the finding of prescriptive right to the ditch or the finding that respondent is entitled as an appropriator to all the waters of Oak Run creek diverted therefrom through the ditch are sustained by the evidence, a new trial must be ordered.

[8] In making such order it may be stated that the evidence does not show definitely what amount of water is actually diverted by the ditch nor what amount is necessary or has been applied to use on his lands by respondent, nor at what periods during the irrigating season there is the greatest necessity for such use by him. In this situation it may be suggested that upon a new trial these matters should be ascertained as far as it is practicable to do so. If there is not water enough (and this appears to be the fact) to permit a diversion of the stream and a simultaneous use of part by both parties without injury, the court may by its decree fix the times when, by rotation, the whole may be used by each at different times in proportion to their respective rights. In doing so, the court should recognize the paramount and primary right of the respondent to the first flow in a full ditch and the use of all of it, or a lesser quantity, for given periods during the irrigating season, as it may be required. If this can be done so that by giving respondent the first flow for a week or every other week, or on certain days in the week, and the appellant the right thereto in the intervals, the wants of respondent are fully supplied, he obtains all he is entitled to and has no ground of complaint. While this remedy of rotation and use of waters for irrigation purposes has been more generally applied as between riparian proprietors (Wiggins v. Muscupiabe, etc., Co., 113 Cal. 182, 45 Pac. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; Smith v. Corbit, 116 Cal. 587, 48 Pac. 725), in principle there is no reason why it should not be made applicable as between claimants by appropriation. It is applied as between riparian owners to permit the beneficial use of the waters by all, and as by appropriation only the right to a beneficial use is acquired, there is no reason why, when it can be justly made applicable, the same rule of rotation should not be applied as between appropriators.

The judgment and order appealed from are reversed.

We concur: SHAW, J.; MELVIN, J.; HENSHAW, J.; ANGELLOTTI, J.; SLOSS, J.

17 Cal. App. 696

WOOLF v. CLARKE. (Civ. 886.)

(District Court of Appeal, First District, California. Dec. 21, 1911. Rehearing Denied by Supreme Court Feb. 19, 1912.)

1. Bills and Notes (§ 342*) — Bona Fide Purchaser—Notice.

The fact that a note was transferred just before maturity, and that it bore interest on its face at the rate of 6 per cent. per month, instead of per annum, which fact escaped the notice of the transferee until the time of the trial, was not sufficient to put him upon inquiry as to equities existing between the maker and the payee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 830–841; Dec. Dig. § 342.*]

2. Pledges (§ 41*)—Sale or Transfer of Property.

Civ. Code, § 3006, forbidding the pledgee of a note to sell it, being for the benefit of the pledgor, the maker of a note cannot complain of a transfer in violation of such statute, where his rights are in no way prejudiced thereby.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 100; Dec. Dig. § 41.*]

Appeal from Superior Court, Monterey County; B. N. Sargent, Judge.

Action by J. Sherman Woolf against Mary H. Clarke. From a judgment for plaintiff, defendant appeals. Affirmed.

Alexander & O'Donnell, D. E. Alexander, and John O'Donnell, for appellant. William Sandholdt, Jr., for respondent.

KERRIGAN, J. This is an appeal from a judgment against defendant, taken within 60 days from its entry, in an action upon a promissory note. Plaintiff recovered judgment, and the appeal is by defendant.

In substance, the following are the facts: On the 7th day of November, 1906, the defendant gave her promissory note to C. F. Necklaus for $1,000, payable 60 days after date, with interest at the rate of 6 per cent. per month from maturity until paid. Subsequently on January 5, 1907, C. F. Necklaus duly indorsed this note and transferred it to the First National Bank of Monterey as collateral security for a loan to him. Several months after so receiving this note the bank sold, assigned, and transferred it to the plaintiff. Thereafter, the note being unpaid and long overdue, said plaintiff commenced this action to recover the amount of the note and the interest due thereon. The complaint alleges, among other things, that the clause in said note reading "6 per cent. per month" was intended to read 6 per cent. per annum. After answer and trial, judgment went for plaintiff for $1,000, and interest at the rate of 6 per cent. per annum, amounting in all to $1,202.83.

Defendant contends in support of her appeal that there was no consideration for the note, and that the bank, having taken it just before its maturity, and with the circumstance that on its face it bore interest at the rate of 6 per cent. per month, must be held to have been put upon inquiry as to the execution of the note.

[1] As to this point, the defendant made little or no effort in the court below to show that any equities affecting the obligation existed between herself and the payee of the note. Moreover, we are satisfied that nothing attending the transfer of the note to the Bank of Monterey was sufficient to put it upon inquiry as to any defect in the binding obligation of the note arising from such equities. Its mere acceptance just before maturity, and the circumstance that it provided in terms for interest at the rate of 6 per cent. per month, were insufficient for that purpose, in view of the testimony of the witness Metz, who acted for the bank in the transaction, that it had escaped his notice that the note in fact bore such rate of interest, and that he knew nothing about it until the day of the trial; that he had at all times theretofore supposed the rate of interest to be 6 per cent. per annum. The court upon the evidence took the plaintiff's view of the case, and we must therefore, according to a familiar rule, conclude with the trial court that the bank received the note as pledgee in due course, before maturity, for value and without notice, actual or constructive, of any equities that may have existed between the defendant and C. F. Necklaus, the payee.

[2] Defendant finally contends that, as the note was transferred to the bank as a pledge to secure repayment to it of a loan, the bank had no right to sell the note, but was bound to hold and collect the same when it became due. This is true. Civ. Code, § 3006; 31 Cyc. 839; Jones on Pledges, etc. (2d Ed.) § 95; Union Trust Co. v. Rigdon, 93 Ill. 458, 466. And doubtless an unauthorized sale would constitute as to the pledgor a conversion of the instrument. But section 3006 was designed for the benefit of the pledgor (McArthur v. Magee, 114 Cal. 129, 45 Pac. 1068), and the maker of the note not being shown to be in any way prejudiced by the transfer and sale of the note cannot be heard to complain.

The judgment is affirmed.

We concur: LENNON, P. J.; HALL, J.

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17 Cal. App. 664

RINGROSE v. GLEADALL et al. (Civ. 891.)

(District Court of Appeal, Third District, California. Dec. 16, 1911. Rehearing Denied by Supreme Court Feb. 14, 1912.)

1. Trusts (§ 112*)—Instrument Creating a Trust—Construction.

Under Civ. Code, §§ 2253, 2258, 2267, providing that the nature, extent, and object of a trust are expressed in the declaration of trust, etc., the court in construing a trust must look to the instrument creating it, and construe it subject to the rules governing the interpretation of contracts declared in title 3 (section 1635 et seq.) of the Code.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 162; Dec. Dig. § 112.*]

2. TRUSTS (§ 112*)—DECLARATION OF TRUST—CONSTRUCTION.

Where the language of an instrument creating a trust is ambiguous, it must, if possible, be construed in favor of the beneficiaries and against the trustee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 162; Dec. Dig. § 112.*]

3. TRUSTS (§ 61*)—DECLARATIONS OF TRUSTS—APPLICATION OF TRUSTEE—TERMINATION OF TRUST.

A trust which requires the trustee to sell real estate and invest the proceeds for the benefit of the beneficiaries, and which fixes no time for the continuance of the trust, nor prescribes directions for payments to the beneficiaries or for any accounting by the trustee, imposes on the trustee only the duties of selling the land and investing proceeds for the benefit of the beneficiaries, and, when such duties are performed, the trust under Civ. Code, § 871, ceases, and he holds the bare legal title for the beneficiaries.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 83-87; Dec. Dig. § 61.*]

4. TRUSTS (§ 136*)—DECLARATION OF TRUSTS—APPLICATION—AGREEMENT—DRY TRUST.

A trust imposed on the trustee only the duties to sell land and invest the proceeds for the benefit of beneficiaries, who were husband and wife, and who subsequently entered into a separation agreement, including a division between them of the property in the hands of the trustee. The beneficiaries and the trustee entered into an agreement to carry out such separation agreement, and immediately thereafter the husband as a beneficiary entered into the possession of the property pursuant to the agreements. *Held*, that the agreements did not enlarge the powers of the trustee, and the trust became a dry trust on the trustee selling the land and investing the proceeds.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 179; Dec. Dig. § 136.*]

5. TRUSTS (§ 136*)—DRY TRUST—RIGHTS OF BENEFICIARIES.

Where there is a dry trust, the beneficiary is entitled to the actual possession and enjoyment of the trust property, and to dispose of it, or to call on the trustee to execute such conveyances of the legal estate as he directs.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 179; Dec. Dig. § 136.*]

6. TRUSTS (§ 136*)—DRY TRUSTS—CONVEYANCES BY BENEFICIARY—RIGHTS OF GRANTEE AS AGAINST TRUSTEE.

A grantee of a beneficiary in a dry trust may compel the trustee to convey the legal title to him.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 179; Dec. Dig. § 136.*]

7. TRUSTS (§ 61*)—TERMINATION—AGREEMENTS OF BENEFICIARIES.

All of the adult beneficiaries in a trust may maintain a bill in equity for a dissolution of a trust, and the discharge of the trustee, where no reason appears why they should not exercise the right of disposing of their property.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 83-87; Dec. Dig. § 61.*]

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Action by Rhody Ringrose, trustee of Ann Galvin, deceased, against Josephine V. Gleadall and another. From a judgment for defendants on their cross-complaint, plaintiff appeals. Affirmed.

James H. Boyer, for appellant. M. R. Jones and L. D. Windrem, for respondents.

BURNETT, J. The action, brought to cancel a deed made by one George Lewis to the defendant Josephine V. Gleadall and to quiet plaintiff's title as against both defendants, resulted in a judgment for the latter in accordance with their answer and cross-complaint. There is no controversy as to the essential facts in the case. In 1887 Ann Galvin died testate in Contra Costa county, and on the 18th day of November, 1898, the superior court of said county, by its decree of final distribution in the matter of the estate of said Ann Galvin, deceased, distributed certain real property belonging to said estate and situated in said county, in accordance with the terms of the will of said decedent, in severalty to Rhody Ringrose as trustee in trust for said George Lewis and Margaret Lewis to sell and dispose of and invest the proceeds in such manner as said George Lewis and Margaret Lewis shall have the benefit thereof, the investment to be made by said trustee as he shall think for the best interest of George Lewis and Margaret Lewis. Plaintiff sold the lands so distributed to him, and invested a portion of the proceeds in other lands, a part of which is involved in this action, and he invested the balance of the said proceeds in a mortgage. On August 21, 1905, George and Margaret Lewis and the plaintiff entered into two agreements providing for the separation of said George Lewis and Margaret Lewis, and the division between them of all the property then in the hands of the plaintiff, and that plaintiff should hold said property in certain proportions, specified in the agreement, in trust for the use of said parties. Immediately after this division, George Lewis entered into and continued in possession of the real property until his death. Prior to his death plaintiff paid to him practically all of the moneys specified as belonging to him in said agreements, and to Margaret Lewis, the greater portion of her share. On March 22, 1907, George Lewis, for a good and valuable consideration, conveyed to the defendant Josephine V. Gleadall the lands in controversy. Subsequent to the death of Lewis, Ringrose individually joined with said Margaret Lewis and Ellen Lewis, a sister of George Lewis—the latter two being the sole heirs of said Ann Galvin—in an action against these same defendants in which plaintiffs claimed to own the property in controversy here, but they afterwards dismissed the suit. Ringrose afterwards filed a petition for letters of administration on the estate of George Lewis, deceased, in which he alleged that said Lewis owned this real property at the time of his death. After letters were issued to him, Ringrose brought an action against these same defendants to cancel said deed from Lewis to Gleadall, in which action plaintiff claimed that Lewis was the owner in fee simple of the property. Judgment went for defendants. Thereafter the present action was brought by Ringrose, and the appeal is from the judgment on a bill of exceptions.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

We deem it unnecessary to notice all the questions discussed by counsel, as, beyond doubt, the vital and decisive point as to the termination of the trust must be resolved so as to render impossible a decision in favor of appellant.

[1] Of course, it is elementary and axiomatic that we must look to the instrument creating the trust to determine the nature, extent, and object of said trust. Civ. Code, §§ 2253, 2258, 2267; Tyler v. Granger, 48 Cal. 259; Goad v. Montgomery, 119 Cal. 557, 51 Pac. 681, 63 Am. St. Rep. 145; Keating v. Smith, 154 Cal. 191, 97 Pac. 300. Neither will it be disputed that, where there is a written instrument creating a trust, to determine the intent of the trustor and the scope of the trust, we must apply the familiar rules for the interpretation of contracts found in title 3 of the Civil Code (section 1635 et seq.).

[2] It is also a reasonable requirement, and is the law, that, if the language of the trust be ambiguous or uncertain, it will be construed, if possible, in favor of the beneficiary and against the trustee. Or, as it has been expressed in Sprague v. Edwards, 48 Cal. 247: "In general, doubtful clauses in a deed are construed most strongly against the grantor and as favorably to the grantee as the language will permit. The same rule holds good as between a trustee of an express trust having no interest in the trust fund and the cestui que trust. In such cases doubtful clauses in the instrument creating the trust are construed strictly as against the trustee acting under a power, and most favorably to the beneficiary under the trust."

[3] As found in the decree of distribution, this is the language of the first trust in controversy here: "It is further ordered, adjudged, and decreed that all that tract of land (describing it) be and the same is hereby distributed in accordance with the terms of the will of said deceased in severalty to Rhody Ringrose, as trustee, in trust for George Lewis and Margaret Lewis, wife of George Lewis, 'to sell and dispose of and to invest the proceeds in such manner' as George Lewis and said Margaret Lewis 'shall have the benefit thereof, the investment to be made by said trustee as he shall think for the best interest' of said George Lewis and said Margaret Lewis." The language of the decree of distribution, it may be said, has the exact significance of the corresponding language of the will. It will be observed that no reason is assigned for the creation of the trust, no time is designated for its continuance, no particular directions prescribed for any payments to the beneficiaries or for any accounting by the trustee, and only two duties are imposed upon said trustee. These are to sell certain land and to invest the proceeds for the benefit of the cestui que trust. The trustee performed these two duties. Was there anything else for him to do in order to discharge his trust? It would be impossible to so hold without reading into the declaration of trust something not found therein. We may imagine that the testatrix intended that the trust should continue during the lifetime of the beneficiaries, but, if so, she failed to express her intention. On the other hand, it is easily conceivable that she had good reasons for confining it to the sale of the land and an investment of the proceeds. But, whether with or without reason, she did so limit it, and we have nothing to do but to give effect to the language as we find it.

In Sears v. Choate, 146 Mass. 395, 15 N. E. 786, 4 Am. St. Rep. 320, there was a bill in equity to terminate a trust created for the benefit of the plaintiff by the will of his father, providing that "all such parts of the income of my estate which may be necessary for the support and education of my son, I order to be used for that purpose and when he shall be twenty-one years old, I direct that four thousand dollars be paid to him annually; when he shall be twenty-five years old, six thousand dollars per annum; and ten thousand dollars when he shall be thirty years old." When the plaintiff reached the age of 21, in 1875, all the property then in the hands of the trustees not required to pay the plaintiff the annuity bequeathed to him by the will was ordered, in a suit, to be paid to him as his own absolute property. Referring to this statement in a former opinion that "it is conceded by all parties that in order to carry out the plain intention of the testator to secure to his son an honorable support during his life, not exposed to the risks of his improvidence or misfortunes, the trustees should retain in their hands enough of the estate to produce beyond question the annuity provided for in the will," the court says: "It is quite probable that the testator had this idea or intention in his mind; but, if he had, he failed to frame his will in such a way as to carry out his intention. This court has held that the founder of a trust may give an equitable life tenant a qualified estate in income, which he cannot alienate and which his creditors cannot reach. Broadway National Bank v. Adams, 133 Mass. 170, 43 Am. Rep. 504. But in order to give such a qualified estate, instead of an absolute one, the language of the founder must be clear and unequivocal to that effect. Taking this will as it is, we should not be justified in holding that the plaintiff took anything less than an absolute equitable estate, both in the income and in the corpus of the trust." The same principle is announced by all the authorities.

The purpose of the original trust, therefore, having been accomplished, the estate of the trustee would be terminated, and he would hold nothing more than the bare legal title for the beneficiaries. Section 871, Civ. Code; Pomeroy, Eq. Juris. § 1065; Perry on Trusts, § 520.

[4] The same result must flow from the construction and operation of the said agreements of the trustee and beneficiaries. One of these agreements, designated as "Exhibit A" in the complaint, is the contract of separation, and states that it is made between George Lewis, party of the first part, and Margaret Lewis, wife of George Lewis, party of the second part. At the end of the agreement, in addition to the signatures of the parties thereto, appear the name of Thos. B. Phelby, Jr., signed as a witness, and the name of Rhody Ringrose, although for what purpose or in what capacity Ringrose signed the agreement does not appear. It is contended therefore by appellant "that the mere signing of his name at the end of the agreement, which states distinctly the names of the parties thereto, did not thereby make him a party to such agreement." Lancaster v. Roberts, 144 Ill. 213, 33 N. E. 27; Blackmer v. Davis, 128 Mass. 538; Evans v. Conklin, 71 Hun, 536, 24 N. Y. Supp. 1081. Appellant seems, though, to have forgotten his stipulation at the trial that: "On the 21st day of August, 1905, said George Lewis and Margaret Lewis, his wife, and Rhody Ringrose, entered into two certain agreements in writing with and concerning the real property hereinafter described, copies of which agreements are annexed to the complaint herein and marked respectively 'Exhibits A and B,' and made a part hereof." But it makes no difference whatever whether the trustee was a party to that agreement. On the same day another contract was entered into between the trustee and the said beneficiaries for the purpose of giving effect to the agreement of separation as far as the division of the property is concerned. It is not disputed that it was competent for the parties to enter into this agreement which is set out in the complaint and designated as "Exhibit B." This agreement was made between "George Lewis, the party of the first part, and Margaret Lewis, wife of said George Lewis, the party of the second part and Rhody Ringrose, the party of the third part," and it recited: "That whereas the said party of the third part holds the legal title of the real property hereinafter described and also" a certain promissory note "in trust, nevertheless, for the use of the said party of the first part and the said party of the second part and whereas simultaneously with the execution of this agreement, the said party of the first part and the said party of the second part have entered into a contract agreeing to an immediate separation and to a division between them, of the property above mentioned and the whole thereof. Now, therefore, it is hereby mutually agreed by and between the parties hereto as follows, to wit 1. That the said party of the third part, as trustee is to hold, to and for the use of said party of the first part that certain parcel of land" herein involved and also 17/60 of the sum due on the said promissory note. Then follows the agreement for the trustee "to hold to and for the sole and separate use of the said party of the second part 43/60" of the sum due on the said promissory note.

The proper view is, undoubtedly, that by agreement of all the parties in interest the original trust, as we have called it, was superseded by this said contract of August 21st. But it is clear as anything can be that the powers of the trustee are not enlarged.

[5] In fact, the trust is plainly not active, but what is designated as a simple or dry trust. "In such case, the cestui que trust is entitled to the actual possession and enjoyment of the property, and to dispose of it, or to call upon the trustee to execute such conveyances of the legal estate as he directs. In short, the cestui que trust has an absolute control over the beneficial interest together with a right to call for the legal title, and the person in whom the legal title vests is a simple ordinary trustee." Perry on Trusts, § 520. As we have seen, this was the view of the situation taken by the parties. George Lewis immediately entered into the possession of said real estate, and so continued until his death. The trustee also began dividing the money between the beneficiaries as they had agreed. By the conduct of the parties we have thus a construction of the contract which, it may be said, comports strictly with the terms employed.

[6] We think there can be no doubt that Josephine V. Gleadall, as the grantee of George Lewis, the beneficial owner of the property, has proceeded in accordance with law to enforce a conveyance to her. O'Connor v. Irvine, 74 Cal. 435, 16 Pac. 236; Keogh v. Noble, 136 Cal. 153, 68 Pac. 579; White v. Costigan, 138 Cal. 569, 72 Pac. 178. The cases cited by appellant possess distinctive features that warrant the judgment in each but there is nothing in any of them opposed to the finding of the trial court herein. In Hays v. Applegate, 101 Ky. 22, 39 S. W. 436, the question was whether "a valid marketable title in fee simple" was held by the grantee of a deed executed by the trustee of a trust whose terms are set out in the opinion. It seems that the property was the subject of a reinvestment by the trustee, and it was contended that by the first sale and investment of the proceeds the power of the trustee was spent. But the court properly held that the evident purpose of the trust was to make the estate of the beneficiary

productive, and it was said that "the provision that the proceeds of sale, as well as any property purchased therewith, should be held 'under the same trust as herein created' must be held to continue the power of sale and reinvestment so as to keep the trust estate productive."

In re Trelease, 49 Misc. Rep. 205, 96 N. Y. Supp. 318, involved the construction of a bequest to the testator's wife of certain property, "the money to be invested in bond and mortgage or in other property, and she shall have the income thereof and she shall have the right to use the principal as she may need it." The disputed point was whether she took simply a life estate. The court said: "It is apparent that the intention of the deceased was that his wife should not only have the income from his property but also the principal, if she needed it. He so stated. She took more than a life interest, and could use the principle as necessity required."

In Dudley et al. v. People's Trust Co., 57 Misc. Rep. 230, 107 N. Y. Supp. 930, the deed of trust "empowered the trustees on the death of the grantor to divide the trust fund into equal parts and hold such parts in trust for the grantor's children, giving each of them during his life the income from a single part, and providing that, on the death of each of such children who might survive the grantor, the principal of his share should be transferred as such child might appoint by will, and in default of such appointment to his legal representatives." The court simply followed the plain language of the trust, and held that it was intended that the trustee should hold each part during the life of the beneficiary, and that only after the latter's death should his share go to his devisee or his legal representatives. The question in Hart's Estate, 203 Pa. 480, 53 Atl. 364, was whether the trustees were liable for loss on account of an unwise investment. It was contended that the terms of the trust left the matter entirely to their discretion as they were authorized "to sell any part thereof and to invest the proceeds in such other securities as may in their judgment be best." The court, however, applied the rule that "where a trustee neither exercises common skill, common prudence nor common caution, and is either guilty of supine negligence in being ignorant of facts which ordinary intelligence would have disclosed to him, or if known, in not exercising his best judgment upon them, and a loss results, he will be surcharged."

A similar question was involved in Gray et al. v. Lynch and McDonald, 8 Gill (Md.) 419. It was held that the trustees exercised a fair discretion and acted in good faith, and therefore were not liable for loss. Another disputed point decided was that where a testator devised to three trustees, by name, certain property in trust, to sell and convert it into money, and invest the proceeds in some safe and profitable stock, which they were to hold in trust for the sole and separate use of the testator's two daughters during their lives and then for their children, it was a power coupled with an interest or trust, which, upon the death of one, could be executed by the surviving trustees. In Mortgage Company v. Massie, 94 Tex. 339, 60 S. W. 544, it was said that "the purpose of the construction of written instruments is to ascertain the intention of the parties to them, and, when this intention is ascertained, it must be given effect." Noting the peculiar terms of the trust, it was held that the effect of the words, "use at his discretion," "invest," "handle," "proceeds," "profits," "increase," "re-invest increase of profits," in an instrument by which a wife made her husband a trustee for the benefit of her children was to authorize him to sell and reinvest after having once invested the trust fund for their benefit.

The decision in Wirth v. Wirth, 183 Mass. 527, 67 N. E. 657, is grounded upon the principles of equity and public policy. The action was brought to compel a trustee to transfer a liquor business in specie to two beneficiaries, one of whom was a minor. It was held that: "If it were assumed that the plaintiffs had a right to have the trust terminated, and if it also were assumed that there might be circumstances which would justify a court of equity in compelling an executor or administrator with the will annexed to turn over in specie to the residuary legatees all the property belonging to such a business, the fact that one of the beneficiaries was a minor, who could not conduct the business legally in person or by his guardian, was a sufficient reason for refusing the decree prayed for." In the Matter of Wilkin, 183 N. Y. 104, 75 N. E. 1105, it was held that: "A bequest of a specified sum of money to an executor 'to be by him invested and to be paid, together with the income thereof' to a son of the testator, 'or to his wife or children, at such times, in such sums and in such manner as such executor may deem best for the interest' of such son, creates a valid trust of personal property, covering both principal and interest of the fund, and authorizes the executor, in the exercise of his sound discretion, in good faith, to pay over the whole or any part of the principal of the fund to the testator's son, or his wife or children, at such times, in such sums and in such manner as such executor may deem best for the interest of that son."

[7] There is manifestly another aspect in which the case might be viewed so as to uphold the judgment of the trial court. It is set forth in Eakle v. Ingram, 142 Cal. 15, 75 Pac. 566, 100 Am. St. Rep. 99, where it is held that "all of the persons beneficially interested in a trust who are of full age may maintain a bill in equity for the dissolution of the trust and discharge of the

trustee, where the case falls within no exception to the rule, and no reason appears why they should not exercise the right of disposing of their property." The decision of the trial court, though, is so clearly just and reasonable that we forbear to consider the subject any further.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

17 Cal. App. 720

KIBELE et al. v. SUPERIOR COURT OF KERN COUNTY et al. (Civ. 1,020.)

(District Court of Appeal, Second District, California. Dec. 26, 1911. Rehearing Denied by Supreme Court Feb. 21, 1912.)

DEPOSITIONS (§ 7*)—TIME OF TAKING—CONDITION OF CAUSE.

Under Code Civ. Proc. § 2021, providing that the deposition of a party to an action may be taken any time after service of summons or appearance of defendant, defendant, though he has not answered, and has demurred to the complaint, may take plaintiff's deposition; the words "matter in issue" in section 2065, providing that a witness must answer questions pertinent to the matter in issue, not applying solely and alone to the naked allegations of the complaint which are denied by the answer, but to the material allegations of the complaint, which, till defendant is in default, are to be deemed denied.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 13–22; Dec. Dig. § 7.*]

Application by J. A. Kibele and another for writ of prohibition to the Superior Court of Kern County and J. W. Mahon, Judge thereof.

Alternative writ dismissed, and application denied.

E. L. Foster, Watkins & Blodget, Geo. E. Whitaker, and Kemp, Mitchell & Silberberg, for petitioners. J. Wiseman Macdonald and William P. Boland, for respondents.

SHAW, J. The petitioner Kibele instituted an action in the superior court of Kern county against the Vesta Oil Company. The defendant, without answering, interposed a demurrer to the complaint, and upon such state of the pleadings proceeded to take the deposition of plaintiff in accordance with the provisions of the sections of the Code relating to depositions. Under the advice of his attorney, E. L. Foster, also petitioner herein, plaintiff refused to answer certain questions propounded to him, and, notwithstanding the order of court, duly made, commanding him so to do, persisted, under the advice of his said attorney, in such refusal to answer. Thereupon petitioners were cited to show cause why they should not be adjudged guilty of contempt; Foster being included in the citation, for the reason that he had advised Kibele to disobey the order. The matter coming on for hearing, the court directed that an order be prepared adjudging petitioners guilty of contempt, and committing them to jail for a term of five days, and was about to sign the order, when it was restrained from so doing by an alternative writ, issued from this court, directing it to show cause why it should not be prohibited from so doing, and meanwhile to desist from further proceedings in the matter.

The sole contention of petitioners urged in support of the granting of the writ is that, as no answer had been filed in the case, there was no issue presented; and hence for this reason only the questions propounded, conceded to be relevant and pertinent to matters alleged in the complaint, were not pertinent to any matter in issue, and therefore plaintiff could not be required, as a witness, to give his deposition. The case of Kibele v. Vesta Oil Company, wherein defendant sought to take the deposition of plaintiff, was an action, as distinguished from a special proceeding. The statute (section 2021, Code Civ. Proc.) in clear and explicit terms provides that the testimony of a witness who is a party to an *action* may be taken therein by deposition at any time after service of summons or the appearance of the defendant. In the case of S. F. Gas & Electric Co. v. Superior Court, 155 Cal. 30, 99 Pac. 359, a like question arose; it being contended that there was no issue for the reason that the case had been tried and was then pending in the Supreme Court on appeal. In discussing the point, the court, speaking through the Chief Justice, said: "It may be answered to this objection that, in case of an *action*, it is not requisite that an issue of fact should have arisen in order to authorize the taking of depositions. As soon as the summons has been served, either party may commence the taking of depositions relevant to any possible issue that may arise upon a denial of the allegations of the complaint, or upon the allegation of new matter in the answer; and there is perhaps, some significance in the distinction made by the statute in this particular between actions and special proceedings. Clearly, therefore, the existence of an actual, as distinguished from a potential, issue of fact, is not, by the terms of the statute, made a conclusive test of the right to take depositions de bene esse." See, also, California, etc., Co. v. Schiappa-Pietra, 151 Cal. 732, 91 Pac. 593. While section 2065, Code of Civil Procedure, provides that "a witness must answer questions legal and pertinent to the matter in issue," it would be a narrow interpretation to construe the words "matter in issue" as applying solely and alone to the naked allegations of the complaint which are denied by the answer. The sustaining of such contention would not only nullify the plain provisions of section 2021, Code of Civil Procedure, but likewise destroy the right given by statute for the perpetuation of testimony, as in neither case could a witness be required to testify against his will. The right to recover the subject of litigation, as legally set forth in the complaint, is the matter in issue, and until a final termination of the case either party thereto, after defendant is in court and before answer filed, is, upon complying with the provisions of the statute, entitled to the legal testimony of the other by deposition as to all material allegations of the complaint upon which such right is based, and all of which, in contemplation of law, since, until his default therein, defendant has the right to answer, are deemed to be denied.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The alternative writ heretofore issued is dismissed, and petitioners' application denied.

We concur: ALLEN, P. J.; JAMES, J.

17 Cal. App. 741

PEOPLE v. PIERRO. (Cr. 197.)

(District Court of Appeal, Second District, California. Dec. 29, 1911. Rehearing Denied by Supreme Court Feb. 26, 1912.)

1. INFANTS (§ 20*) — DELINQUENTS — CRIMINAL PROSECUTION.

Under the Juvenile Court Act (St. 1909, p. 213) § 1, which defines a dependent child as one who commits any of different acts enumerated, and section 26 of the act, which provides that, "where a child shall be dependent or delinquent" under the terms of the act, any person contributing to the dependency or delinquency of such child shall be guilty of a misdemeanor, a person cannot be convicted of the offense denounced without a showing that the child in question was a delinquent.

[Ed. Note.—For other cases, see Infants, Dec. Dig. § 20.*]

2. INFANTS (§ 20*) — CONTRIBUTING TO DELINQUENCY—INFORMATION.

Pen. Code, § 952, provides that an indictment or information must be direct and certain "as it regards * * * the particular circumstances of the offense charged, when they are necessary to constitute a complete offense." The Juvenile Court Act (St. 1909, p. 213) § 1, defines a dependent child as one who commits any of enumerated acts; and section 26 provides for the punishment as a misdemeanor of the act of contributing to the delinquency of a delinquent child. *Held*, that an information charging a person with contributing to the delinquency of a delinquent child, which merely alleges that a certain person was a minor female child under the age of 18 years, "and was then and there a dependent child, within the meaning" of the act "concerning dependent and delinquent minor children," and does not allege that the child had been adjudged a delinquent, is insufficient, as not showing the particular acts committed which made the child a delinquent.

[Ed. Note.—For other cases, see Infants, Dec. Dig. § 20.*]

3. INFANTS (§ 20*)—CONTRIBUTING TO DELINQUENCY—INFORMATION.

The information is not rendered sufficient by an allegation that the accused committed acts of a lewd and lascivious nature with the child, as she may have been an unwilling and unresponsive victim in the hands of the defendant, and her moral perception or character may not have been injuriously affected by the defendant's conduct.

[Ed. Note.—For other cases, see Infants, Dec. Dig. § 20.*]

Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Frank Pierro was convicted of contributing to the dependency of a minor, and appeals. Reversed.

L. E. Dadmun, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People. H. S. Utley and L. J. Utt, amici curiæ.

JAMES, J. Defendant was prosecuted under the provisions of the juvenile court law of 1909 (St. 1909, p. 213) for having committed acts of a lewd and lascivious character with an alleged dependent child named Valita Rhinehart. Otherwise expressed, the offense of contributing to the dependency of a minor under the age of 18 years was the crime intended to be charged by the information. The appeal is taken from a judgment of imprisonment, and from an order made by the trial court denying defendant's motion for a new trial.

[1] The act of the Legislature referred to defines a dependent child to be one who is found committing, or who engages in the performance of, a variety of acts, all of which are specified in some 15 subdivisions of the first section of the law. A child of the character therein described, or who does any of the different acts enumerated in either or any of such subdivisions, is declared to be dependent. By section 26 of the act, it is then provided that "in all cases where any child shall be dependent or delinquent under the terms of this act, the parent or parents, legal guardian or person having custody of such child, or any other person who shall, by any act or omission, encourage, cause or contribute to the dependency or delinquency of such child shall be guilty of a misdemeanor." Under the terms of the statute, then, it is essential that, before a person can be convicted of contributing to the dependency of a child, the fact that such child has become a dependent must be alleged and proved. The condition of the child as having become impressed with the character of a dependent is an indispensable prerequisite to the maintenance of a charge like the one made against the defendant in this case.

[2] The district attorney appreciated this requirement of the law, and alleged in his information "that, on or about the 31st day of November, 1910, at and in the county of San Diego, one Valita Rhinehart was a minor female child under the age of 18 years, and was then and there a dependent child, within the meaning of that certain act of the Legislature of said state entitled 'An act concerning dependent and delinquent minor children; providing for their care, custody and maintenance;' approved March 8, 1909." Allegations then followed in which were enumerated the various acts alleged to have been committed by defendant with and in the presence of the child. The defendant, by demurrer, objected to the sufficiency of this information, on the ground that the particular acts or conduct chargeable against Valita Rhinehart, by reason of which the child became a delinquent, were not set out in the information, and that therefore defendant was not informed of the particulars of the charge he was called upon to meet. In our opinion, there was merit in this objection, and the demurrer to the information should have been sustained. The child, if dependent, may have become a vagrant or a beggar; she may have become incorrigible or destitute; she may have frequented the company of criminals, or become an inmate of a house of prostitution, or deported her-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

self in many other ways by which the character of a dependent child may have become affixed to her, within the meaning of the juvenile court law. Defendant was entitled to have the information show the particulars in this regard; for he was called upon to meet the issue, first, as to whether the child had in fact become a delinquent. If she had not, the charge of contributing to the cause of such delinquency of the child, or its continuance, could not be made out against him. Merely charging that the child was a delinquent, within the meaning of the juvenile court law, as the district attorney did charge, when the statute enumerates many and different acts by reason of which a child may become a delinquent, cannot be said to satisfy the requirement of section 952, Penal Code, which provides that an indictment or information must be direct and certain as it regards, "3. The particular circumstances of the offense charged, when they are necessary to constitute a complete offense." People v. Martin, 52 Cal. 201. Had the child against whom the offense is alleged to have been committed been adjudicated to be a dependent child, then it would have been sufficient to plead such adjudication; but when no adjudication is relied upon as showing a legal determination made of the character of the minor, the facts which make such minor a dependent must be pleaded in the information.

[3] It cannot be said in this case that, by reason of the commission of the several acts which it is alleged the defendant committed with and toward Valita Rhinehart, she became a dependent child. She may have been an unwilling and unresponsive victim in the hands of defendant, and her moral perception or character may not in such case have been warped, distorted, or affected injuriously by the conduct of defendant. The lack, therefore, of sufficient allegation as to facts showing the child to have been a dependent is not remedied or supplied in the later statements contained in the information of acts and things which defendant is alleged to have done. We are cited to two decisions by respondent as authority in opposition to defendant's contention that the information is insufficient: State v. Addcock, 65 Mo. 590; Gunyon v. State, 68 Ind. 79. These cases, to our minds, are not in point. They each deal with charges of aiding or attempting to aid prisoners to escape from jail, and it was there held that, under the statutes then being considered, it was not necessary to allege facts showing the particular offense which such prisoners were charged with having committed; the crime was held to be properly charged when it was alleged that the prisoners, in one case, had been lawfully committed, and, in the other, that such prisoners had been charged with or convicted of a felony. Under the terms of the statutes of Missouri and Indiana, it very plainly appeared that the matter of the particular felony with which a prisoner may have been charged, or the facts upon which it was founded, were wholly immaterial. The case of State v. Dunn, 53 Or. 304, 99 Pac. 278, is cited also as an authority to the same point, and to this citation must be made the same answer that the Supreme Court of Oregon was there considering and applying a statute wholly different in those essentials which are material to this case. The act construed in State v. Dunn, supra, was one designed for the protection of minors; its purpose was similar, if not identical, with the juvenile court law of California, but its scope was greater. By the express terms of the Oregon statute, it was made an offense for a person to commit any act which (quoting) "manifestly tends to cause any child to become a delinquent child." Naturally and necessarily, where it is made an offense for a person to commit any act of the kind described in the sentence quoted, the question as to whether the child becomes a dependent child is immaterial. Under the California statute, the child must become a dependent person within some of the specific definitions given in the statute before the offender who contributes to cause that dependency can be prosecuted.

Numerous other errors of law are assigned by appellant, and because of which it is claimed a reversal of the judgment and order should follow. The question that has been discussed in this opinion goes to the foundation of the case, and renders it unnecessary to consider any of the additional points made.

The judgment and order are reversed.

We concur: ALLEN, P. J.; SHAW, J.

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17 Cal. App. 684

MORRIS v. ALLEN et al. (Civ. 876.)

(District Court of Appeal, First District, California. Dec. 21, 1911. Rehearing Denied Jan. 20, 1912.)

1. REPLEVIN (§ 103*)—JUDGMENT—CONFORMITY TO PLEADINGS.

An automobile was sold to two buyers on a conditional sale, and was subsequently attached by a creditor of one of them; the purchase price being still partly unpaid. *Held*, in claim and delivery by the seller against the attaching creditor and the officer, that defendants, not having paid or offered to pay the balance due on the purchase price, and having denied plaintiff's title by pleading that the sale was an absolute one, were not entitled to have the judgment for plaintiff vest them with the interest of the buyer before levy of the attachment.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 398–411; Dec. Dig. § 103.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. Replevin (§ 75*)—Judgment—Damages—General and Special Damages.

Under Code Civ. Proc. § 667, which provides that plaintiff in an action for the recovery of personal property may have judgment for the possession of the property, or for its value, if delivery cannot be had, and damages for its detention, the value of the property and damages for its detention are separate and independent items, and the damages recoverable may be general or special, or both.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 303, 304; Dec. Dig. § 75.*]

3. Replevin (§ 76*)—Judgment—Measure of Damages.

Plaintiff, on obtaining judgment in an action for the recovery of personal property affirming his right of possession, is entitled to such damages as will compensate him for the injury sustained by the wrongful taking and detention, although such damages must be connected with and incident to the possession of the property.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 305, 306; Dec. Dig. § 76.*]

4. Replevin (§ 78*)—Damages—Detention—Depreciation.

Where personal property sought to be recovered in an action of claim and delivery diminishes in value while it is wrongfully detained, the depreciation is a proper element of damages.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 307, 308; Dec. Dig. § 78.*]

5. Damages (§ 5*)—"General Damages" and "Special Damages."

"General damages" are those which necessarily result from the act complained of; "special damages" are those that are the natural but not the necessary result of the act.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 4; Dec. Dig. § 5.*

For other definitions, see Words and Phrases, vol. 4, pp. 3059, 3060; vol. 8, p. 7669; vol. 7, pp. 6572, 6573; vol. 8, p. 7802.]

6. Damages (§ 142*)—Pleading—General and Special Damages.

General damages necessarily resulting from the act complained of may be shown in evidence under a general allegation of damages, while special damages not the necessary result of the act complained of, and not being implied by law, must be particularly pleaded and proved.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 413; Dec. Dig. § 142.*]

7. Replevin (§ 107*)—Judgment—Construction.

In an action of claim and delivery, a judgment awarding the plaintiff the possession of an automobile, or $600, the value thereof, in case delivery could not be had, and $250 damages for detention, is to be construed as a judgment that plaintiff shall recover $600 in case a delivery cannot be had, but, in case a delivery can be had, shall recover only $250 by way of damages.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 424–428; Dec. Dig. § 107.*]

8. Sales (§ 469*)—Conditional Sales—Payment—Interest of Buyer.

Where title to the thing sold is by the terms of the contract reserved in the seller until the purchase price is fully paid, no title passes to the buyer, notwithstanding delivery, until there has been a full performance of the condition as to payment.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1357; Dec. Dig. § 469.*]

9. Sales (§ 458*)—Validity—Repugnancy to Interest Created—"Alienate."

Civ. Code, § 711, declaring that conditions restraining alienation, when repugnant to the interest created, are void, is but an expression of the policy of the law declaring conditions accompanying the absolute transfer of property and attempting to restrain the subsequent sale or alienation thereof to be void, the word "alienate" signifying a transfer of property and implying the right by title to do so; and hence a contract of conditional sale under which the buyer acquired no title or interest, and which entitled the seller to immediate possession of the property if it was taken on attachment, was not repugnant to the interest created or a restraint on alienation.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1336; Dec. Dig. § 458.*

For other definitions, see Words and Phrases, vol. 1, pp. 302–306; vol. 8, p. 7571.]

10. Sales (§ 474*)—Buyer's Interest Under Conditional Sale—Attachment.

A buyer under a contract of conditional sale, by which the title remains in the seller until full payment, has no attachable interest in the property until he has fully complied with the condition relating to payment of the purchase price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1391–1402; Dec. Dig. § 474.*]

Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Action by R. H. Morris against W. C. Allen and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Olney, Pringle & Mannon, for appellants. Walter E. Rode, for respondent.

LENNON, P. J. This is an appeal upon a bill of exceptions from a judgment in an action of claim and delivery, wherein the plaintiff was awarded possession of a "Ford" automobile, or the sum of $600, the value thereof, in the event that a delivery could not be had, and damages for its detention in the sum of $250. The pleadings and the evidence in the case show the undisputed facts out of which the controversy arose, to be that Morris, the plaintiff, was on September 17, 1907, the owner of the car in dispute, and on that date, by a contract in writing, made a conditional sale of the same to F. J. Zajac and A. Korwin for the sum of $750. Of the purchase price $350 was paid in cash, and the balance was agreed to be paid in specified installments. It was further provided in the contract of sale that the vendees would not suffer the car to be attached, and that if it was attached the vendee would immediately notify the vendor of that fact and procure a release of the attachment and deliver the car to the vendor. Time was of the essence of the contract; and it was especially agreed that until all of the conditions of the contract were performed the title to the property should remain in the vendor, and that if any of the covenants of the contract were broken by the vendees the contract, at the option of the vendor, should terminate, whereupon the vendor would be permitted to retake the car, and all payments made, and all payments due under the contract were to be applied and considered as rent. On October 14, 1907, while the car was in the possession of Zajac and Korwin, and still subject to the terms and conditions of the contract of conditional sale, the defendant Howard procured a writ of attachment to be issued out of the justice court, in an action instituted against Zajac alone, and the defendant Allen, as constable, and by virtue of the writ, levied upon and took possession of the car. Korwin's interest in the car was never attached or purchased by Howard. Neither Zajac nor Korwin procured a release of the attachment, and the balance due on the purchase price not having been paid or offered to be paid, either by the vendees or the defendants, the plaintiff demanded of the defendants, in a written, verified claim, which set out his title and the source thereof, that they deliver the car to him. Compliance with this demand was refused, and on March 7, 1908, plaintiff brought this action.

[1] No claim was made upon behalf of the defendants that they had paid, or even offered to pay, to the plaintiff the balance of the purchase price due under the contract; and as their answer in effect repudiated the rights and title of the plaintiff by pleading that Zajac was the owner of the car by absolute purchase, there is no merit in the contention that the judgment of the lower court should have subrogated them to whatever rights the vendees had in the car prior to the levy of the writ of attachment. Liver v. Mills, 155 Cal. 463, 101 Pac. 299.

The plaintiff's complaint is in the form usually employed in actions of claim and delivery, and general damages only, in the sum of $300, for the wrongful taking and detention, are pleaded and prayed for.

[2-4] At the trial it was established without conflict or objection that at the date of the taking the value of the car was $600; but over the objection of the defendants the plaintiff, upon the issue of general damages, was permitted to testify that during the one year and six months the car was in the possession of the defendants it had depreciated in value to the extent of $400. The defendants objected to this testimony solely upon the ground that it was immaterial; and it is now insisted that the ruling of the trial court was erroneous because, as it is claimed, the damages proved and recovered were special in their nature, and could not, in the face of the objection, be shown in evidence without being specially pleaded. This contention cannot be maintained. The plaintiff in an action for the recovery of personal property may have judgment for the possession of the property, or for the value thereof in the event that a delivery cannot be had, and damages for its detention. Code Civ. Proc. § 667. Under this section of the Code the value of the property replevied and damages for its detention are separate and independent items, and the damages which may be pleaded, proven, and recovered are general, or special, or both. It is the general rule, where the plaintiff prevails, that even though the property has been delivered to him on the writ he is entitled to a judgment, not only affirming his right of possession, but awarding him as well such pleaded and proven damages as will compensate him for the injury sustained by reason of the wrongful taking and detention. While it is true, as suggested by the defendant, that the damages, either general or special, which a successful plaintiff may recover in replevin, must be connected with and incident to the possession of the property in dispute, it is equally true that the plaintiff must receive full indemnity for the injury he has sustained; and it necessarily follows that where the property sought to be replevied diminishes in value while it is wrongfully detained the depreciation is a proper element of damages. Wells on Replevin, § 535; Cobbey on Replevin, 853; 2 Sedg. on Dam. § 536.

[5, 6] "General damages" are those which necessarily result from the act complained of, and may be shown in evidence under a general allegation of damages. Special damages are those that are the natural, but not the necessary, result of the act complained of, and, not being implied by law, they must be particularly pleaded and proved. That the defendant may not be taken unawares is the reason for the rule requiring the cause of a special damage to be specifically pleaded, and it is obvious that when the source of the damage is the direct and necessary result of the act complained of the rule cannot be invoked or applied. Stevenson v. Smith, 28 Cal. 102, 87 Am. Dec. 107; Treadwell v. Whittier, 80 Cal. 579, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175. The manufacture of motor vehicles is still largely in its infancy; and it is a matter of common knowledge that by reason of the many changes and improvements that are made from year to year an automobile manufactured and marketed in any one year necessarily decreases in value as a salable commodity with each succeeding year of its existence. This being so, damage from depreciation by reason of lapse of time was the direct and necessary result of the wrongful taking and detention in the case at bar, and was rightfully proven and assessed under the general allegation of damages. 2 Sedg. on Dam. § 536; Young v. Willet, 8 Bosw. (N. Y.) 486. The case of Stevenson v. Smith, supra, is cited to the point, and strongly relied upon by the defendants; but nothing that is said there is opposed to the views here expressed. In that case the distinction which exists between general and special damages is clearly pointed out, and the rule of pleading applied when the latter form of damages is relied upon for the wrongful taking and detention of personal property. Beyond this

the case affords no relief to the defendants, for it was there held that neither of the items sought to be proved necessarily resulted from the mere taking and detention of the property sought to be replevied, and that one of them was not even consequential upon any of the facts alleged in the complaint, but resulted from other and independent acts of the defendant.

By the terms of the judgment the plaintiff was awarded the possession of the automobile or the value thereof, which was fixed at $600, in the event that a delivery could not be had. In addition, however, the sum of $250 as damages for the detention was awarded unconditionally, and the defendants now complain that, if the judgment were to be executed as it is written, the plaintiff, in the event that the property could not be returned, would recover, in addition to the $350 previously paid on the purchase price, the value of the automobile, in the sum of $600, and $250 more for its detention. Incidentally it may be stated that the point immediately under discussion savors much of a moot question, for it was conceded by both parties at the oral argument that the judgment had been partially satisfied by a delivery of the automobile into the possession of the plaintiff under a writ of execution. However that may be, if the judgment in question were not susceptible of a more liberal construction than that which the defendants here contend for, it would indeed require modification at our hands, for it would practically give the plaintiff $1,200 for property which was sold originally for $700. Cobbey on Replevin, § 961; Garrett v. Wood, 3 Kan. 231. Certainly no such result was contemplated by the trial court, nor would it be countenanced here.

[7] While the judgment would have been free from ambiguity if the award of damages had been expressly made dependent upon the return of the property in suit, yet a fair and reasonable interpretation of the judgment warrants the conclusion that the award of damages relates to and is dependent upon the execution of the clause awarding possession. In brief, the sum and substance of the judgment is that, in the event a delivery cannot be had, plaintiff shall recover $600, the value of the automobile, but in case a delivery can be had the plaintiff shall recover only $250 by way of damages for its detention. So construed the judgment meets the requirements of the pleadings, the proof, and the law.

[8, 9] The defendants make their last stand upon the contention that the contract of conditional sale is void because the clause entitling the vendor to immediate possession of the property sold, if it be taken on attachment or execution, is repugnant to the interest created and in restraint of alienation. This contention, it seems to us, is refuted by the very statement of the proposition upon which it is founded. Admittedly the contract of sale in the case at bar is conditional; and it is the settled law of this state that where, as here, title to the thing sold is, by the terms of the contract, reserved in the vendor until the purchase price is fully paid, no title passes to the vendee, notwithstanding delivery, until there has been a full performance of the condition as to payment. Putnam v. Lamphier, 36 Cal. 151; Vermont Marble Co. v. Brow, 109 Cal. 236, 41 Pac. 1031, 50 Am. St. Rep. 37; Van Allen v. Francis, 123 Cal. 477, 56 Pac. 339; Ward Land Co. v. Mapes, 147 Cal. 747, 82 Pac. 426. Section 711 of the Civil Code, which declares "that conditions restraining alienation when repugnant to the interest created, are void," is but a codification of the ever-existing policy of the law declaring void conditions accompanying the absolute transfer of property which attempt to restrain or restrict the subsequent sale thereof. To alienate property signifies its transfer, and implies the right by title to do so. Obviously a person without title to property cannot make a valid transfer of it; and, as the vendees in the case at bar never had any title to the property in dispute, it cannot be said that the condition in the contract, which provided that the vendees would not permit the property to be attached, was repugnant to or in any sense in restraint of their right and power to alienate whatever interest or rights they may have had in the contract itself.

[10] While it may be true that the vendee under a contract of conditional sale acquires a defeasible interest in the property sold, which, before default, he may sell or assign, nevertheless he has no attachable interest in the property until such time as he has fully complied with the condition concerning payment of the purchase price. Drake on Attachment, § 246; Central Loan Co. v. Campbell Com. Co., 5 Okl. 396, 49 Pac. 48; McIver v. Williamson, etc., Co., 19 Okl. 454, 92 Pac. 170, 13 L. R. A. (N. S.) 696.

The condition in the contract in controversy, which provides that the seller will not suffer the property to be attached, manifestly was intended solely for the protection of the vendor's rights against the encroachments of the vendees' creditors, and it was no more a condition in restraint of alienation than was the condition that title should not pass until the payment of the purchase price.

The judgment appealed from is affirmed.

We concur: HALL, J.; KERRIGAN, J.

17 Cal. App. 746

REID v. WARREN IMPROVEMENT CO.

(Civ. 878.)

(District Court of Appeal, First District, California. Dec. 29, 1911.)

1. EVIDENCE (§ 354*)—STATEMENTS OF ACCOUNT—COMPETENCY.

Where a complaint in an action for services refers to an account for particulars of the services, it is not error to permit defendant to put in evidence the account, as well as an earlier account, the balance of which was carried forward to the later account.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432–1483; Dec. Dig. § 354.*]

2. ATTORNEY AND CLIENT (§ 140*)—ACTIONS—VALUE OF SERVICES.

Ordinarily, in actions for the reasonable value of legal services, the court may exercise its own judgment and knowledge in fixing such value.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 336–349; Dec. Dig. § 140.*]

3. ATTORNEY AND CLIENT (§ 166*)—ACTIONS—VALUE OF SERVICES—EVIDENCE.

In an action for the reasonable value of legal services, evidence *held* sufficient to support the finding of the court as to the value of the services.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 166.*]

4. TRIAL (§ 396*) — FINDINGS — CONFORMITY TO PROOF.

Where part of a finding is supported by the testimony of the plaintiff and part by the evidence offered by defendant, it is supported by the evidence, although it does not agree entirely with the evidence offered by either party.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 935–938; Dec. Dig. § 396.*]

5. APPEAL AND ERROR (§ 1071*)—HARMLESS ERROR—FINDINGS—CONFORMITY TO PLEADINGS AND PROOF.

Where the findings were in accordance with evidence received without objection, the judgment would not be reversed, although they did not conform to the issues raised by the pleadings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234–4239; Dec. Dig. § 1071.*]

Appeal from Superior Court, City and County of San Francisco. Geo. A. Sturtevant, Judge.

Action by J. S. Reid against the Warren Improvement Company. From a judgment for plaintiff for an insufficient amount, he appeals. Affirmed.

J. S. Reid, pro se. Ames & Manning, for respondent.

HALL, J. This is an appeal by plaintiff, from a judgment in his favor, but for a less amount than he claimed, taken within 60 days from the rendition and entry of the judgment. The complaint is in three counts, and sets up three distinct causes of action. In the first count appellant sued to recover the reasonable value of services rendered by appellant to respondent, as an attorney at law. The services are alleged to be reasonably worth the sum of $665. In its answer respondent denied that said services were reasonably worth any greater sum than $152.29. Respondent further alleged that said services were rendered under an express contract, whereby appellant was to have 10 per cent. of such sums as he might collect for respondent, and alleged the facts showing that under this contract appellant was entitled to but $152.29 for his said services.

It is most convenient for us first to dispose of the points relating to the first count. The court found the reasonable value of the services sued for in this count to be the sum of $343.22, and the principal point urged for a reversal of the judgment as to this count is that said finding is not supported by the evidence. Preliminary, however, to discussing this point, we will dispose of the only other point raised by appellant, to wit, that the court erred in admitting in evidence two bills rendered by appellant to respondent for the services sued for in this count.

[1] The objection urged is that the bills or accounts were rendered by way of an offer for a compromise. We do not think that the record supports this contention. It does not appear that up to the time of the rendition of the bills any controversy had arisen as to the amount thereof, but they appear from the record before us to have been rendered in the ordinary course of business. Furthermore, in appellant's complaint it is alleged "that the particulars of the said services are more specifically set forth in an account of the same rendered to the defendant on the 19th day of July, 1907, at the instance of the defendant." The second bill is the account rendered on said day, and begins with a balance in favor of appellant carried forward from the first bill. The two bills thus constituted the account referred to in the complaint, and set forth the particulars of the services sued for in this count. We think it hardly lies in the mouth of the plaintiff to object to the introduction of an account thus referred to in his own complaint. These bills contained itemized charges for all the services sued for in the first count of the complaint. As to all but one of the items the charge made in the bills was very much less than the amount testified to by appellant as the reasonable value of his services. The bills or accounts were competent and material evidence against defendant, both as to the particulars of the services sued for and as to the value thereof. The court therefore did not err in admitting them over the objections of appellant.

[2, 3] As to the sufficiency of the evidence to support the finding of the court that the reasonable value thereof was $343.22, appellant concedes that, as a general rule, in actions to recover for the reasonable value of legal services, the court may exercise its own judgment and knowledge in fixing such

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

value. He, however, claims that such rule has no application in this case because, as he claims, he was prevented by the action of the court from fully proving the particulars of the services rendered, and that therefore there was no sufficient data before the court for the exercise of its knowledge as to the value of legal services. This contention is based upon what occurred in a colloquy between the court and counsel near the beginning of his testimony, in which the court suggested in effect that it was not necessary for the plaintiff to go into minute details as to what his services consisted of, but that such matters might be left to be developed more fully upon cross-examination. Defendant's counsel did not cross-examine as to the particulars of the services rendered, but put in evidence the accounts rendered by plaintiff to defendant for the services sued for. No objection or exception was taken to the course suggested by the court, and no motion for a new trial was made upon the ground of accident or surprise. The attack is solely made upon the sufficiency of the evidence to support the finding; and, regardless of whether or not there was sufficient evidence given by testimony of witnesses to furnish data for the court to pass upon the value of all the services sued for from its own knowledge of the value of legal services, there was ample evidence before the court to support its finding. The accounts before referred to, rendered by appellant to respondent, contained an itemized statement as to all the services sued for, and as to each and every item thereof, save one, set forth the charge made therefor by appellant. These charges aggregate the sum of $347.50. The only item for which the charge was not fixed in the account was for preparing and filing a complaint for $37.85 (in a justice court). It is evident that a small amount would be sufficient for this item. The court found the value of all the services sued for in the first count to be $343.22, which is but a few dollars less than the amount originally claimed by appellant when he rendered his bill to respondent. Although he testified upon the witness stand that such services were worth $665, the court was justified in rejecting such estimate. The bills rendered by appellant afforded sufficient evidence both as to value and the particulars of the services rendered to justify the finding of the court that such value was but $343.22.

The only other point made for a reversal of the judgment is that the findings made by the court as to the issues under the third count of the complaint are not supported by the evidence, and do not respond to the issues made by the pleadings.

[4] In this count appellant sought to recover upon a special contract, whereby he claimed to be entitled to 10 per cent. of the amount recovered in a certain suit brought by him for respondent. The action was compromised and dismissed after answer filed but before trial thereof. Defendant in its answer denied the contract as alleged in plaintiff's complaint, and set up in effect that plaintiff agreed to prepare the papers for an attachment suit for the sum of $25, and if the matter should be settled without suit such sum should be in full. If, however, the suit should be filed but settled and dismissed before trial, plaintiff was to receive $50 in full for his services, and that he was to receive 10 per cent. of the amount recovered only in case the action should be pressed to final judgment.

The court found that by the contract plaintiff's compensation for preparing the papers in said action was to be $25, and $50 additional for all services that might be rendered by him thereafter in said action prior to a trial thereof, making in all the sum of $75, provided that the action should be settled before any trial on the facts thereof. It was settled without any trial on the facts; and the court allowed plaintiff $75 for his services therein.

It is the finding of the court as to the terms of the contract above set forth that is challenged by appellant. We think that it is supported by the evidence. It does not exactly agree either with the testimony of plaintiff or the evidence on behalf of the defendant taken separately, but the different parts of the finding are supported by evidence either given by plaintiff or on behalf of defendant. Thus plaintiff testified that he was to be paid $25 for simply preparing the papers for an attachment suit, and if he was required to file such suit and cause attachments therein to be levied he was to be paid $50 more. The effect of the balance of his testimony is that he was to receive 10 per cent. of whatever was recovered either by judgment or settlement without trial, if the defendant therein took any action, after the filing of the suit and levying of the attachment, other than to settle.

On the other hand, the evidence on behalf of the defendant was to the effect that no more than $50 was to be paid for all services prior to trial of the action, and that the 10 per cent. was to be paid only if the action was actually tried in court. The court evidently accepted a part of the testimony of plaintiff as correct and a part of the evidence given on behalf of defendant as correct, and made its finding accordingly. The finding is thus supported by the evidence.

[5] As to the contention that the findings as to the terms of the contract do not conform to the issues presented by the pleadings, it is sufficient to say that, while the findings as to the contract do not follow exactly the language of either pleading, we think they substantially dispose of the issues presented. At any rate, all the evidence as

to the terms of the contract was admitted without objection, and the matter was fully and fairly presented to the court, which made findings in accordance with the evidence. In such case, though the court might have directed the pleadings to be amended so as to conform to the proof, it is apparent that no injury has been done to appellant by the course pursued by the court.

No other point is urged for a reversal, and the judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

17 Cal. App. 723

McCARTHY v. MORRIS. (Civ. 978.)

(District Court of Appeal, First District, California. Dec. 28, 1911.)

1. Appeal and Error (§ 1015*)—Findings—Conclusiveness.

If the evidence substantially conflicts, the granting of a new trial for insufficiency of the evidence is conclusive upon the appellate court, whether the evidence sustains all or only a part of the material issues, in absence of a showing of abuse of discretion by the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3876; Dec. Dig. § 1015.*]

2. New Trial (§ 72*)—Verdict Contrary to Evidence.

It is the duty of the trial court to set aside a verdict which is contrary to the weight of the evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 146–148; Dec. Dig. § 72.*]

3. Landlord and Tenant (§ 152*)—Repairs by Landlord—Duty to Make.

A lessor of a furnished hotel for a term of five years, under a lease providing that the lessee should keep up all furnishings during the lease, was not bound by any implied covenant to supply new furnishings when needed, especially in view of Civ. Code, § 1955, providing that one who lets personalty must repair all deteriorations thereof not occasioned by the natural result of its use, and section 1956, requiring the hirer to bear all expenses which might naturally be foreseen by him.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 152.*]

Appeal from Superior Court, City and County of San Francisco; Geo. H. Cabaniss, Judge.

Action by Harriet McCarthy against Orrie E. Morris. From an order granting a motion for a new trial after verdict for defendant, defendant appeals. Affirmed.

Homer W. Wood, for appellant. Percy E. Towne, for respondent.

LENNON, P. J. In the month of April, 1909, plaintiff and defendant entered into an agreement in writing, by which the defendant agreed to and did lease from the plaintiff, fully furnished, the property known as the "Hotel Victoria," in the city and county of San Francisco, for the term of five years. In the month of May following, the defendant went into possession of the leased property, and ever since has been in the use and occupation thereof as the tenant of plaintiff. By the terms of the lease the defendant was required to maintain to the best of her ability the upkeep of all furnishings during the life of the lease. The defendant became indebted to the plaintiff in the sum of $2,000 for rent for the month of April, 1910, but paid on account thereof only the sum of $1,300.75. She refused to pay the balance of $699.25, claiming the right under the terms of the lease, and the subsequent acquiescence of the plaintiff, to withhold the same as reimbursement for money to that amount expended by her in replenishing and replacing the original furnishings of the hotel which had become worn and unfit for use. Plaintiff disputed the right of the defendant, under the terms of the lease or otherwise, to withhold any portion of the stipulated rent for the purpose of refurnishing, and brought this action to recover the unpaid balance of the rental referred to. This was the only issue raised by the pleadings, and upon a trial of the case, with a jury, a verdict was had for the defendant. Thereafter the trial court, upon motion of the plaintiff, granted a new trial. Insufficiency of the evidence to sustain the verdict and that the verdict was against law were the only grounds urged for a new trial.

The defendant, in support of her appeal from the order granting a new trial, asserts that the evidence is sufficient to sustain the verdict, notwithstanding the fact that it is conflicting and regardless of the terms of the lease, in this, that both parties acted upon the assumption that the landlord was to purchase new furniture whenever the necessity for the same arose.

[1] The conceded conflict of evidence upon this phase of the case is fatal to the defendant's contention under the firmly fixed rule in this state that, where there is a substantial conflict of evidence, the granting of a new trial upon the ground of the insufficiency of the evidence is conclusive upon this court in the absence of a showing that the action of the trial court was an abuse of discretion.

This is so whether the evidence is insufficient to sustain all or only a portion of the issues upon which the verdict rested.

[2] There was in the case at bar a substantial conflict in the evidence upon the phase of the case under discussion; and if in the opinion of the trial court the verdict was contrary to the weight of such evidence, it was the right and the duty of that court to set it aside. Domico v. Casassa, 101 Cal. 413, 35 Pac. 1024; Mills v. Oregon Railway & Nav. Co., 102 Cal. 357, 36 Pac. 772; Warner v. Thomas Dyeing & Cleaning Works, 105 Cal. 409, 38 Pac. 960; In re Martin, 113

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Cal. 480, 45 Pac. 813; Cutten v. Pearsall, 146 Cal. 690, 81 Pac. 25.

[3] Equally untenable is the contention that the lease contained an implied covenant on the part of the landlord to supply new furnishings when needed, and that therefore mere proof of the execution of the lease was sufficient to support the verdict. In support of this contention, we are cited to sections 1955 and 1956 of the Civil Code. It is conceded that the necessity for partially replenishing and replacing the furniture, linen, and other incidentals appurtenant to the operation and maintenance of the leased premises arose from deterioration, which was the natural and necessary result of everyday use; and if section 1955 of the Civil Code, in the presence of that clause of the lease which placed the burden of upkeep upon the defendant, has any application to the facts of the case at bar, it weighs against the defendant, for it is therein provided "that one who lets personal property must * * * repair all deteriorations thereof not occasioned by the fault of the hirer and not the natural result of its use." The record reveals the fact that the defendant for 15 years previous to the execution of the lease had been engaged in the hotel business; but even without such previous experience she would, as a matter of course, be expected to foresee when she undertook the present lease that from time to time during its life she would be confronted with the necessity of repairing, replenishing, and replacing the furnishings of the hotel, and therefore section 1956 of the Civil Code only adds to her dilemma, by providing that the "hirer must bear all expenses as might be naturally foreseen by him."

Upon a reading of the whole record we are unable to perceive any abuse of discretion on the part of the trial court in granting a new trial.

The order appealed from is affirmed.

We concur: KERRIGAN, J.; HALL, J.

(17 Cal. App. 737)

PEOPLE v. GILMORE. (Cr. 348.)

(District Court of Appeal, First District, California. Dec. 29, 1911.)

1. Jury (§ 53*)—Competency—Prior Services.

The fact that jurors had served in other cases within the year did not disqualify them from serving in a criminal case, where they had not been finally discharged from jury service within the year.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 259; Dec. Dig. § 53.*]

2. Criminal Law (§ 415*)—Evidence—Admissibility.

A witness, present during an affray which results in a fatal stabbing, may testify to a statement by the deceased immediately after the stabbing, where he testifies that such statement was in defendant's presence and hearing and even though he contradicts himself upon this latter point.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 937–949; Dec. Dig. § 415.*]

3. Criminal Law (§ 366*)—Evidence—Admissibility—Res Gestæ.

A declaration that he was stabbed, made by the deceased during the combat, was properly admitted as a part of the res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 806–820; Dec. Dig. § 366.*]

4. Criminal Law (§ 365*)—Evidence—Admissibility—Res Gestæ.

An assault by the defendant upon a party who interfered to assist one who had gone to the assistance of deceased, and which was an inseparable part of the original affray, was admissible as res gestæ in a trial of the defendant for fatally stabbing the deceased in the original affray.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 807; Dec. Dig. § 365.*]

5. Criminal Law (§ 822*)—Trial—Instructions.

The correctness of a particular instruction in a criminal case must be determined in connection with the entire charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990–1995; Dec. Dig. § 822.*]

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Edward Gilmore was convicted of manslaughter, and he appeals. Affirmed.

Leo J. McEnerney and Thos. B. Lynch, for appellant. Attorney General Webb, for the People.

LENNON, P. J. The defendant was convicted of the crime of manslaughter, and appeals from the judgment and the order denying his motion for a new trial.

[1] Assuming, without deciding, that subdivision 3 of section 199, and subdivision 13 of section 200, Code of Civil Procedure, must be read in connection with section 1072 of the Penal Code, and that when so read these sections formulate a valid challenge for cause to a juror in a criminal case, still it does not appear from the record before us that there was any foundation in fact for such a challenge to the prospective jurors Love, Thoroe, and Holliday. From the testimony of these three talesmen upon their voir dire, it appears that each had served as jurors in certain cases pending and decided in the same court within a year of the trial of the defendant in the case at bar. It appears further, as a matter of course, that upon the termination of each case the jury was discharged; but the order of a trial court, discharging a jury upon reaching a verdict in any given case, does not mean that the individual jurors are thereby relieved from future jury duty. In the instance of Juror Holliday, it affirmatively appears that he had never been finally discharged from jury service by order of the court. On the contrary, he was in attendance upon the court to serve as a juror on the trial of the defendant in

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

obedience to an express order, previously made, requiring him to report for further jury duty. In the case of the other two jurors, no showing was made to the trial court that they had been finally discharged from jury service in any court of this state within a year prior to the commencement of the trial of the defendant; and, in the absence of such a showing, it must be presumed that they were regularly upon the panel, and neither exempted nor disqualified from acting as jurors. For these reasons, if for no other, the challenges interposed to each of the designated jurors were properly disallowed by the trial court.

[2] There was no error in the ruling of the trial court permitting the witness Shea, who was present during the affray from its inception to its termination in the fatal stabbing of the deceased by the defendant, to testify to all that happened, on the night of the homicide between Del Vane, the deceased, and Gilmore, the defendant. In the course of his testimony, this witness told of a declaration of the deceased, made immediately after the stabbing and in the presence and hearing of the defendant, wherein the deceased said to the witness: "Gene, look out! He's got something in his hand." The objection made at the trial to this testimony was properly overruled. The witness declared plainly and positively, in answer to repeated questions, that all of the things which he narrated were said and done in the presence and hearing of the defendant. In our judgment, the testimony of the witness as to his whereabouts and the position of the defendant during and immediately after the quarrel was neither clouded nor conflicting; but, even if it could be fairly argued that the witness was contradictory in his testimony as to the defendant being in a position to know and hear all that was said and done by the deceased after the stabbing. this would be but an argument against the weight of the evidence, and would not affect its admissibility.

[3] The record does not support counsel for the defendant in the claim that one of the people's witness, John P. O'Brien, was permitted, over the objection of the defendant, to testify to a declaration of the deceased which was no part of the res gestæ. This witness testified that he came upon the scene just as the defendant was in the act of striking the deceased with his fist; that thereupon the deceased grappled with the defendant, and during the struggle which followed the deceased cried out, "Harry, I am stabbed." It is not true, as claimed by counsel for the defendant, that the record shows that this declaration of the deceased was made while the witness O'Brien and the defendant were engaged in a subsequent altercation; and, having been made, as the record clearly shows, during the actual combat between the deceased and the defendant, it was obviously a part of the res gestæ and rightfully admitted in evidence.

[4] The record shows further that when the deceased cried out that he had been stabbed, the witness O'Brien went to his assistance, and the defendant then turned upon O'Brien and assaulted him. The other witness, Shea, then interfered upon behalf of O'Brien, and all three men fell to the floor, whereupon the defendant was disarmed by Shea. It is now insisted upon behalf of the defendant that the assault upon O'Brien was no part of the assault upon Del Vane, and that the trial court erred to the prejudice of the defendant in permitting O'Brien to testify to the details of the assault upon him The record does not disclose that the defendant made any objection to this particular piece of evidence; but, aside from this, it is readily apparent, even from a casual reading of the record, that the assault upon O'Brien was an inseparable part of the original affray in which Del Vane was stabbed to death, and as such it was essentially res gestæ and clearly admissible. People v. Teixeira, 123 Cal. 298, 55 Pac. 988.

[5] The defendant's complaint against the charge of the trial court upon the law of self-defense is hypercritical, but in no event can the correctness of the trial court's charge be tested by singling out and assailing, as the defendant here attempts to do, a particular instruction which, when read in connection with the context of the entire charge, correctly and consistently states the law of the case. No fault can be fairly found with the charge of the court, when read and considered in its entirety, and when so read and considered it clearly, concisely, correctly, and without conflict states the law of self-defense as defined in the statutes and decisions of this state.

The judgment and order appealed from are affirmed.

We concur: HALL, J.; KERRIGAN, J.

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17 Cal. App. 680

PEOPLE v. ROMERO. (Cr. 363.)

(District Court of Appeal, First District, California. Dec. 21, 1911.)

1. HOMICIDE (§ 230*)—ASSAULT TO MURDER.

Evidence in a prosecution for assault to murder *held* to show that the shooting of the injured person was intentional.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 478; Dec. Dig. § 230.*]

2. CRIMINAL LAW (§ 1159*)—APPEAL—VERDICT—CONCLUSIVENESS.

The appellate court cannot legally interfere with a verdict of conviction based on conflicting evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074–3083; Dec. Dig. § 1159.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. CRIMINAL LAW (§ 829*)—TRIAL—INSTRUCTION—REQUESTS.

There was no error in refusing a requested instruction which was substantially given elsewhere in the charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

4. CRIMINAL LAW (§ 787*)—INSTRUCTIONS—TESTIMONY BY ACCUSED.

It was not error to refuse an instruction that accused is not required to testify for himself, as a jury must have so understood from the fact that he did not testify.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1902; Dec. Dig. § 787.*]

5. CRIMINAL LAW (§ 1122*)—APPEAL—RECORD.

Alleged error in refusing a requested instruction cannot be considered on appeal where the record does not show, as required by Pen. Code, § 1127, whether it was given or refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2940–2945; Dec. Dig. § 1122.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Manuel Romero was convicted of assault with a deadly weapon, and from the judgment, and from an order denying a motion for a new trial, he appeals. Affirmed.

Crittenden & Houck, for appellant. Attorney General Webb and Benj. K. Knight, Dist. Atty., for the People.

KERRIGAN, J. The defendant was informed against by the district attorney of Santa Cruz county for the offense of an assault with intent to commit murder. Upon being tried, he was convicted of a lesser offense, to wit, an assault with a deadly weapon. Subsequently the court denied a motion for a new trial, and sentenced the defendant to a term of imprisonment in the state prison. This appeal is prosecuted from the order denying defendant's motion for a new trial and from the judgment.

[1] The defendant claims that the evidence is insufficient to support the verdict of the jury, and that the court committed prejudicial error by refusing to give certain requested instructions.

There is no good foundation for the point that the evidence is insufficient. It shows that the defendant and the prosecuting witness had been living together for some time, having assumed towards each other the rights and duties of husband and wife without the previous celebration of any marriage ceremony. Angered by a report which reached him that (to use the language of the record) the prosecutrix had been "chasing around in Santa Cruz with niggers," the defendant, furious with jealousy and under the influence of intoxicating liquor, accused the prosecutrix of this conduct, attacked her, repeatedly knocking her down, slashed her clothes, and struck her with a knife. This was in the forenoon of June 24, 1911. Early in the afternoon of the same day the defendant shot the prosecutrix in the stomach, and it is for this last act that he was prosecuted.

The defendant did not take the witness stand, but the prosecutrix testified at the trial that the defendant told her that he was going to shoot a rabbit, and that while loading his pistol, apparently for that purpose, it was discharged, the bullet finding lodgment in her stomach. This witness had previously, on the occasion of the preliminary examination of the defendant, testified as to the shooting, and had also made a statement under a sense of impending death at variance with this testimony. Apparently by the time of the trial of the case she had experienced a desire to befriend the defendant, and her testimony given then was inconsistent with her former declarations. Through fear of the defendant, or out of kindness to him, or for some other reason, her testimony at the trial favored her assailant. The question for the jury to decide was whether the shooting was accidental or intentional. They had the right to consider that the defendant was incensed by what he had heard about his paramour; that he was intoxicated; that he had been quarreling with and cursing and swearing at her. They doubtless concluded that he was speaking with sarcasm, or carrying out a cunning attempt to disguise a premeditated act, when he said he was going to shoot a rabbit.

[2] We think that the facts and circumstances of the case warrant the conclusion at which the jury evidently arrived that the shooting was intentional; and we cannot, even if we were so disposed, legally interfere with their verdict. People v. Saunders, 13 Cal. App. 743, 110 Pac. 825; People v. Rushing, 130 Cal. 449, 62 Pac. 742, 80 Am. St. Rep. 141.

[3] The court refused to give to the jury the defendant's proposed instruction defining reasonable doubt. That instruction correctly stated the law, and perhaps it would have been as well to give it in the language asked (People v. Williams, 17 Cal. 142); but as it was substantially given elsewhere in the charge, it cannot be said that error in this regard was committed.

[4] A more serious question is presented by the court's action with respect to the following requested instruction: "*The defendant is not required to take the witness stand and testify in his own behalf.* It is the duty of the prosecution to show his guilt beyond all reasonable doubt and to a moral certainty; and, if they fail so to do, he is entitled to rest his case and ask an acquittal at the hands of the jury." It is on the italicized portion of the requested instruction that the defendant relies for a reversal of the judgment; the remainder having been given in another part of the charge. The defendant,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

as before stated, did not offer himself as a witness, and the jury must therefore have understood that he was not required to do so. If this instruction had embraced the statement that no unfavorable inference could be drawn against the defendant because of his failure to testify, a different question would be presented.

[5] It may be said, further, with regard to this objection that the record does not show, as required by section 1127, Penal Code, whether this instruction was given or refused which alone would be a sufficient reason for not considering the objection. People v. Bemmerly, 87 Cal. 117, 25 Pac. 266; People v. January, 77 Cal. 179, 19 Pac. 258; Texas Cotton Prod. Co. v. Denny Bros. (Tex. Civ. App.) 78 S. W. 557.

The judgment and order appealed from are affirmed.

We concur: LENNON, P. J.; HALL, J.

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17 Cal. App. 703

CARTER v. GROSSHANS et ux. (Civ. 890.)

(District Court of Appeal, First District, California. Dec. 21, 1911.)

APPEAL AND ERROR (§ 1002*)—FINDINGS—CONCLUSIVENESS.

A decision upon conflicting evidence will not be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

Action by Kate A. Carter against John Grosshans and wife. Judgment for defendants, and plaintiff appeals. Affirmed.

Austin Lewis (W. A. S. Nicholson, of counsel), for appellant. Mortimer Smith and H. W. Pulcifer, for respondents.

LENNON, P. J. This action was brought to recover a judgment against the defendants, John Grosshans and Florence Grosshans, his wife, for the sum of $500, alleged to be due and unpaid on the purchase price of certain real property situated in the city of Berkeley. The purchase price of the property was $3,500, of which $1,000 was to be paid down upon the signing and delivery of the contract, and the balance in monthly installments of not less than $20 per month.

The plaintiff pleaded in her complaint and testified at the trial that at the time of making the contract, and as a part of the same transaction, she and the defendants agreed that in lieu of the first payment of $1,000 only one-half thereof need be paid in cash, provided the defendants would furnish and supply plaintiff with a home free of cost to her for the remainder of her life. Pursuant to this agreement and upon the signing of the contract, the defendants paid the plaintiff $500, and took possession of and occupied the premises, but have ever since refused to provide plaintiff with a home, or to pay to plaintiff the balance of the $1,000 which was to be paid upon the signing and delivery of the contract. The testimony of the plaintiff was supplemented by the written correspondence of the parties and other documentary evidence which, in a small degree, had a tendency to support the claim of the plaintiff in the particulars stated.

The defendants in their answer specifically denied the agreement to furnish the plaintiff with a home in lieu of a rebate of $500 on the purchase price of the property, and asserted that they had paid the plaintiff the full sum of $1,000, recited and receipted for in the original contract of sale. Upon the issue thus raised the defendant and his wife flatly contradicted the testimony of the plaintiff; and at the conclusion of the trial the evidence upon this and every other material and controverted point was in hopeless conflict. Judgment was rendered for the defendants, from which the plaintiff appeals upon the single ground of the insufficiency of the evidence to support the findings and the judgment.

From the record before us, which consists of the judgment roll and, in lieu of a bill of exceptions, a certified transcript of the testimony and proceedings had in the lower court, it is readily apparent that the trial judge gave full credit to the testimony of the defendants, and gave but little, if any, credence to the testimony of the plaintiff. Much, if not all, of the argument of the appellant is devoted to a discussion of the weight of the evidence and the credibility of the witnesses. This, of course, upon appeal is a waste of time and words, for the rule is too well settled to admit of discussion that, where the lower court rests the decision of a question of fact upon conflicting evidence, neither its weight nor the credibility of witnesses can be considered by an appellate court.

The judgment appealed from is affirmed.

We concur: HALL, J.; KERRIGAN, J.

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17 Cal. App. 718

WEST v. MEARS et al. (Civ. 1,041.)

(District Court of Appeal, Second District, California. Dec. 23, 1911.)

1. APPEAL AND ERROR (§ 356*)—TIME OF APPEAL.

An appeal from the judgment, not taken within six months after it was entered, cannot be considered, not having been taken in time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1926, 1927; Dec. Dig. § 356.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. APPEAL AND ERROR (§ 867*)—MODE OF REVIEW.

On appeal from an order denying a new trial, neither the sufficiency of the complaint, as stating a cause of action, nor whether the judgment is supported by the findings, can be considered; those matters being reviewable only on appeal from the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476–3486; Dec. Dig. § 867.*]

3. MORTGAGES (§ 59*) — EXECUTION — ACKNOWLEDGMENT—NECESSITY.

It is not necessary that the mortgage be acknowledged in order to enforce it as against the original mortgagor.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 155–159; Dec. Dig. § 59.*]

4. APPEAL AND ERROR (§ 706*)—RECORD—EVIDENCE—EFFECT OF ABSENCE.

In absence of the alleged newly discovered evidence in the record, error in denying a motion for a new trial on that ground cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2944–2947; Dec. Dig. § 706.*]

5. DESCENT AND DISTRIBUTION (§ 91*)—TITLE OF DISTRIBUTEE—ACTION ON NOTE.

One acquiring title to a note under a decree of distribution becomes the owner, so as to maintain an action thereon.

[Ed. Note.—For other cases, see Descent and Distribution, Dec. Dig. § 91.*]

Appeal from Superior Court, Los Angeles County; John G. Covert, Judge.

Action by Henry S. West against C. F. Mears and another. From a judgment for plaintiff and an order denying a motion for a new trial, defendants appeal. Order denying new trial affirmed.

Randall & Gaines, for appellants. Hartley Shaw, for respondent.

ALLEN, P. J. The action was one to foreclose a mortgage, and was commenced on the 4th day of January, 1910; the complaint alleging that the note and mortgage were executed on the 4th day of January, 1905. The note secured by the mortgage was due in one year. The answer denied the execution of the note and mortgage, pleaded want of consideration therefor, and fraud in their procurement. The court found all of the allegations of the complaint to be true and the allegations of the answer to be untrue, and rendered judgment accordingly. This judgment was duly entered July 25, 1910. More than six months thereafter, to wit, on April 5, 1911, defendants gave notice of an appeal from the judgment and from an order denying a new trial.

[1, 2] The appeal from the judgment, not having been taken within time, cannot be considered. It follows that we cannot inquire into the sufficiency of the complaint to state a cause of action, or the action of the court in sustaining a demurrer thereto, or whether the judgment is supported by the findings. Moore v. Douglas, 132 Cal. 400, 64 Pac. 705, and cases cited.

[3] The only matter for consideration is as to the action of the court in denying the motion for a new trial. This motion was based upon an alleged error of the court in overruling defendants' objection to the reception of the note and mortgage sued on as evidence in the case, because the same was not acknowledged. There is nothing in this contention. The suit being against the original mortgagor, an acknowledgment was not necessary to give it validity. In addition to this, the note and mortgage are not set out in the statement of the case, and it cannot be determined from the record whether there was any variance as claimed. The motion for a new trial was based on the further ground that the evidence was insufficient to support the findings. We find, upon an examination of the statement, that there is a decided conflict in the evidence; but there is some evidence upon the part of plaintiff, and sufficient to support the findings of the court as made.

[4] The contention that the court erred in denying the motion for a new trial on the ground of newly discovered evidence cannot be considered, in view of the fact that none of the newly discovered evidence is incorporated in the record.

[5] One obtaining title to a note through a decree of distribution becomes the owner thereof, and entitled to maintain an action thereon.

We find no merit whatever in this appeal, and the order denying a new trial is affirmed.

We concur: JAMES, J.; SHAW, J.

17 Cal. App. 692

HUNTINGTON PARK IMPROVEMENT CO. v. SUPERIOR COURT OF LOS ANGELES COUNTY et al. (Civ. 1,055.)

(District Court of Appeal, Second District, California. Dec. 21, 1911.)

1. DISMISSAL AND NONSUIT (§ 40*)—RIGHT TO DISMISS—ENTRY.

Under Code Civ. Proc. § 581, subsec. 1, which provides that plaintiff may dismiss by written request to the clerk, filed among the papers of the case, at any time before trial, where a counterclaim has not been made or any affirmative relief sought by defendant, the effect of such a request is ipso facto to dismiss the case, though the clerk fails to make entry thereof in the register.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 67; Dec. Dig. § 40.*]

2. PROHIBITION (§ 5*)—ACT OF JUDGES—JURISDICTION.

Where plaintiff has dismissed his action by filing a written request therefor with the clerk, as provided by Code Civ. Proc. § 581, subsec. 1, prohibition will lie to restrain the court from proceeding with the trial for the reason that the court has been ousted of its jurisdiction by the act of the plaintiff.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 20–30; Dec. Dig. § 5.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. CERTIORARI (§ 28*)—GROUNDS—EXCESS OF JURISDICTION.

Code Civ. Proc. § 1068, provides that the writ of review shall extend only to those cases where an inferior tribunal exercising judicial functions has exceeded its jurisdiction and there is no appeal or other adequate remedy. Section 581, subsec. 1, provides that plaintiff may dismiss by written request to the clerk, filed among the papers of the case, at any time before trial, where defendant has interposed no counterclaim, and does not seek affirmative relief. *Held*, that though section 581, subsec. 1, gives plaintiff an absolute right to dismiss, and his filing of a written request under the statute ipso facto dismisses the case without an order of court, where, instead of pursuing the statutory method, he presents a motion in open court for an order of dismissal, he abandons his remedy under the statute, and an order denying his motion is not an act in excess of jurisdiction to review which a writ of review will lie.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 33, 41; Dec. Dig. § 28.*]

4. CERTIORARI (§ 5*)—OTHER REMEDY—APPEAL—"NECESSARILY AFFECTS THE JUDGMENT."

Code Civ. Proc. § 1068, provides that a writ of review shall issue only where an inferior tribunal has exceeded its jurisdiction and there is no appeal or other adequate remedy. Section 956 provides that, upon an appeal from a judgment, the court may review the verdict or decision and any intermediate order or decision excepted to which involves the merits or "necessarily affects the judgment," *held* that, though no appeal lies from an order dismissing or refusing to dismiss an action, an erroneous order denying plaintiff's motion to dismiss the action affects the judgment thereafter rendered on the merits against the plaintiff, so that such order may be reviewed on appeal from the judgment, and hence a writ of review will not lie.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.*]

5. CERTIORARI (§ 5*) — OTHER REMEDY — APPEAL.

An order denying plaintiff's motion to dismiss, made in open court in an action in which there was no affirmative relief sought, with judgment for defendant, will not be reviewed by writ of review, since there is an adequate remedy by appeal from an order on a motion to set aside and vacate the judgment for want of jurisdiction, such order being one made after judgment.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.*]

6. JUDGMENT (§ 287*)—RECORD—CONCLUSIVENESS.

In no event can the record of a court of general jurisdiction, showing a judgment duly rendered upon trial, be contradicted by evidence dehors the record, whether such evidence be controverted or not.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 567, 568; Dec. Dig. § 287.*]

Action by the Huntington Park Improvement Company against the Park Land Company. Plaintiff's motion to dismiss the action was denied, and it applies for a writ of review. Writ dismissed.

Fred N. Arnoldy and Walter L. Bowers, for petitioner. J. A. Gibson and Gibson, Dunn & Crutcher, for respondents.

SHAW, J. Certiorari. The record transmitted in obedience to the writ issued shows that a certain action brought in the superior court of Los Angeles county, wherein petitioner was plaintiff and the Park Land Company was defendant, was duly and regularly tried, findings of fact made, and judgment rendered for defendant. Petitioner asks that such acts be declared null and void, claiming that the action of the court was in excess of its jurisdiction for the reason that, prior to entering upon the trial thereof, there being no affirmative relief demanded by defendant, petitioner, who was plaintiff in the action, moved the court for a dismissal of the same, which motion was by the court denied. There is nothing whatever in the record showing the making of such motion or ruling. Indeed, petitioner does not claim that such facts are shown by the record. In lieu of such absent record, it presents a transcript of a colloquy occurring at the time between the court and counsel for the respective parties, which it is claimed shows the making of the motion and the adverse ruling had thereon. At the hearing in this court, counsel for respondents admitted the correctness of this transcript, but insisted that it did not appear therefrom that such alleged motion was made or ruling had thereon; and, further, since the record disclosed that the court had jurisdiction to try the case, such fact could not be contradicted by evidence dehors the record, and hence the matter was not a subject of review upon certiorari.

Accepting the record as showing that no affirmative relief was asked by defendant, and conceding that the transcript shows that the motion to dismiss was made in open court and by the court denied, we are nevertheless of the opinion that petitioner is not entitled to the writ applied for.

[1] 1. If the motion was denied, the case was not dismissed, but pending, and therefore subject to the jurisdiction of the court. It is true that under subdivision 1 of section 581, Code of Civil Procedure, the plaintiff, where no affirmative relief is demanded, may himself dismiss the action by filing with the clerk a written request therefor. The effect of such act on his part is, ipso facto, to dismiss the case, even though the clerk fails to make entry thereof in the register.

[2] In such case, prohibition will lie to restrain the court from proceeding with the trial, for the reason that the court has been ousted of jurisdiction by the act alone of plaintiff. Hopkins v. Superior Court, 136 Cal. 552, 69 Pac. 299; Kaufman v. Superior Court, 115 Cal. 152, 46 Pac. 904. While plaintiff had an absolute right to dismiss the action, such right could be exercised only in the mode or manner prescribed by the statute; in other words, the right is meas-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ured by the mode provided for its exercise.

[3] When, instead of pursuing the statutory mode, it, by motion made in open court, invoked the inherent power of the court in the exercise of which it was asked to make an order dismissing the case, the making of an order either granting or denying the motion was within the exercise of the jurisdiction of the court. That the court may order a dismissal, upon application made in open court by plaintiff, is upheld in Richards & Knox v. Bradley, 129 Cal. 670, 62 Pac. 316, and McDonald v. Cal. Timber Co., 2 Cal. App. 165, 83 Pac. 172, which cases also constitute authority sustaining the right of appeal from an order of dismissal. If, however, the power so to do be a matter of absolute right when exercised in other than the statutory mode, such order is wholly unnecessary, for it is not a right the exercise of which depends upon an order of court, but solely upon the act of plaintiff in making the motion. It therefore follows, we think, that the order, if made, denying the motion, was one made within the jurisdiction of the court, and hence, if not justified by the facts, constitutes an error to be otherwise reviewed than in a proceeding of this character.

[4] 2. The office of the writ of review extends only to those cases where "an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy." Section 1068, Code Civ. Proc. No appeal lies from an order dismissing or refusing to dismiss an action (section 956, Code Civ. Proc.), and petitioner, upon authority of Garthwaite v. Bank of Tulare, 134 Cal. 237, 66 Pac. 326, claims that the order refusing to dismiss cannot be reviewed upon an appeal from the judgment. In that case a motion was made by defendant to dismiss the case for want of prosecution, which motion was denied. Upon trial, judgment went for plaintiff. With reference to this order, which was one of the errors relied upon for a reversal of the judgment on an appeal by defendant, the court said: "This court can review only an intermediate order or decision which involves the merits or affects the judgment. The decision on the motion did not involve the merits of the action, nor did it necessarily affect the judgment thereafter rendered." The sentence last quoted was not necessary to a decision of the case, the court having held the alleged error was not prejudicial to the substantial rights of defendant so appealing. We are unwilling to accept this case as an authority in support of the proposition that a judgment on the merits rendered against a plaintiff, after an erroneous order denying his motion to dismiss the action, is not affected by the making of such erroneous order. It would seem clear in this case that the granting of the motion to dismiss would have prevented the rendition of the judgment on the merits which followed the order denying such motion. In our opinion, the order did affect the judgment rendered, since, had the motion been granted, the judgment could not have been rendered.

[5] 3. Assuming, as claimed by petitioner upon the strength of the Garthwaite Case, that the order cannot be reviewed on appeal from the judgment, nevertheless there existed a plain, speedy, and adequate remedy by means of a motion to set aside and vacate the judgment upon the ground of want of jurisdiction, in support of which the facts which it is claimed ousted the court of jurisdiction could have been presented, and, upon the making of an order upon such motion, either party could have appealed therefrom, as from an order made after judgment, upon a bill of exceptions embodying the facts upon which the ruling of the court was based, thus presenting the question for consideration upon a duly authenticated record.

[6] 4. In no event can the record of a court of general jurisdiction showing a judgment duly rendered upon trial be contradicted by evidence dehors the record, whether such evidence be controverted or the truth thereof admitted.

It follows that the writ must be dismissed, and it is so ordered.

We concur in the judgment: ALLEN, P. J.; JAMES, J.

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17 Cal. App. 734

PEOPLE v. PETERSON. (Cr. 353.)

(District Court of Appeal, First District, California. Dec. 28, 1911.)

1. Forgery (§ 26*) — Information — Sufficiency.

Pen. Code, § 470, provides that one who "signs the name of another person or of a fictitious person, knowing that he has no authority to do so, or falsely makes, alters, forges, or counterfeits any bill or note, or utters the same as genuine, knowing the same to be false, altered, or counterfeited, shall be guilty of forgery." The information alleged that accused willfully, falsely, and with intent to defraud a certain company, made, altered, and forged a certain promissory note and that accused, well knowing the note to be forged, passed the same as true and genuine to the corporation. *Held*, the information was not defective for not alleging that accused knew that she had no authority to execute the note.

[Ed. Note.—For other cases, see Forgery, Dec. Dig. § 26.*]

2. Forgery (§ 32*) — Information — Sufficiency—Uttering and Publishing.

Under Pen. Code, § 470, providing that one who utters, publishes, passes, or attempts to pass as true and genuine any false, altered, or forged bill or note, knowing the same to be false, altered, or counterfeited, shall be guilty of forgery, an information alleging that accused, well knowing a note to be forged, willfully, unlawfully, falsely, and fraudulently, and with intent to prejudice, a corporation named, uttered, published, and passed a certain note as true and genuine, sufficiently charged the offense of uttering and publishing the forged note.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 64; Dec. Dig. § 32.*]

3. WITNESSES (§ 269*)—CROSS-EXAMINATION.

A witness cannot be cross-examined on a matter not touched by the original examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949-954; Dec. Dig. § 269.*]

Appeal from Superior Court, City and County of San Francisco; Wm. P. Lawlor, Judge.

Inez C. Peterson was convicted of forgery, and appeals. Affirmed.

Philip C. Boardman, for appellant. Attorney General Webb, for the People.

KERRIGAN, J. The defendant was convicted of the crime of forgery. She moved for a new trial, which motion was denied, whereupon she was sentenced to imprisonment at the state prison for a term of years. She prosecutes this appeal from the judgment.

The information alleges that the defendant, on or about the 7th day of March, 1911, at the city and county of San Francisco, state of California, "did then and there willfully, unlawfully, feloniously, falsely, fraudulently, and with intent to prejudice, damage and defraud the Frankenau Investment Company, a corporation * * * make, alter, forge, and counterfeit a certain" promissory note. After setting forth a copy of the note, the information further alleges that "she, the said Inez C. Peterson, * * * well knowing the same to be false and forged, did," at the said time and place, "willfully, unlawfully, feloniously, falsely, fraudulently, and with intent to prejudice, damage and defraud" the said corporation, "utter, publish, and pass the same as true and genuine to said" corporation.

To this information defendant interposed a general demurrer, which was overruled; and this ruling is now assigned as error.

It will be observed that the first part of the information does not allege that the defendant did the things charged, "knowing that she had no authority so to do," and for this reason the defendant contends that the information fails to incorporate therein an essential ingredient of the offense as defined by section 470 of the Penal Code; that therefore her demurrer should have been sustained.

[1, 2] This position is devoid of merit. The information charges that the defendant willfully, unlawfully, feloniously, and with intent to prejudice and damage the said investment company, did falsely make and forge the promissory note described. The charge is predicated upon a portion of the section defining what is forgery, which is not qualified by the language "not knowing that he had not authority so to do." This particular language was inserted by an amendment to the section adopted in 1905. The charge is based upon that portion of the statute which reads as follows: "Every person who, with intent to defraud, * * * falsely makes, alters, forges or counterfeits any * * * promissory note, * * *" and as a charge under this portion of the section the information is without defect. But even if this were not so, still the order of the court overruling the demurrer would have to be sustained, because the part of the information charging the uttering and passing of the note alone states a complete public offense.

The information charged the defendant with both forging the note and with uttering it. Evidence was introduced under both branches of the information, and the jury was instructed upon both branches of the case. The verdict was general, and if, as argued by defendant, the charging of either offense was radically defective, it would be impossible to say upon which charge of the information the verdict was based, and hence the judgment would perhaps have to be reversed. People v. Mitchell, 92 Cal. 590, 28 Pac. 597, 788; People v. Turner, 113 Cal. 278, 45 Pac. 331. The rule laid down in those cases, however, has no application here, for the reason that neither part of this information is, as we have seen, open to objection.

[3] Defendant also complains that the trial court prejudicially curtailed her right to cross-examine Dr. Alfred G. Meyer, a witness called for the prosecution. The testimony of this witness on direct examination did not touch the subject of defendant's sanity, and therefore, of course, she had no right to cross-examine him concerning that matter.

The judgment and order are affirmed.

We concur: LENNON, P. J.; HALL, J.

17 Cal. App. 699

McLAUGHLIN v. McLAUGHLIN. (Civ. 885.)

(District Court of Appeal, First District, California. Dec. 21, 1911.)

1. APPEAL AND ERROR (§ 1011*)—SCOPE OF REVIEW—CONFLICTING EVIDENCE.

Conflicting evidence on an issue upon which the court has made a finding will not be reviewed merely to determine its preponderance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

2. PARTNERSHIP (§ 95*)—PURCHASE OF COPARTNER'S INTEREST—CONTRACT—RIGHT OF BUYER TO RESCIND.

Where one competent to contract agreed to buy out his partner, and there was no mistake, fraud, or other reason which would make the agreement void under Civ. Code § 1689, providing for what cause a party to a contract may rescind, he had no right of rescission.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 142; Dec. Dig. § 95.*]

3. Partnership (§ 95*)—Sale to Copartner —Rescission—Notice.

A statement by one partner to a contract of sale to the other that he would not keep his contract if he could get out of it does not amount to a notice of rescission.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 95.*]

4. Damages (§ 189*)—Contract—Action by Seller for Breach — Evidence — Sufficiency.

In an action for breach of a contract to purchase and pay for a one-third interest in a drug store, evidence *held* sufficient to sustain a finding that the plaintiff suffered a damage of $355.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 189.*]

5. Damages (§ 222*)—Action by Seller for Breach—Findings—Sufficiency.

Where, in an action for the breach of a contract of sale of a business by the buyer, the complaint asked general damages only, a finding that, by the defendant's failure to perform, the plaintiff was damaged in a certain sum was sufficient to support a judgment for the plaintiff for such amount.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 222.*]

6. Judgment (§ 585*)—Merger and Bar—Action by Seller for Breach—Estoppel.

Where a contract for the purchase by one partner from another of an interest in a drug store was breached by the buyer, and the seller subsequently sued to dissolve the partnership, which suit was based upon facts in no way related to the sale agreement or its breach, the seller was not estopped by such suit from maintaining an action for damages for the breach.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1092–1097; Dec. Dig. § 585.*]

Appeal from Superior Court, City and County of San Francisco; John E. Raker, Judge.

Action by Maud McLaughlin against Ralph McLaughlin. From a judgment for plaintiff, defendant appeals. Affirmed.

Wm. H. Chapman and W. T. Hume, for appellant. Thos. F. Dunn, for respondent.

HALL, J. This is an appeal by defendant from a judgment in favor of plaintiff and against defendant for the sum of $355.

Plaintiff, defendant, and one Juanita Dowd who are sisters and brother, were, on the 3d day of October, 1909, equal copartners in a certain drug store or business conducted by them upon property owned by defendant. On said day plaintiff and defendant entered into an agreement in writing, signed and executed by them in duplicate, wherein defendant agreed to purchase from plaintiff, and plaintiff agreed to sell to defendant, the interest of plaintiff in said business for the sum of $750, which, by the terms of the contract, was to be paid by defendant to plaintiff within 40 days from the date of said contract. Defendant did not pay said money, or any part thereof, within said 40 days, or at all, but refused to perform said contract, and repudiated the same. This action was brought on the 18th day of February, 1910, to recover damages for the breach of said contract on the part of defendant in refusing to pay for and purchase said interest of plaintiff in said business, as he had agreed.

The contract is perfectly certain and unambiguous in its terms, and, as stated in appellant's brief, "the answer of defendant admits the execution of the contract, but seeks to avoid the same upon the following grounds: (1) The contract alleged does not express all of the agreement of the parties, in that the contract was intended to be an option to purchase, and not an absolute contract to purchase. (2) That the defendant was not competent to execute the contract; and therefore the same was void. (3) That the defendant rescinded the contract within a reasonable time after discovering that the same did not express the contract as he understood it."

Defendant also pleaded that plaintiff, after the expiration of 40 days and before the commencement of this action, had brought and prosecuted an action against defendant and the other copartner, Juanita Dowd, to judgment for a dissolution of said copartnership in said drug store business, and claimed that by such action she was estopped from recovering damages for defendant's breach of his contract to purchase.

The court found the facts against the claim of defendant pleaded by him in support of his alleged grounds for avoiding the contract, and also held that the bringing and prosecution of the action for a dissolution did not bar or estop plaintiff from recovering damages for defendant's breach of said contract to purchase said business.

[1] We understand appellant to ask for a reversal of the judgment for insufficiency of the evidence to support the findings of the trial court upon the matters above set forth as pleaded as grounds for avoidance of the contract. It is sufficient to say that there is abundant evidence in the record to support the finding of the court. We do not deem it necessary to recite the testimony; for appellant in his brief, as we understand it, only claims that the affirmative matters relied on by him were supported by a preponderance of the evidence. Thus, as to the first ground, he states: "In this case, by a preponderance of testimony and by the circumstances surrounding the making of the contract, it is established that the appellant did not understand the contract to be one of purchase and sale, but merely an option for 40 days." Again he says: "The second defense depends upon practically the same

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

evidence as the first defense. The preponderance of evidence shows that the defendant was drunk, or just getting over the effects of a spree." There is thus no real contention that there does not exist a conflict in the evidence as to the facts relied on by appellant as constituting what he is pleased to designate his "first and second defenses." At any rate, the evidence in the record abundantly supports the findings of the court.

[2, 3] As to the finding of the court that the defendant did not rescind the contract, it is sufficient to say that, the findings being against him as to the matters above discussed, he had no right to rescind. As the contract was not entered into by him through mistake, fraud, or because of any other reason that would make it voidable, he had no right to rescind. Civ. Code, § 1689. Further, the testimony of plaintiff shows that he never did give her any notice of rescission; the nearest approach thereto being his statement to her that "if he could get out of it he would not keep his contract."

[4] Appellant further contends that the evidence does not support the finding made by the court that plaintiff was damaged by the refusal of defendant to perform the contract in the sum of $355. The contract called for the payment by defendant of the sum of $750 to plaintiff for her one-third interest in the business. Defendant himself testified that her one-third interest at the time of making the contract and at all subsequent times was of a no greater value than $250. A pharmacist, who had been employed as such for the three years preceding the closing out of the business, testified to the effect that the entire business (that is, the interest of the three owners), including stock, fixtures, bills receivable, and good will was worth but $1,000 to a good pharmacist, and but $750 to any one else. This evidence afforded ample basis for the finding that plaintiff, by defendant's breach of the contract to purchase her one-third interest, had suffered a damage of $355.

[5] Appellant in his closing brief also contends that the finding as to damage is not sufficient to support the judgment. The finding is "that, by reason of defendant's refusal to perform his said part of said agreement to purchase the interest of plaintiff in the property hereinbefore described, plaintiff has been and is damaged in the sum of $355." This finding is ample. It substantially finds in the language of the complaint, which sought the recovery of general damages only. The natural and ordinary damages resulting from a breach of a contract may be recovered under a general allegation of damages. 13 Cyc. 175, and cases there cited under note 99. And a finding that follows the language of a good complaint is all that is required.

[6] The only other matter that remains to be considered is the contention of the appellant that plaintiff, by bringing and prosecuting to judgment the suit for dissolution of the copartnership, had estopped herself from claiming damages for defendant's breach of his contract to purchase her interest in said business. We can see no element of estoppel in her action. The two actions had no connection with one another. The breach of the contract to purchase was complete, and the damages for such breach had accrued before the suit for dissolution was instituted. She had a right to recover her damages for such breach, and as the partnership still existed she had a right by her action to compel a dissolution and settlement of the partnership affairs. Appellant had defaulted and refused to perform his contract to purchase. The subsequent bringing of the action for a dissolution did not alter or in any way change his position with regard to the contract to purchase, which he had already repudiated. Neither did plaintiff seek two inconsistent remedies. The remedies she sought grew out of different facts, and had no relation to one another.

The judgment must be affirmed; and it is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

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17 Cal. App. 759

AGOURE v. PECK et al. (Civ. 1,049.)

(District Court of Appeal, Second District, California. Jan. 2, 1912.)

1. APPEAL AND ERROR (§§ 931, 934*)—REVIEW—PRESUMPTIONS.

Where a court of record found that a party deposited in court money to pay to the adverse party, and that the latter was entitled thereto, and rendered judgment to that effect, an appellate court must presume, in the absence of a contrary showing, that the facts or pleadings authorized the findings and judgment within Code Civ. Proc. §§ 572, 573, providing for deposits in court for delivery on conditions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3762–3771, 3777–3781; Dec. Dig. §§ 931, 934.*]

2. DEPOSITS IN COURT (§ 8*)—MODE OF DEPOSIT—ORDER OF COURT—"PUBLIC MONEY."

Code Civ. Proc. § 572, provides that, when it appears by a pleading or the examination of a party that he holds money or other property which is the subject of the litigation as trustee for another party, the court may order the same, upon motion, to be deposited in court upon such conditions as may be just. Section 573 provides that, whenever money is paid into court, the same must be delivered to the clerk, who shall deposit the same with the county treasurer to be held in a distinct fund, subject to the order of the court, and for the safe-keeping of the same the treasurer shall be liable on his official bond. *Held* that, where money was paid to the clerk of the court without a preliminary order of the court directing such deposit, such money when paid to the county treasurer became public money within Pen. Code, § 426, where the court thereafter found that a deposit had been made, and adjudged that the party for whose benefit it was made was entitled thereto, and hence the county treasurer was liable on his official bond for the amount of such deposit.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Deposits in Court, Dec. Dig. § 8.*

For other definitions, see Words and Phrases, vol. 6, pp. 5797–5798.]

3. JUDGMENT (§§ 506, 507*)—COLLATERAL ATTACK.

Where the court within its jurisdiction took cognizance of a fund paid into court by a party for the use of the adverse party and awarded by its judgment the fund to the adverse party, the judgment could not be collaterally attacked either by a party to the action or by a stranger, however erroneously the court acted.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 949, 950; Dec. Dig. §§ 506, 507.*]

4. DEPOSITS IN COURT (§ 8*)—COUNTY TREASURER—LIABILITY.

A county treasurer who receives a certificate of deposit under a judgment adjudging the same to be a deposit in court for the benefit of a party to a pending litigation must reduce the money payable on the certificate to his possession and safely keep the same until disbursed under authority of law, and, where he retains the certificate payable on demand, he in effect loans the money to the bank, and violates the law, and he and his sureties on his official bond are liable for a loss in consequence of the insolvency of the bank, though he acted in good faith, and believed that the bank was solvent.

[Ed. Note.—For other cases, see Deposits in Court, Dec. Dig. § 8.*]

Appeal from Superior Court, Ventura County; Frank R. Willis, Judge.

Action by Pierre Agoure against H. E. Peck and another. From a judgment for plaintiff and from an order denying a new trial, defendants appeal. Affirmed.

Hiatt & Selby, Geo. F. Hatton, H. F. Peart, and Orestes Orr, for appellants. Charles S. Burnell and Charles E. Haas, for respondent.

ALLEN, P. J. The action is one brought by plaintiff against the treasurer of Ventura county, and upon his official bond. Judgment went for plaintiff, from which, and an order denying a new trial, defendants appeal. The case is this: On the 19th day of March, 1907, an action was pending in the superior court of Ventura county, wherein Joseph F. Lewis was plaintiff and Pierre Agoure was defendant. On said date plaintiff in said action tendered to Agoure the sum of $1,000, conceded to be due him on account of the cancellation of a lease involved in said action, which sum Agoure refused to accept; and thereupon Lewis deposited with a banking company in Ventura $1,000 and the bank issued a certificate of deposit for such sum, payable to the county clerk upon return of the certificate duly and properly indorsed. This certificate of deposit was delivered to the county clerk, who receipted for the same as money deposited in the case of Lewis v. Agoure, and who had the same in his hands on the 3d day of April, 1907, at which date the action pending was finally heard and determined by the superior court of Ventura county, in which action the trial court found: "That the said plaintiff has brought into and deposited in court the sum of one thousand dollars ($1,000), lawful money of the United States, to pay to the said defendant for the cancellation of said lease, should the court so award; that the defendant, Agoure, is entitled to have paid to him the said sum of one thousand dollars ($1,000) so tendered him and now deposited with the clerk of this court." The judgment recited, among other things: "It is further ordered, adjudged, and decreed that the defendant is entitled to the sum of one thousand dollars ($1,000), deposited in court for him by the plaintiff, and the said sum is hereby awarded the said defendant as a consideration for the cancellation of his lease." Thereafter the clerk continued to hold such certificate of deposit until the 19th day of June, 1907, on which date the clerk delivered said certificate of deposit to the treasurer of Ventura county, at the time notifying the treasurer that the same was a deposit in court and was delivered by the clerk to the treasurer as and for a deposit in court in said action, and the treasurer received the same as and for a deposit of $1,000 in court in said action, and not otherwise; and at the time of such deposit the clerk inquired of the treasurer if he desired to have the money in gold pieces, and the treasurer replied that he guessed not; that, if the clerk would indorse it, he would take a chance on it. Thereafter, on April 6, 1909, after said judgment of the superior court had been affirmed by this court, the superior court of Ventura county made its order directing the defendant treasurer to deliver and pay over $1,000 to plaintiff herein, which the defendant refused to do, and such sum has never been paid to plaintiff, or to any one for him. It appears from the record that the treasurer, upon receipt of the certificate of deposit, continued to hold the same. The said banking company at such time, and for a long time thereafter, was reputed to be solvent, but subsequently became insolvent and the certificate of deposit became uncollectible. The trial court found in this action that the money was properly paid into the hands of the treasurer in his official capacity, and that he was guilty of negligence, in that he did not use due diligence to prevent loss to plaintiff, although not acting in bad faith.

[1] It is contended by appellants that the court was without jurisdiction or authority to order the money paid into court, for the reason that nothing appears in the record showing that the case of Lewis v. Agoure was one which, under section 572 of the Code of Civil Procedure, justified an order

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

with reference to deposit; and, further, that, if the same comes under such section, a preliminary order before deposit, upon the application of a party, is essential in order that a deposit may be accepted or become a deposit in court. Section 572, Code of Civil Procedure, provides: "When it is admitted by the pleadings, or shown upon the examination of a party to the action, that he has in his possession, or under his control, any money or other thing capable of delivery, which, being the subject of litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same, upon motion, to be deposited in court or delivered to such party, upon such conditions as may be just subject to the further direction of the court." Section 573, Code of Civil Procedure, provides that, whenever money is paid into or deposited in court, the same must be delivered to the clerk in person, or to such of his deputies as shall be especially authorized by appointment in writing to receive the same. "He must, unless otherwise directed by law, deposit it with the county treasurer to be held by him subject to the order of the court. The treasurer must keep each fund distinct, and open an account with each. * * * For the safe-keeping of the money deposited with him the treasurer is liable on his official bond." Nothing to the contrary appearing, and all intendments being in favor of the judgment of a court of record, it will be presumed that in the case of Lewis v. Agoure the $1,000 therein involved was by the pleadings in that case admitted to be due, or that such facts existed or had been shown to the court as would authorize an order directing a deposit.

[2] It may be, and probably it is, true that before the 3d day of April, the date when the superior court made its order and judgment in connection with this fund, by reason of failure on the part of Lewis to make application for and there being no formal order of court directing a deposit of the money, the same, although in the hands of the clerk, was nevertheless subject to the order of Lewis, and was not under the control of the court or in its treasury. But when the court, taking cognizance of the fund, and by its judgment determined the same to have been paid into court, and then being deposited subject to the order and judgment of the court, the same became a deposit in court and the control of Lewis thereover ceased.

[3] "However erroneously the court may have acted in the premises, it being within its jurisdiction to make the order, its order is not absolutely void." Rowe v. Blake, 112 Cal. 644, 44 Pac. 1084. "In a collateral action, it cannot be brought in question, even by a party to it, much less, as in this case, by a stranger to it." Hunt v. Loucks, 38 Cal. 382, 99 Am. Dec. 404. We are of opinion, then, that the court had jurisdiction in a proper case to make the order, and that it must be assumed that the case in which the order was made was a proper one, and, having been so made and the judgment of a court rendered in connection therewith, the same is binding upon the parties and is not subject to collateral attack. The court then having accepted in its treasury the $1,000 involved and adjudged it to be a money deposit in court, the law requires the clerk to pay the same into the hands of the county treasurer, and the same when received by the treasurer in his official capacity became public money under the provisions of section 426 of the Penal Code. The treasurer is by statute prohibited from depositing public money in any bank or loaning the same or any portion thereof, and is liable for failure to keep the same in his possession until disbursed or paid out by authority of law.

[4] When the treasurer received this certificate of deposit, under the terms of the judgment of the court, he could only receive the same as money, and it was his plain duty to have reduced the money, certified to be payable upon the presentation of the certificate, to his possession and to have safely kept the same until disbursed under authority of law. Failing to do this, he was guilty not only of a violation of the law, but of gross negligence in the management and care of this property; and assuming that the liability of a treasurer on account of such deposits is but that of a depositary for hire, and liable therefor only in the absence of ordinary care, nevertheless, the record in this case discloses that he did not use ordinary care in the preservation of this property. His retention of the certificate of deposit, payable upon demand, was in legal effect but a loan to the bank of the money in his possession, a thing which by law he is prohibited from doing, and he cannot be heard to excuse himself upon the ground that he acted in good faith, believing the bank to be solvent. We are of opinion, therefore, that all of the findings of the court with reference to the negligence and want of care upon the part of the treasurer are amply supported.

We see no error of the court in the admission or in the rejection of evidence tendered.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

17 Cal. App. 764

AMERICAN-HAWAIIAN ENGINEERING & CONSTRUCTION CO., Limited, v. BUTLER et al. (Civ. 846.)

(District Court of Appeal, Third District, California. Jan. 2, 1912.)

1. Appeal and Error (§ 1151*)—Review—Errors on Face of Record.

Where there was a general finding that the plaintiff did certain work for the defendant and furnished certain materials, the reasonable value of which amounted to a certain sum, and that the hire of watchman, foreman, etc., on such building cost another and smaller sum, the latter sum will not be considered to have been included in the larger on a finding in the plaintiff's favor, where a conclusion of law declares that the plaintiff is not entitled to recover the smaller sum; and hence the error in failing to allow such smaller sum is one appearing on the face of the record, which may be corrected by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1151.*]

2. Interest (§ 19*)—Time from Which Interest Runs—Quantum Meruit.

In an action of quantum meruit, interest is allowable only from the time judgment is rendered.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 35–40; Dec. Dig. § 19.*]

3. Interest (§ 19*)—Time from Which Interest Runs—Quantum Meruit.

Where contractors elected to rescind a building contract for breach by the owner, and sued on a quantum meruit for services rendered and material furnished, and both the liability and the amount of the demand were controverted, the demand was unliquidated, especially where the finding was for a sum considerably less than that sought, and interest will not be allowed thereon before judgment.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 35–40; Dec. Dig. § 19.*]

4. Interest (§ 66*)—Recovery—Pleading—Necessity of Claim.

Interest will not be allowed, prior to a judgment, in an action for the reasonable value of services rendered and material furnished, where there were no facts alleged in the complaint from which it could be inferred that the plaintiff was entitled to such interest, and there was no prayer therefor.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 147; Dec. Dig. § 66.*]

5. Interest (§ 18*)—Accounts—Settlement.

Under Civ. Code, § 1917, which provides that interest is payable on money due on any settlement of account from the day the balance is ascertained, interest will not be allowed upon a recovery on a quantum meruit for materials furnished and services performed under a building contract, though estimates of materials and labor incorporated in the building were delivered monthly to the architects in accordance with the terms of the contract, such estimates not binding defendant.

[Ed. Note.—For other cases, see Interest, Dec. Dig. § 18.*]

6. Work and Labor (§ 14*)—Quantum Meruit—Evidence—Building Contract.

While, in an action on a quantum meruit for the value of services and material furnished for a building after an election to rescind the building contract, the contract might be shown to aid the determination as to the value of the work and materials, none of its terms may be taken advantage of therein.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 31–33; Dec. Dig. § 14.*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by the American-Hawaiian Engineering & Construction Company against Emma G. Butler and another. From a judgment for plaintiff for a part of the relief demanded, it appeals. Modified and affirmed.

Edgar C. Chapman, for appellant. Charles W. Slack, for respondent Butler. R. H. Countryman, for other respondent.

BURNETT, J. In this opinion we shall refer to Emma G. Butler as respondent, since the defendant in the cross-complaint has no interest in the proceedings here. The plaintiff has appealed on the judgment roll from a judgment in its favor. It makes two contentions: "First: The judgment should be increased by the amount of $7,170, the sum expended by appellant in the hire of superintendents, foremen, and watchmen in the construction of the building mentioned in this action; and, second, it should be increased by the amount of legal interest on a part of its claim from the time of filing the complaint in this action, on, to wit, November 11, 1907, viz., interest on $57,804.57."

[1] As to the first of these propositions, respondent answers: "First, that the appellant has recovered the amount of the value of these men's services, and the value thereof is included in finding No. 4 of the lower court, fixing 'the reasonable market value of all of the work of the construction of said building, and of the material and labor so as aforesaid incorporated therein.' Second, that, even if the lower court did not in fact include in its finding No. 4 the value of the services of these men, yet the court will not inquire therein, unless the fact of such omission appear plainly on the face of the record, which it does not." We think it does appear "plainly on the face of the record" that the trial court made no allowance for the services of these men. This is a necessary inference, as we view it, from the ordinary signification of the terms employed by the court in stating the facts and its conclusions therefrom. It can hardly be made more emphatic than by exhibiting these findings as follows:

"(3) That on or about the 29th day of June, 1905, plaintiff did, at the special instance and request of defendant, commence the work of the construction of certain portions of said building, and did thereafter continue to perform said work without interruption, except as hereinafter stated, from and after the 29th day of June, 1905, to and including the 17th day of September, 1907, and did furnish certain building materials and certain labor, all of which were incorporated in said building during said last-mentioned period of time.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"(4) That the reasonable market value of all of the work of the construction of said building and of the materials and labor so, as aforesaid, incorporated therein by plaintiff was and is the sum of $191,805.42."

"(27) That during the progress of the work of the construction of said building plaintiff expended the sum of $7,170 for hire of superintendents, watchmen, and foremen in, upon, and about said building, and that the reasonable value of the services performed in, upon, and about said building by such superintendents, watchmen, and foremen was and is the sum of $7,170."

If nothing further appeared, we might justly conclude that the trial court considered and found the $7,170 to be a part of the said $191,805.42. But, among the conclusions of law, it is declared "that plaintiff is not entitled to recover of or from defendant the sum of $7,170, or any part thereof, for the services of superintendents, watchmen, or foremen employed by plaintiff in, upon, and about said building during any portion of the period of time in which plaintiff was performing the work of the construction thereof under said contract of June 29, 1905, or otherwise." It is thus clear that the court below did not contemplate the expenses incurred for the services of the superintendents, etc., as a part of "the work of the construction of said building" or of "the labor incorporated therein." But it is admitted by respondent that this expense was a necessary part of the cost of the building, and should be included in the allowance made to plaintiff.

Adopting respondent's construction of finding 4, the court's view of the case is thus presented: "The reasonable market value of all the labor and material furnished for the building, including the services of superintendents, watchmen, and foremen, is the sum of $191,805.42. That of said sum there has been paid by defendant to plaintiff the sum of $124,478.99. That there is now due, owing, and unpaid to plaintiff by defendant for and on account of the work of the construction of said building and for the materials and labor incorporated therein the sum of $67,326.43. Of this $191,805.42, $7,170 were expended for the hire of superintendents, etc., and plaintiff is not entitled to recover any portion of the $7,170." And yet the court enters judgment for the said sum of $67,326.43. In other words, the court reaches the two inconsistent and irreconcilable conclusions, to wit, that plaintiff should and should not recover for the expense incurred for the hire of the superintendents. Under this interpretation of said finding 4, it is manifest that the judgment should have been for $7,170 less than the said $67,326.43, to make the findings and conclusions of law harmonious. We think the only reasonable explanation of the matter is that finding 4 is merely a general finding, wherein one of the averments of the complaint on a quantum meruit is adopted, that this must be read in connection with finding No. 27, which is a special finding, and that it appears clearly from the aforesaid conclusions of law that such special finding is not included in said general finding. Upon the theory of respondent, there was, of course, no reason in the world why there should have been this special finding as to the services of the superintendents, etc., rather than as to the services of any other class of employés. We can readily understand, though, that there was probably a controversy as to whether these services were properly chargeable against defendant, and the court reached the conclusion that, though they were of said value of $7,170, yet respondent ought not to be liable therefor. Indeed, the opening brief of appellant is devoted entirely, as far as this point is concerned, to the maintenance of the proposition that the employment of such persons was necessary, and that the contractor was entitled to a reasonable compensation for said employment. This was not contested in respondent's brief, but the other position was taken, which, as before stated, we deem untenable.

[2, 3] As to the interest, the general rule in this state is, undoubtedly, that, in an action of quantum meruit, interest is not allowed until judgment is rendered. The latest case to which our attention is called is Erickson v. Stockton, etc., R. R. Co., 148 Cal. 206, 82 Pac. 961, wherein it is said, through Mr. Justice Henshaw: "Plaintiff's demand, as has been said, was for the value of services rendered and for the value of goods sold within two years upon an open account. Not only was the fact of defendant's liability for the demand denied, but the value and amount of the demand were also controverted, and it appears that, while plaintiff was claiming over $8,000, the award to him was less than $1,500. In such a case, it is well settled that section 1917 of the Civil Code applies, viz., that interest is payable on all moneys, at the rate of 7 per cent. per annum, due on any settlement of account from which the balance is ascertained. Brady v. Wilcoxson, 44 Cal. 239; Coburn v. Goodall, 72 Cal. 498 [14 Pac. 190, 1 Am. St. Rep. 75]; Cox v. McLaughlin, 76 Cal. 60 [18 Pac. 100, 9 Am. St. Rep. 164]; Heald v. Hendy, 89 Cal. 632 [27 Pac. 67]; Easterbrook v. Farquharson, 110 Cal. 317 [42 Pac. 811]." It was therefore held that the plaintiff was not entitled to interest before judgment. This is a similar action, in which defendant's liability for the demand was denied and the value and amount of the demand also controverted, and while plaintiff sued for $111,738.37, the award, as we have seen, was for a sum over $40,000 less. It may be stated, also, that no facts are alleged in the complaint from which it could

be inferred that plaintiff was entitled to interest on the amount that should be found due; nor was there any prayer for interest. Plaintiff undoubtedly proceeded upon the theory that interest should not be allowed prior to judgment.

[4] The findings disclose the fact that, for the reason that defendant failed to comply with its terms, the plaintiff rescinded the written contract under which the work was done, and said plaintiff elected to sue for the reasonable value of the services performed and material furnished. We have, therefore, a case like Cox v. McLaughlin, supra. Therein it is said: "It may be stated as a general principle that interest is not allowed on unliquidated damages or demands. This term 'unliquidated' applies equally to cases of tort, as slander, assault and battery, etc., and to cases upon a quantum meruit, for goods sold and delivered or services rendered. The reason of such denial of interest is said to be that the person liable does not know what sum he owes, and therefore can be in no default for not paying. The damages in such cases are an uncertain quantity, depending upon no fixed standard, are referred to the wise discretion of a jury, and can never be made certain, except by accord or verdict." The court proceeds to state that there was an express contract between the parties, but that for some reason a recovery upon that contract had been abandoned, and plaintiff had brought the action upon a quantum meruit, precisely as he might have done had there been no contract. It was declared that "defendant was not in default for not ascertaining that which, outside of the abandoned contract, he could not ascertain, except by an accord or by a verdict or its equivalent."

[5] Appellant seeks to differentiate that case from this by reason of certain findings upon issues tendered by the answer herein. The only ones necessary to notice are "that under said contract, and pursuant to its terms and provisions, plaintiff performed the work of the construction of said building under the direction of the architects thereof, Messrs. Reid Bros., and did incorporate building materials and labor therein, estimates of which said materials and labor so incorporated were made by plaintiff monthly as said work progressed, and the same were, immediately after the making thereof, delivered to the said architects of said building; that shortly after said estimates were so, as aforesaid, delivered to said architects certificates relating to said estimates were issued by said architects to plaintiff in amount not exceeding 75 per cent. of the reasonable market value of the materials and labor so, as aforesaid, incorporated in said building for the months immediately preceding the issuance of each of said certificates, respectively," and that defendant paid to plaintiff the amount set forth in the certificates up to July 31, 1907, aggregating the sum of $124,478.99, and that on the 4th day of September, 1907, plaintiff presented an estimate for the month of August, amounting to the sum of $16,311.58, with a demand that 75 per cent. of the same, or $12,233.64, be paid to plaintiff, but no part of the same was ever paid by defendant; nor has defendant ever paid or offered to pay plaintiff for any material and labor incorporated in the building subsequent to the month of July, 1907. Appellant declares that under such a contract, which the court found respondent had complied with concerning the payments provided for therein, respondent knew each month how much the contractor had earned during the preceding month, how much he received each month, and how much was retained by respondent and that it became due when the contract was rescinded, and therefore should bear interest from that date, or at least from the date when the complaint was filed. But it is to be noticed that these statements of the amount due constituted simply an estimate upon which to base the monthly payments. It cannot be said that respondent was bound by these estimates. Indeed, the contract expressly provided that no certificate given nor payment made, except the final one, should be conclusive evidence against any claim of the owner. We think it cannot be said that there was any accord or agreement as to the exact amount due at any time for the services and material furnished for the building. Probably, in nearly every action upon quantum meruit, the defendant might ascertain by inquiry and investigation substantially what, if anything, is due; but the law requires more than that before it will exact interest. Under the provisions of section 1917 of the Civil Code, which is applicable to this class of cases, the balance must be ascertained, either by agreement of the parties, or by judgment, as a condition precedent to interest. Erickson v. Stockton R. R. Co., supra.

[6] Appellant's contention presents a rather curious situation, in that it is sought, in an action on an implied contract, to take advantage of some of the terms of an express contract that has been rescinded. Said contract could be considered, of course, in the determination of what was the reasonable market value of the work and materials; but we think it should not be given the effect claimed for it by appellant.

We are of the opinion that, in view of the nature of the action, the amount claimed by appellant, and the denials of defendant, no part of the debt should be deemed to have been liquidated before the action was brought. We think the judgment should be modified by adding thereto the sum of $7,170, and as thus modified it should be affirmed. It is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

17 Cal. App. 727

LOCHER v. WALSH et al., Board of Trustees of City of Auburn.

(Civ. 922.)

(District Court of Appeal, Third District, California. Dec. 28, 1911.)

1. MUNICIPAL CORPORATIONS (§ 108*)—ORDINANCES—INITIATIVE PETITIONS—SUFFICIENCY—DECISION OF CITY CLERK.

St. 1911, pp. 359, 361, authorizing the registered voters of any municipality to initiate legislation by petition of at least 30 per cent. of the votes cast at the last preceding general election, and requiring the clerk on the filing of a petition to ascertain from the records of registration whether the petition is signed by the requisite number of voters, and if found sufficient, providing that the petition be submitted to the trustees, who shall forthwith order an election, imposes on the clerk alone the duty of determining the sufficiency of the petition, and, in the absence of fraud or mistake, the trustees have no power to determine its sufficiency.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 108.*]

2. MUNICIPAL CORPORATIONS (§ 108*)—ORDINANCES—INITIATIVE PETITIONS—WITHDRAWAL OF SIGNATURES.

Where the clerk of a city has determined the sufficiency of an initiative petition as filed under St. 1911, pp. 359, 361, and has made a finding in writing in the form of a certificate to be attached to the petition, a request of petitioners for withdrawal comes too late to divest the clerk of jurisdiction to attach the certificate and submit the petition to the trustees, who must then order an election.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 108.*]

Mandamus by A. J. Locher against J. T. Walsh and others, Board of Trustees of the City of Auburn, to compel respondents to call a special election in the city for adoption or rejection of a proposed ordinance, pursuant to an initiative petition. Granted.

Tuttle & Tuttle, for petitioner. Lee Chamberlain, J. J. Bauer, and A. C. Lowell, for respondents.

CHIPMAN, P. J. Mandamus. It appears from the petition: That the city of Auburn, Placer county, is a city of the sixth class. That the persons named as defendants are the duly qualified and acting trustees of said city, and that L. F. Morgan is the duly elected and acting clerk thereof. That on November 22, 1911, a petition was filed with said clerk praying that a certain ordinance relating to the regulation of the sale of spirituous liquors in said city be submitted to a vote of the electors of said city, which said petition was signed by more than 30 per cent. of the entire vote cast at the last preceding general municipal election held in said city. That, within 10 days thereafter, the said clerk did examine and ascertain, from the records of registration of said Placer county, that said petition was signed by more than 30 per cent. of the qualified voters of said city and equal in number to more than 30 per cent. of the entire vote cast at said last general municipal election. That said clerk thereupon, on December 2, 1911, did attach to said petition his certificate in the words and figures as follows: "City of Auburn, Auburn, California, Dec. 2, 1911. To the Honorable Board of City Trustees, Auburn, Cal.—Gentlemen: I hereby certify that I have compared the signatures of the persons whose names appear on the foregoing petition and that I find 126 names of registered voters. L. F. Morgan, City Clerk. 30% of 419, the number of votes cast at the last city election is required by law. 125.7 is 30%. L. F. Morgan." That thereafter, on December 4, 1911, the said respondents convened as a board of trustees of said city at a regular meeting thereof and considered said petition and by a vote of a majority of said board, "wrongfully and without authority of law denied, and still deny, and refused to grant and still refuse to grant, the request contained in said petition, that the ordinance therein proposed be submitted forthwith to a vote of the electorate of said city, at a special election in said city." Petitioner prays that the said board of trustees be required to forthwith call a special election in said city and submit to the electorate thereof at said election the adoption or rejection of said proposed ordinance. It appeared that on December 2, 1911, six of the persons who had signed said petition handed to the clerk a request that their names be withdrawn therefrom. A question of fact here arose as to what the clerk had done up to this time. It appears that, prior to receiving said request, the clerk had written on a piece of paper the certificate set out in the petition (copied above), as to which the clerk made the following statement, which is stipulated to be the fact, viz.: "That this certificate at that time was on my desk, in my place of business, known as Morgan's Shoe Store, on Railroad street, in the city of Auburn. At that time the petition was inside of my writing desk. This is a desk that has a lid that raises up, and the lid being down, the petition was inside of the desk, and the certificate was on top of the desk, or outside of the desk, and had not been attached to the petition handed to me on November 22, 1911." The certificate was attached to the petition on December 2, 1911, after the clerk had received said request, and in that form was considered by the trustees on December 4, 1911, and denied for the reason that certain signers to the petition had requested their names to be withdrawn therefrom. This we understand to have been the situation in view of which respondents contend that there was a failure to comply with the statute governing the proceedings and hence they were justified in denying the petition.

The statute relating to the subject necessarily involves an examination of the provisions governing both the recall and initiative which are found in Statutes 1911, pp. 359, 361, as follows:

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"Sec. 10. The procedure to effect such removal or recall shall be as follows: A petition demanding the election of a successor to the person sought to be removed shall be filed with the clerk, which petition shall be signed by registered voters equal in number to at least twenty-five per cent. of the entire vote cast at the last preceding general municipal election, and shall contain a statement of the grounds. * * * Within ten days from the date of filing such petition, the clerk shall examine and from the records of registration ascertain whether or not said petition is signed by the requisite number of qualified voters, and if necessary the city council * * * shall allow him extra help for that purpose, and he shall attach to said petition his certificate showing the result of said examination. If by the clerk's certificate the petition is shown to be insufficient, it may be amended within ten days from the date of said certificate. The clerk shall, within ten days after such amendment, make the examination of the amended petition and if his certificate shall show the same to be insufficient it shall be returned to the person filing the same, without prejudice, however, to the filing of a new petition in the same effect. If the petition shall be found to be sufficient, the clerk shall submit the same to the city council, or board of trustees or other governing body without delay, whereupon the council, or board of trustees or other governing body shall forthwith cause a special election to be held within not less than thirty-five days nor more than forty days after the date of the order calling such election, to determine whether the voters will recall such officer, provided that if a general municipal election is to occur within sixty days, the council may, in its discretion, postpone the holding of such election to such general election or submit such recall election at any such general election occurring not less than thirty-five days after such order.

"Sec. 11. The registered voters of any municipality shall have power to propose by petition, and adopt or reject at the polls, if not adopted in the meantime by the city council, * * * any ordinance, act or other measure which is within the power conferred upon the city council, board of trustees or other governing body. Such ordinance, act or measure may be proposed by filing with the clerk a petition setting forth said measure in full signed by voters equal in number to the percentage hereinafter required. Such petition shall be executed, signed and verified in the same manner and the clerk shall perform the same duties in relation thereto, as is provided in the preceding section concerning petitions for recall. If the petition be signed by voters equal in number to thirty per cent. of the entire vote cast at the last preceding general municipal election, and contains a request that said measure be submitted forthwith to a vote of the electorate at a special election, then the city council * * * must either pass the measure without alteration or submit the same to the electorate at a special election to be held at a date not more than thirty days from the date of calling the same. If the petition be signed by voters equal in number to fifteen per cent. of the entire vote cast at the last preceding municipal election, or if for any reason any measure proposed by petition signed by thirty per cent. of said voters aforesaid has not been submitted at a special election as above provided, then in either event such measure or measures shall be submitted to the electorate at the next general municipal election which shall take place at any time after thirty days from the date of the clerk's certificate of sufficiency; provided that the city council * * * shall not in the meantime pass the same without alteration."

[1] Respondents contend that the duties of the clerk are "purely ministerial subject to the supervision of the board." Furthermore, they claim that "said names were withdrawn before the clerk acted on said petition, and certainly before the board acted thereon." The power conferred upon the board and the clerk respectively is shown in Good v. Common Council, 5 Cal. App. 265, 90 Pac. 44, under the charter provisions of the city of San Diego. The duties there devolved upon the clerk and council in proceedings for the recall of an officer did not materially differ from the provisions here involved. See, also, Davenport v. Los Angeles, 146 Cal. 508, 80 Pac. 684. In the Good Case the court said: "There is no discretion vested in the common council in connection with the calling of this election. That body's functions are purely ministerial; but, if it be conceded that it was vested with some discretion, it does not follow that it can refuse to act. The duty of determining whether or not the petition contains the proper number of signatures and the comparing of them with the great register devolved upon the city clerk. He is the person given authority to hear and determine the question of sufficiency of the petition, and no appeal therefrom is provided and none apparently intended to be given. This is evident from the provision of the act requiring the return of the petition by the city clerk to the petitioner if found insufficient, and which in effect negatives petitioner's right of appeal." It may be observed that this is evident also from the provision that "If the petition shall be found to be sufficient (by the clerk) the clerk shall submit the same to the city council or board of trustees or other governing body without delay, whereupon the council or board of trustees or other governing body

shall forthwith cause a special election to be held," etc. We think it plainly apparent from the statute that the procedure provided by it devolves upon the clerk alone the duty and power, in the absence of fraud or mistake, neither of which is alleged here, of determining the sufficiency of the petition in respect of the requisite number of signers, the only question now presented.

[2] The remaining inquiry is as to the right of the six petitioners to withdraw their names from the petition under the circumstances shown. The statute makes no provision for withdrawal of names from the petition. The procedure for proposing an ordinance is initiated "by filing with the clerk a petition setting forth," etc. "Within ten days from the date of filing such petition the clerk shall examine and from the records of registration ascertain whether or not said petition is signed by the requisite number of qualified voters (i. e., registered voters), * * * and he shall attach to said petition his certificate showing the result of said examination." The statute seems to deal with the petition filed with the clerk, and not a petition after names have been withdrawn therefrom. Whether a signer may, after the petition has been filed with the clerk, and, during this period of examination of the names to determine the sufficiency of the petition, withdraw his name, is a question not necessarily before us and is not decided. It appears that the clerk had completed his investigation, had determined the facts, and had so certified before any name had been withdrawn. He had reached a conclusion and had made a finding, in writing, in the form of a certificate which was, on the same day, attached to the petition and presented to the board. We do not think that, because this certificate had not been physically attached to the petition at the moment the request for the withdrawal of the six names was made, it can be held to render his certificate fruitless and inoperative. The statute prescribes no point of time when he shall attach his certificate to the petition. The most that is required is that the petition presented to the board shall have his certificate attached, and this was done. The clerk had jurisdiction to act, and he had acted. No power was given by the statute to the board to determine the sufficiency of the petition. The only power conferred was in the clerk, and when he had determined the fact within his power to determine it was then too late for any signer to withdraw his name and thus defeat the jurisdiction of the clerk. In a note to Sim v. Rosholt, 16 N. D. 77, 112 N. W. 50, 11 L. R. A. 372, the cases are collected. It was held, in the case cited, that, under the North Dakota Rev. Code, relating to the establishment of drains, the jurisdiction of the board of drain commissioners to order such drain is acquired by the filing with the board of a petition as therein required; and, after such jurisdiction is thus acquired and the board has taken action thereunder, it cannot be divested of such jurisdiction by the action of the petitioners in withdrawing their names from the petition. The court examined the cases cited in support of the right to withdraw from the petition before final action thereon. The court said that it will be found from the cases cited: "That they do not support the right of petitioners to withdraw their names after the sufficiency of such petition and the qualifications of the petitioners have been passed upon by the board authorized to act thereunder. On the contrary, they will be found to support respondents' theory that, after the board had passed upon the sufficiency of such petition, it is thereafter too late to withdraw therefrom." Of course, if respondents' contention be sound, that the board had the power to pass upon the sufficiency of the petition, their conclusion would follow. But here, in our judgment, lies the fundamental error in the argument. The board was given no such power, and it was expressly given to the clerk. Nor was there given to the board any supervisory power over this question of the petition's sufficiency. Cases are cited in the opinion in Sim v. Rosholt, supra, which hold "that the question of jurisdiction is to be determined from the petition as it was when filed, and without regard to the subsequent acts of the petitioner," as was held in Seibert v. Lovell, 92 Iowa, 507, 61 N. W. 197. We do not find it necessary, however, to go further than to hold that the clerk had jurisdiction to determine the sufficiency of the petition as filed, and having determined that it was sufficient, and having so found and certified before any request for withdrawal was made, such request was too late for the petitioners to exercise any such right or to divest the clerk of jurisdiction. See question discussed in the recent case of Conn v. City Council of Richmond, infra.

We think the writ should issue, and it is so ordered.

We concur: HART, J.; BURNETT, J.

17 Cal. App. 705

CONN v. CITY COUNCIL OF CITY OF RICHMOND. (Civ. 1058.)

(District Court of Appeal, First District, California. Dec. 22, 1911. Rehearing Denied by Supreme Court Feb. 20, 1912.)

1. MANDAMUS (§ 154*) — PETITION — SUFFICIENCY.

A petition for a writ of mandate to compel a city council to fix a date for the holding of an election to recall certain of its members sufficiently shows that plaintiff is a party "beneficially interested" within Code Civ. Proc.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

§ 1069, where it alleges that plaintiff is an elector and taxpayer.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 154.*

For other definitions, see Words and Phrases, vol. 1, p. 749.]

2. Mandamus (§ 154*) — Performance of Public Duty—Petition—Requisites.

A petition for a writ of mandate to compel performance of a public duty not due to the government, as such, need not show that the interest of the petitioner, if he be a qualified elector, is different from that of the remainder of the community.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 154.*]

3. Municipal Corporations (§ 159*)—Recall—Petition—Requisites.

Under a municipal charter which authorizes an election to recall officers on a petition containing a general statement of the grounds for which the removal is sought, the petition need not be in the strict form required of pleadings, and it is unnecessary to designate specific acts for which a removal is sought.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 159.*]

4. Municipal Corporations (§ 156*)—Recall of Officers—Grounds—Sufficiency—Determination.

Under Richmond city charter, which authorizes an election to recall officers on a petition which contains a general statement of the grounds for which removal is sought, it is the province of the electors, and not of the court, to determine the sufficiency of the grounds relied upon for removal.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 156.*]

5. Municipal Corporations (§ 159*)—Recall of Officers—Petition for Election—Sufficiency.

Under Richmond city charter, which provides for an election to require officers, on the filing of a petition signed by a certain number of electors equal to one-fourth of the vote cast at the last general election, etc., the jurisdiction to order a recall election depends upon presentation of a petition signed not only by the requisite number of electors, but sufficient as well upon its face in material matters of form and substance.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 159.*]

6. Municipal Corporations (§ 159*)—Recall of Officers—Petition for Election.

The petition for a municipal election to recall officers is sufficient, though some of the signers signed the initials of their given names instead of their names in full, and though others failed to comply with the requirement that each signer add to his signature his place of residence, giving the street and number.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 159.*]

7. Municipal Corporations (§ 124*)—Recall of Officers—Construction of Charter.

A municipal charter provision for an election to recall officers on petition of a certain percentage of the electors should be liberally construed to promote its purposes.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 124.*]

8. Municipal Corporations (§ 159*)—Recall of Officers—Petition for Election—Power of Clerk.

Under Richmond city charter, which provides that on filing of a petition for a recall election the city clerk shall determine whether it is sufficiently signed, and, if so, attach his certificate thereto and submit the petition to the city council, the clerk may not arbitrarily refuse to act on a petition, because of any doubt he may have as to the genuineness of all, or any, of the signatures to the petition.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 159.*]

9. Municipal Corporations (§ 159*)—Recall of Officers — Election — Duty of Council.

The duty of the city council, under Richmond city charter, to order a recall election on a sufficient petition being presented to them, as provided for by the charter, is mandatory.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 159.*]

10. Appeal and Error (§ 1011*)—Review—Findings—Conclusiveness.

A finding on conflicting evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

11. Mandamus (§ 76*)—Official Action—Right to Relief.

The rule that ordinarily mandamus will not lie to compel performance of an official act, if when the writ is applied for the time limited by law for action has expired, does not apply where the requirements and purposes of the law have been disregarded and defeated by defendant officers; and hence the right to compel a city council to act on a petition for an election to recall certain of its members is not lost by expiration of the time within which the election should be called under the charter, where the council has refused to act.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 76.*]

12. Municipal Corporations (§ 124*)—Recall of Officers—Constitutional Law.

The provisions of Richmond city charter for recall of officers on an election based on petition by a certain percentage of the electors does not violate the provisions of the state Constitution regarding tenure of office, removal, and impeachment.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 124.*]

Appeal from Superior Court, Contra Costa County; A. J. Buckles, Judge.

Mandamus by Thomas G. Conn against the City Council of the City of Richmond. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

See, also, 121 Pac. 719.

Lee D. Windrem, J. J. Dunne, and H. M. Owens, for appellant. J. P. Montgomery and W. Lair Hill, for respondent.

LENNON, P. J. This is an appeal from an order denying a new trial and from a judgment in mandamus, wherein the defendant, the city council of the city of Richmond, is commanded to forthwith fix a date for the holding of an election for the recall of six of its members.

That portion of the charter of the city of Richmond which bears directly upon the questions involved may be epitomized as follows: The holder of an elective office may be removed by the electors qualified to vote for the successor of the officer sought to be removed. The petition for the removal of an officer must be signed by such electors equal in number to at least 25 per cent. of the entire vote cast at the preceding general municipal election. Each signer of such petition shall add to his signature his place of residence, giving the street and number thereof, and the petition must contain a general statement of the grounds for which the removal is sought. Any qualified elector or taxpayer of the municipality is competent to solicit signatures to a petition for the removal of an officer. The petition, which must be filed with the city clerk, is required to be verified by the affidavit of the person soliciting the same, setting forth that all of the signatures thereto were made in his presence, and are the genuine signatures of the persons purporting to have signed the petition. No other affidavit as to the genuineness of the petition shall be required. Each signature, the genuineness of which is not called into question by the sworn affidavit of the purported signer thereof, shall be presumed to be genuine, and unless and until it be proven otherwise by official investigation it must be presumed that the petition presented contains the signatures of the requisite number of qualified voters. Within 10 days from the date of filing such petition the clerk shall examine and ascertain from the records of registration whether or not it has been signed by the requisite number of electors; and the clerk, if he find the petition to be sufficient, shall attach to the same his certificate showing the result of his examination, and thereupon submit the petition to the city council. It is then made the duty of the council to fix a date for, and order, an election for the recall of the officer sought to be removed, not less than 30 days nor more than 40 days from the date of the clerk's certificate to the council that a sufficient petition has been filed. Any officer sought to be removed may be a candidate to succeed himself, and unless he requests otherwise in writing the clerk shall place his name on the ballot without nomination. At such election the candidate receiving the highest number of votes shall be declared elected, and if any person other than the incumbent receives the highest number of votes the incumbent shall be deemed removed from office.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

In substance, the petition for the writ of mandate alleges that the plaintiff was on and prior to the 10th day of May, 1909, a resident, freeholder, taxpayer, and a legally qualified elector of the city of Richmond, and as such was legally qualified to vote for the various candidates for municipal office in said city. On the 10th day of May, 1909, as the result of a municipal election, E. J. Jarrard, C. A. Fallett, O. P. Ludwig, J. B. Willis, J. C. Owens, J. N. Hartnett, J. J. Dooling, H. E. Wyatt, and Ed. McDuff were elected city councilmen, and ever since then have constituted the city council of the city of Richmond. In the month of June, 1910, the plaintiff, in conjunction with other qualified electors of the city, prepared and circulated therein petitions for the recall of J. B. Willis, J. C. Owens, J. M. Hartnett, J. J. Dooling, H. E. Wyatt, and Ed. McDuff. Each of the petitions, asking for the recall of the designated councilmen, were signed by 300 qualified electors of the city of Richmond, which was equal to 25 per cent. of the entire vote cast at the preceding municipal election, and all of the signers of the several petitions were qualified electors who would have been entitled to vote for the successors of the incumbents sought to be removed. Each of the recall petitions set out the place of residence, by street and number, of every signer, and alleged the grounds of recall to be that the six councilmen sought to be removed had been guilty of: (1) Malfeasance in office; (2) that they had been parties to a political agreement by which the office of city engineer was traded in consideration of other appointments; (3) that such political trafficking was contrary to the spirit of the charter and a detriment to the public interest; (4) that the accused councilmen had united in denying the petition of a majority of the qualified electors in matters of public policy; and further and finally (5) that the signers of the petition for the recall no longer desired the services of those particular councilmen. The petitions were filed with the city clerk of the city of Richmond on the 2d day of July, 1910, and within 10 days thereafter the city clerk duly examined and compared them with the registration records, and found that each and all of said petitions were signed by the requisite number of electors, and that each and all of the signers were entitled to vote for the successors of the councilmen sought to be removed. The city clerk, on the 11th day of July, 1911, submitted to the city council the several recall petitions, with his certificate attached thereto, showing the result of such examination and comparison, and that said petitions were in all respects sufficient; but because of the machinations of the six accused councilmen the city council not only neglected, but absolutely refused, to provide for and set a date for the election prayed for in the petitions.

[1, 2] It is contended at the outset by counsel for the defendant that the petition for the writ of mandate is fatally defective, in that it fails to show affirmatively that the plaintiff is a party beneficially interested in the subject-matter of the litigation, as required by section 1069 of the Code of Civil Procedure.

The point is not well taken. The petition alleges that the plaintiff is an elector and taxpayer of the city of Richmond, and as such it is clear that he is directly interested in the subject-matter of the action. The injury complained of is the wrongful denial of the right to vote upon a question which affects the welfare of the community individually and collectively, and the relief sought is the securing of an enforcement of the right. It needs no argument, or citation of authority, it seems to us, to maintain the proposition that presumptively every elector of a municipality is beneficially interested in the manner in which the governmental affairs of the municipality are being administered by the representatives of the people. True, it has been held in the case of Linden v. Board of Supervisors of Alameda County, 45 Cal. 6, that because an individual elector, seeking to compel an election on the question of a removal of the county seat, had no interest in the subject-matter of the action distinguishable from the balance of the community, his interest was neither beneficial nor sufficient to support an application for a writ of mandate. But the rule there announced has since been modified, if not wholly disregarded and discredited, in later decisions by the same court; and we think that the prevailing and more logical rule in this and other jurisdictions may safely be declared to be that, when the purpose of a petition for a writ of mandate is to compel the performance of a public duty not due to the government as such, it need not appear that the interest of the petitioner, if he be a qualified elector, is in any way different from that of the balance of the community. While the refusal of a public officer or board to take such action as may be required for the proper enforcement of the law is no more the concern of one citizen than of another, nevertheless it is not only the right but the duty of every citizen to insist upon the prompt and proper performance of official duty which affects the public interest generally. And it is enough in this instance that the petitioner for the writ of mandate is a qualified elector of the municipality, and as such interested in having the law enforced. High, Extr. Rem. §§ 431, 433; Maxwell v. Bd. of Supervisors, 53 Cal. 389; Hyatt v. Allen, 54 Cal. 353; Eby v. Board, 87 Cal. 166, 25 Pac. 240; Frederick v. San Luis Obispo, 118 Cal. 391, 50 Pac. 661; Union Pac. R. R. Co. v. Hall, 91 U. S. 355, 23 L. Ed. 428; State v. Weld, 39 Minn. 426, 40 N. W. 562; Pumphrey v. Baltimore, 47 Md. 145, 28 Am. Rep. 446; State v. Menzie, 17 S. D. 535, 97 N. W. 745; State v. Lien, 9 S. D. 297, 68 N. W. 748; People v. Swanstrom, 79 App. Div. 94, 79 N. Y. S. 936; State v. County Court, 33 W. Va. 589, 11 S. E. 72; State v. County Court, 47 W. Va. 672, 35 S. E. 959.

[3] It is next contended, upon behalf of the defendant, that the facts stated in the petition do not constitute a cause of action or entitle the plaintiff to the relief demanded.

In this behalf it is claimed that neither in the general charge of malfeasance in office, nor in the more specific charges which follow in the several recall petitions, is there any statement of fact or circumstance which would enable the accused councilmen to know and understand the particular dereliction of which they are accused.

It is a mistaken theory of counsel for the defendant that the charter provisions of the city of Richmond contemplate and require that a recall petition should be drawn with a due regard for the technical niceties and refinements of the rules of law which pertain to the preparation of pleadings in civil and criminal cases. At the outset the charter under discussion declares that "the holder of an elective office may be removed by the electors qualified to vote for the successor of the officer sought to be removed." Manifestly the purpose of the charter in providing for a recall election is to give the people of the municipality the right to cut short the official term of every elected officer whose conduct in office is for any cause unsatisfactory or distasteful to the body of the community. The method for doing this is clearly pointed out in the charter; and nowhere in the procedure provided for the removal of the incumbent of an elective office is anything said, either expressly or impliedly, which requires a recall petition to designate the specific acts for which a removal is sought. The petitioners are only required to state generally their grounds or reasons for demanding the removal of the obnoxious officer, for the obvious and only purpose, it seems to us, of furnishing information to the people of the community, upon which a political issue rather than an issue at law may be raised and determined.

The people of the city of Richmond, in framing their charter, reserved to themselves the right to remove a public officer by the same process and in the exercise of the same discretion which elected him.

[4] It will not be disputed that the electors of a community are as well qualified to determine whether an administrative officer shall remain in office as they were to decide upon his qualifications for office in the first instance; and in so far as the charter of the city of Richmond is concerned, it is clearly the privilege of the people at the polls, rather than the province of the courts, to pass upon the sufficiency of the grounds stated for the removal of an elected officer by the modern method of a recall election.

It is sought to justify the refusal of the defendant to call the election prayed for upon the theory that the charter vests the city counsel with final and exclusive jurisdiction to pass upon the form and sufficiency of the recall petitions, and that, in the absence of a finding by the council as to the sufficiency of the petitions, mandamus cannot be invoked to compel the defendant to fix a date for the election.

[5] It may be conceded, as contended by counsel for defendant, that the jurisdiction of the city council to order a recall election depends upon the presentation to it of a petition signed not only by the requisite number of electors entitled to vote for the successor of the officer sought to be removed, but sufficient as well upon its face in material matters of form and substance.

[6, 7] In this connection it appears that some of the signers of the several recall petitions did not sign their names in full; that is to say, they gave only the initials of their given names. Others failed to comply with the charter requirement that each signer "shall add to his signature his place of residence, giving the street and number." Because of this it is urged that the petitions upon their face fail to contain the requisite number of adequate signatures called for by the charter, and that therefore the petitions were wholly insufficient to confer jurisdiction upon either the city clerk or the city council to inaugurate the recall election petitioned for.

No useful purpose would be subserved by following counsel for defendant through the intricate ramifications of the technical argument which they have advanced in support of their contention. If the charter provisions under consideration were susceptible of any such narrow construction as is here contended for, it would be practically impossible to invoke a recall election in the city of Richmond. The charter in question, like every other statute, should receive a liberal construction with a view to promoting the purpose for which it was enacted by the people; and, so construed, we find no difficulty in holding that the charter provision requiring the clerk to "examine and ascertain from the records of registration" whether or not the petitions were signed by the requisite number of qualified voters does not empower or command him to decide as to the regularity of the registration of the signers with respect to the manner or form in which their names and addresses appear upon the register.

All that the charter requires the clerk to do is to identify the persons who have signed with the persons whose names appear in the records of registration. The charter provision requiring the signer to give his residence by street and number manifestly was intended solely for the purpose of facilitating the work of the clerk in investigating, identifying, and verifying the persons and signatures of the purported signers of the recall petitions, and therefore the designation of residence at the junction of two streets, which some of the signers gave, was a substantial and sufficient compliance with the requirements of the charter.

[8] By the provisions of the charter the city clerk may not arbitrarily reject or refuse to act upon a petition because of any real or fancied doubt which he may have as to the genuineness of all or any of the signatures appended to the petition. The petition upon its presentation is prima facie genuine as to the signatures; for, by the very terms of the charter, "each signature, the genuineness of which is not called in question by the sworn affidavit of the alleged owner thereof, shall be presumed to be genuine." This presumption, we take it, controls not only the city clerk, but the city council as well. Immediately following this requirement of the charter is the proviso that "unless and until it be proven otherwise by official investigation it shall be presumed that the petition presented contains the signatures of the requisite number of qualified voters," and then the duty of making an official investigation for the purpose of ascertaining whether or not the petition is signed by the requisite number of electors entitled to vote is clearly committed to the city clerk.

It seems clear to us, therefore, that in so far as the number and genuineness of the signatures of electors entitled to vote are concerned, the city clerk alone, by the express provisions of the charter, is empowered to pass upon and determine the sufficiency of every recall petition that may be filed with him, and that in these two particulars at least his finding and certificate are conclusive and controlling.

Granting to the city council the right and duty of ascertaining whether or not the petitions upon their face conformed to the charter requirements in material matters of form and substance, still this did not invest the city council with the arbitrary power to refuse to take any action at all in the premises.

[9] In the case at bar the petitions upon their face in form and substance conform to the spirit and letter of the charter; and as there was no controversy before the council or elsewhere as to the sufficiency of the petitions, the duty of the council in the premises was purely ministerial and clearly defined by the charter.

The city clerk having submitted to the city council proper petitions for a recall election, together with his certificate as to their sufficiency, it became the plain duty of the city council, in the mandatory language of the charter, to "thereupon order and fix a date for holding said election."

In the case of Good v. Common Council, 5 Cal. App. 265, 90 Pac. 44, which involved the application and interpretation of recall provisions in a city charter similar in its essential features to the one at bar, practically the same point was presented and decided adversely to the contention made here. There the court said: "There is no discretion vested in the common council in connection with the calling of this election. That body's functions are purely ministerial; but if it be conceded that it was vested with some discretion, it does not follow that it can refuse to act. The duty of determining whether the petition contains the proper number of signatures, and comparing them with the great register, devolved upon the city clerk. He is the person given authority to hear and determine the question of the sufficiency of the petition, and no appeal therefrom is provided, and none apparently intended to be given."

[10] The trial court found as a fact that each of the persons who circulated the recall petitions was, as required by section 1 of article 8 of the charter, a qualified elector of the municipality. This finding is now assailed by the defendant, not upon the ground that it is without support from the evidence, but because "it is flatly contradicted" by the evidence produced upon behalf of the defendant. Attached to and made a part of each recall petition was the affidavit of the person who solicited the same, which, among other things, set forth the fact that he was a qualified and registered elector of the city of Richmond. These affidavits, as a part of the several recall petitions, were received in evidence, without reservation or limitation; and even if it be true, as is now claimed by the defendant, that the statements therein made are contradicted by the evidence offered and admitted upon behalf of the plaintiffs in the form of the affidavits of registration which were made by the several solicitors to the recall petitions, this results in nothing more than a conflict of evidence, and in such contingency the finding of the trial court must be sustained.

[11] The defendant presents, but does not strongly urge, the point that the court had no jurisdiction to issue the writ of mandate in the case at bar, because the time prescribed and limited by the charter for ordering and fixing the date of the recall election had expired when the writ was issued.

Ordinarily a writ of mandate will not issue to compel the performance of an official act if, when the writ is applied for, the time limited by law for action has expired; but this rule does not apply in a case like the one at bar, where the requirements and purpose of the law have been disregarded and defeated, of their own volition, by the very officers intrusted with the performance of a public duty which was clearly obligatory. Merrill on Mandamus, §§ 50, 79; 2 Dill. Mun. Corp. § 839; High, Extr. Rem. 401; Good v. Com. Council, supra; People v. Town of Fairbury, 51 Ill. 149.

If, as we think, the charter provisions in controversy confer upon the city clerk the exclusive and final duty of officially investigating the sufficiency of the petitions in respect to the number of qualified electors who have signed the same, and that the duty of the city council, upon the presentation to it of a recall petition prima facie sufficient and certified by the city clerk to be sufficient, is purely ministerial, then the trial court was right in its ruling in rejecting the offer of the defendants to impeach the integrity of the clerk's certificate as to the sufficiency of the several recall petitions.

[12] The question of the constitutionality of the recall provisions in the charter under consideration is tentatively touched upon, but not seriously discussed, in the printed arguments of counsel for the defendant. Upon the oral argument, however, it was strenuously insisted that the attempted recall of a municipal officer, who has been elected to serve in office for a fixed term, is violative of the provisions of the state Constitution regarding tenure of office, removal, and impeachments.

Manifestly the tenure of office, and the method of removing an elected city official, are purely municipal affairs, which in no sense conflict with the constitutional provisions relating to the tenure of office or the removal by impeachment of state officers. Similar recall provisions, as applied to administrative officers, have been upheld and declared not to be in conflict with either state or federal Constitution in other jurisdictions, where the points of attack were identical with the arguments advanced here. Graham v. Roberts, 200 Mass. 152, 85 N. E. 1009; Hilzinger v. Gillman, 56 Wash. 228, 105 Pac. 471; Bonner v. Belsterling (Tex. Civ. App.) 137 S. W. 1154. And nothing that has been said or cited by counsel has caused us to doubt the constitutionality of the charter provisions in question.

The judgment and order appealed from are affirmed.

We concur: HALL, J.; KERRIGAN, J.

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17 Cal. App. 705

CONN v. CITY COUNCIL OF CITY OF RICHMOND. (S. F. 6,113.)

(Supreme Court of California. Feb. 20, 1912.)

In Bank. Mandamus by Thomas G. Conn against the City Council of the City of Richmond. Judgment for plaintiff was affirmed by the District Court of Appeal (121 Pac. 714). Application for rehearing denied.

PER CURIAM. The petition for a rehearing in the Supreme Court is denied. The Supreme Court, however, does not thereby approve that part of the opinion of the District Court of Appeal as declares that under the provisions of the charter of Richmond the certificate of the city clerk of the city of Richmond to the effect that the signatures to the recall petitions are genuine, and that they are sufficient in number to require a recall election, is conclusive and controlling. It does not appear that there was any evidence offered to impeach the accuracy of the clerk's certificate upon these points, and the statement was not necessary to the decision. Such signatures might be forged, or the signers might not reside in the city, and yet the petitions might be supported by false affidavits of the solicitors and a false certificate of the clerk. In such a case we would not say that the clerk's certificate was conclusive, or that mandamus would lie to compel an election to be called, but leave the question open for decision when it arises.

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162 Cal. 27

CLOPTON v. CLOPTON et al. (L. A. 2,763.)

(Supreme Court of California. Jan. 9, 1912.)

1. Appeal and Error (§ 1010*)—Separate Maintenance — Action — Appeal—Findings—Conclusiveness.

The decision of the trial court on questions of fact is conclusive upon the Supreme Court in so far as there is substantial evidence tending fairly, with such inferences as may reasonably be drawn therefrom, to support such decision, even though the Supreme Court might think that a different conclusion should have been reached; and a finding in a wife's action for separate maintenance that acts or conduct of the husband constituted such cruelty as to warrant a divorce is entitled to special weight.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3982; Dec. Dig. § 1010.*]

2. Appeal and Error (§ 1058*)—Harmless Error—Exclusion of Evidence.

Error in the exclusion of evidence on the part of defendant is harmless where defendant subsequently gave the evidence sought.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4200–4206; Dec. Dig. § 1058.*]

3. Appeal and Error (§ 242*)—Reserving Rulings on Exception to Evidence—Effect.

Where evidence is objected to, and the court receives the evidence subject to the objection and reserves its ruling, and at no time formally rules on the objection, the matter will be regarded on appeal as though the objection had been formally overruled and exception noted to such ruling.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1417–1425; Dec. Dig. § 242.*]

4. Judgment (§ 654*)—Res Judicata—Dismissal of Previous Action.

In an action by a wife for separate maintenance on the ground of cruelty, evidence by the plaintiff as to alleged acts of cruelty occurring prior to the time when a previous action by plaintiff for a divorce on similar grounds was dismissed by her without the consent and knowledge of the defendant and without consideration of any kind from him *held* admissible; the previous judgment not being res judicata.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1165; Dec. Dig. § 654.*]

5. Trial (§ 98*)—Admission of Evidence—Exceptions and Rulings Thereon.

Where it is the practice of receiving evidence subject to objection without a ruling thereon, a ruling should be made prior to the conclusion of the trial, and in time to enable the party to fully present his case with reference to such ruling.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 193, 249; Dec. Dig. § 98.*]

6. Husband and Wife (§ 31*)—Husband's Duty of Support—Antenuptial Contract—Effect.

The duty of a husband to support and maintain his wife was in no way affected by an antenuptial contract, providing that, if there was no issue, the wife should have one-fourth of the property he owned at the time of his death, and that he should have the absolute management thereof with power of disposition during his life.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 178–195, 833, 884; Dec. Dig. § 31.*]

7. Husband and Wife (§ 299*)—Action for Separate Maintenance—Conveyance to Defeat Judgment—Persons Entitled to Set Aside.

While a wife, merely because of the conjugal relation, cannot attack a voluntary disposition of her husband's separate property, yet, where by reason of the husband's conduct she is entitled to separate maintenance, she is within the protection of Civ. Code, § 3439, invalidating any transfer of property made with intent to delay or defraud any creditor or other person of his demand.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1094–1097; Dec. Dig. § 299.*]

8. Husband and Wife (§ 298*)—Review—Finding—Allowance.

Evidence in an action by a wife for separate maintenance *held* to support the trial court's allowance of $75 monthly, together with $250 counsel fees.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1093; Dec. Dig. § 298.*]

9. Husband and Wife (§ 299*)—Action for Separate Maintenance—Conveyance to Defeat Judgment—Extent of Relief.

It is only so far as a wife's right of maintenance has been affected by the husband's transfer of his separate property without consideration that she has any legal ground of complaint entitling her to avoid such transfer.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1094–1097; Dec. Dig. § 299.*]

10. Husband and Wife (§ 298*)—Action for Separate Maintenance—Sufficiency of Evidence—Value of Property.

Evidence in an action by a wife for separate maintenance, in which a monthly allowance was made to plaintiff, together with counsel fees, *held* insufficient to sustain a finding that the property remaining in the possession of defendant was worth more than $2,500.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1093; Dec. Dig. § 298.*]

Department 1. Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action for separate maintenance by Jennie M. Clopton against Hoggatt Clopton, Pearl Clopton, and another. Judgment for plaintiff, and from denial of their motion for new trial, defendants appeal. Judgment against Hoggatt Clopton affirmed, and judgment against Pearl Clopton and another reversed, and new trial awarded.

See, also, 119 Pac. 651.

Kendrick & Ardis, for appellants. John E. Daly and H. T. Gordon, for respondent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ANGELLOTTI, J. This is an appeal by defendants from an order denying their motion for a new trial in an action brought by plaintiff to obtain a decree requiring defendant Hoggatt Clopton, her husband, to pay her monthly, for her support and maintenance, the sum of $250 per month, together with attorney fees and costs for the prosecution of the action.

Plaintiff alleged in her complaint that she was without means and physically unable to earn money for her support. Defendants Pearl Clopton and Hugh Clopton, the children of Hoggatt Clopton, were made parties defendant; it being alleged substantially as to them that Hoggatt Clopton, in anticipation of her action, and for the purpose and design to hinder, delay, and defraud the plaintiff and to deprive her of her right to support and maintenance, had conveyed to them, without consideration, all of his real property, specifically described in the complaint and alleged to be worth not less than $100,000. She asked as to them that any allowance made her be adjudged a lien against such real property so conveyed. Her complaint against her husband upon which her prayer for permanent support and maintenance was based was that he had been guilty of extreme cruelty constituting cause for divorce. Defendant Hoggatt Clopton by his answer denied the allegations of cruelty, denied that he had conveyed all of his property to his codefendants, and denied that such as had been conveyed had been so disposed of with intent to defraud plaintiff or deprive her of support or maintenance. He also by cross-complaint asked for a divorce on the ground of extreme cruelty inflicted on him by plaintiff. Defendants Hugh Clopton and Pearl Clopton each answered, denying the allegations of the complaint that the several conveyances to them were without consideration or were made with the intent or purpose set forth therein, and alleging that Hoggatt Clopton is the owner of a house and lot in the city of Los Angeles and other property reasonably worth the sum of $11,000, and that the income from said property is sufficient to support plaintiff.

The trial court found in favor of plaintiff upon the issues of extreme cruelty and necessity for support and maintenance by her husband. It further found that defendant had conveyed to Pearl Clopton and Hugh Clopton all of his real property except a lot in the city of Los Angeles, without consideration and with the intent and purpose alleged in the complaint, the same being parcels of land at Long Beach in Los Angeles county and at Huntington Beach, Newport Beach, and Santa Ana in Orange county. It found that the value of all of said property, including that in the city of Los Angeles, was $22,000. It further found that the only property left Hoggatt Clopton was the lot in the city of Los Angeles, of the value of $2,500 and subject to a mortgage for $1,100, and producing an income of about $12 a month, and certain oil stock and stock in the Huntington Beach Tent City Company, neither of which had any market value, and that said property "is insufficient to answer for a judgment to be made in this cause," that the income from said land is not "sufficient for the support of plaintiff."

Judgment was given that Hoggatt Clopton pay plaintiff $75 per month for her maintenance, and $250 counsel fees, that said charges constitute a valid lien upon all the property at Huntington Beach and Long Beach so conveyed to Hugh Clopton and Pearl Clopton, and that neither of said last-named defendants has any interest in any of the property conveyed to him and her, respectively, "except subject to the lien of this judgment in plaintiff's favor."

Defendants' motion for a new trial was ordered granted, unless plaintiff file a release and discharge of her judgment as to all the property described in the findings and judgment, except that situate at Huntington Beach in Orange county. This requirement having been complied with by plaintiff, the motion for a new trial was denied.

[1] 1. It cannot be held that the findings of the trial court upon the issues of extreme cruelty on the part of defendant Hoggatt Clopton and that his acts in this regard were without sufficient cause or provocation (for this is what the finding in this behalf means) are without sufficient support in the evidence. We do not mean to say that, were we acting as trial judges in this case, our conclusion would have been the same upon this question as was that of the trial judge. We simply mean what has so often been said by this court, that the decision of the trial court upon questions of fact is conclusive upon us, in so far as there is any substantial evidence tending fairly, with such inferences as may reasonably be drawn therefrom, to support such decision, even though we may think that a different conclusion should have been reached. As was said in Robinson v. Robinson, 113 Pac. 155, "it should further be borne in mind that the question whether acts or conduct constitute such cruelty as under all the circumstances shown warrants the granting of a divorce is of such a nature that the conclusion of the trial court is necessarily entitled to great weight, and it is only where it is clear that it is without any substantial support in the evidence that it will be disturbed on appeal." No useful purpose would be subserved by a discussion of the evidence given on this issue. We find no prejudicial error in any action of the trial court complained of in the brief in the matter of evidence on this issue.

[2] The objection that a question asked defendant Hoggatt Clopton was suggestive and leading was not good and should not

have been sustained, but he subsequently gave the desired evidence. The writing signed by him relative to a proposed compromise of a prior divorce action was not of such a character as to prejudice his cause, even if improperly admitted in evidence. The same must be held as to an answer of plaintiff giving a remark that she heard defendant Pearl Clopton make to defendant Hugh on one occasion.

[3] Complaint is made that the court failed to rule on defendants' objection to testimony given by plaintiff as to certain alleged acts of cruelty occurring prior to April 19, 1907, on which day a previous action brought by plaintiff for a divorce on the ground of cruelty was dismissed by her. The court reserved its ruling, receiving the evidence subject to the objection. Apparently it has never formally ruled on this objection, except in so far as a ruling against the objection is to be inferred from the fact that the court has found upon the facts so testified to in favor of plaintiff. The matter must here be regarded as though defendants' objections had been formally overruled and exceptions noted to such rulings.

[4] We see no reason to doubt the admissibility of the evidence. The evidence shows very clearly that the dismissal of the former action was by the plaintiff herself, under subdivision 1 of section 581, Code of Civil Procedure, without the consent or even knowledge of the defendant Hoggatt Clopton, and without consideration of any kind from him to her. All this is shown by his own evidence. It consequently was not a bar to another action concerning the matters involved therein. Merritt v. Campbell, 47 Cal. 542, involving a judgment of dismissal based upon and entered in pursuance of an agreement of the parties, is not in point.

To show cruelty on the part of plaintiff, defendants offered in evidence the complaint of plaintiff in such former action, plaintiff objected thereto, and the court reserved its ruling thereon receiving it subject to the objection. Defendant Hoggatt Clopton had alleged the filing of this complaint and its contents in his cross-complaint in this action, and the trial court found in favor of said defendant upon such allegations. It is thus apparent that the trial court did in fact receive and consider such evidence so offered by defendants. It further found, however, that the allegations of plaintiff contained in said divorce complaint were true.

[5] In passing, it is proper to say, as has been said before, that the practice of receiving evidence that is objected to, subject to the objection and without a ruling thereon, is not except under very exceptional circumstances to be commended. And, where such a course is followed, certainly a ruling should be made prior to the conclusion of the trial and in time to enable the party to fully present his case in the light of such ruling. However, as we have said, we cannot see that any prejudice could have resulted to defendants in this case by reason of the failure of the court to formally rule on the objections specified above.

[6] Complaint is made of a finding of the trial court to the effect that an antenuptial contract executed by plaintiff and Hoggatt Clopton on the day of their marriage, providing, among other things, that, in the event that there was no issue of said marriage, the wife should have one-fourth of such property as he owned at the time of his death, and that he should have the absolute and exclusive management and control, with power of disposition, of all his property during his lifetime, was fraudulently obtained by said Hoggatt, is not sufficiently sustained by the evidence. This claim is well based, there being absolutely nothing in the evidence from which any such conclusion could reasonably be inferred. But we regard this finding as altogether immaterial, and are unable to see that it prejudices defendants in any way. There is nothing in this contract that purports to relieve the husband from the obligation of supporting and maintaining his wife during the continuance of the proposed marriage relation, and, of course, nothing of that kind was intended by either party. That duty on the part of the husband was in no way affected by the contract.

[7] It is settled in this state that, while the wife, merely because of the conjugal relation, has no standing to attack a voluntary disposition of her husband's separate property, for the reason that the fact of marriage gives her no interest therein, nevertheless, where by reason of the conduct of the husband she is entitled to enforce separate maintenance at his hands, she is so far within the protection of the statute invalidating any transfer of property made with intent to delay or defraud "any creditor or other person of his demands" (section 3439, Civ. Code) that such statute avoids as to her any transfer made with design to defeat such right. Murray v. Murray, 115 Cal. 266, 47 Pac. 37, 37 L. R. A. 626, 56 Am. St. Rep. 97. The existence of this rule has been recognized in all subsequent decisions. See Tully v. Tully, 137 Cal. 65, 69 Pac. 700; Greer v. Greer, 135 Cal. 124, 67 Pac. 20; Kessler v. Kessler, 2 Cal. App. 509, 83 Pac. 257. We are speaking, of course, of transfers made without consideration. Giving the antenuptial contract full force, it did not in any degree affect this right of the wife. The question whether it was fraudulent or not could not affect the determination of the question whether the conveyances were made with design to affect the right of the wife to the maintenance and support to which she was entitled, which was the vital question in this connection, and we cannot see that the finding complained of could possibly have

affected the determination by the trial court of the latter question. Nor do we see that it could possibly have affected the determination of the trial court as to the amount that should reasonably be allowed to the wife for her support and maintenance. Conceding, as claimed, that the financial resources of the husband constituted an element to be considered in fixing that amount, the vital question in this regard would be the amount of such resources, disregarding such conveyances as had in fact been made with such design to defraud the wife, and the question of the validity of the antenuptial contract could not affect the determination of that question. The finding complained of was pure surplusage, not affecting the determination of any material issue.

[8] There was, we think, enough in the evidence to support the conclusion that the sum of $75 per month was a reasonable amount to be paid for the support and maintenance of the wife.

The same is true as to the conclusion that all the conveyances by Hoggatt Clopton to Hugh Clopton and Pearl Clopton, respectively, made after the commencement of this action, which include all the conveyances except the one made to Pearl of a lot of land in the city of Long Beach, which was released in pursuance of the order of the court from the effect of the judgment, were made by plaintiff without any consideration from either of the grantees.

[9] There remains for consideration another claim made by defendants Hugh and Pearl Clopton, which we are satisfied must be held to be good and which requires a reversal of the order as to them. It is only to the extent that the wife's right of support has been affected by the transfer of his separate property by her husband that she has any legal ground of complaint entitling her to avoid such transfer. See Kessler v. Kessler, supra. The court should not disturb such a transfer any further than the exigencies of the decree in favor of the wife require, all else belonging to the transferee. Murray v. Murray, supra; Tully v. Tully, supra. It was found by the trial court in accord with the evidence that defendant Hoggatt Clopton still owned, in addition to certain oil stock, and stock in the Huntington Beach Tent City Company, a lot of land in the city of Los Angeles, incumbered by mortgage in the sum of $1,100. The court also found that the stocks had no market value, and that the value of the Los Angeles lot was only $2,500, incumbered by mortgage in the sum of $1,100. It further found that it is not true that the property remaining in defendant Hoggatt Clopton was reasonably worth $11,000 or any greater sum than $2,500.

[10] This finding is attacked as not being sustained by the evidence, and we are unable to find any sufficient support therefor. The sum and substance of the testimony in regard to the stocks, which had cost Mr. Clopton several thousand dollars, was that there had been no income therefrom for two or three years. The mere absence of present income did not show entire want of value. But, passing all question as to the value of the stocks, there was also the Los Angeles realty. The monthly income from the house thereon was only $12, but this does not establish that the value of the property was only $2,500. The deed of this property to Hoggatt Clopton, introduced in evidence by plaintiff, recited a consideration of $10,000. The uncontradicted evidence of Hoggatt Clopton was that it is worth "six or seven thousand dollars." Plaintiff's attorneys have not pointed out, and we have not been able to find, any other evidence on this point. In view of what we have said, the finding above referred to was material on the question whether plaintiff should be given any relief as against the transferred property, and if it is not sustained by the evidence, as we hold to be the case, the defendant grantees are entitled to a new trial. We are of the opinion, also, that this is a matter material in the determination of the question whether the transfers to Hugh Clopton and Pearl Clopton were made with the design and purpose to deprive the wife of such support as she was entitled to. It is, however, unnecessary that there should be any new trial of the issues relating to the question of the defendant Hoggatt's liability to the plaintiff for her separate support and maintenance.

It should further be said that we do not see how any of the transferred property can properly be resorted to for the payments of amounts accruing under the decree in plaintiff's favor, as long as the defendant husband has property of his own available for that purpose.

The order denying a new trial is affirmed as to defendant Hoggatt Clopton, and reversed as to defendants Hugh Clopton and Pearl Clopton, who are awarded a new trial upon all the issues made by the pleadings except those relating to the right of plaintiff to separate support and maintenance by defendant Hoggatt Clopton.

We concur: SHAW, J.; SLOSS, J.

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162 Cal. 200

Ex parte MAGINNIS. (Cr. 1,701.)

(Supreme Court of California. Feb. 6, 1912.)

1. STATUTES (§ 110½*)—TITLES—SUBJECTS.

The juvenile court law of 1909 (St. 1909, p. 213) is entitled "An act concerning abandoned and delinquent children, providing for their care, custody and maintenance; providing for their commitment" to state schools named, "and the manner of such commitment and release therefrom; establishing a probation committee and probation officers, * * * and fixing the salaries of probation officers; providing for detention homes for such children; providing for the punishment of persons responsible for or contributing to the delinquency or dependency of such children, and giving to the superior court jurisdiction of such offenses and repealing inconsistent acts." The act defined dependent and delinquent children; gave jurisdiction under the act to the superior court designated as the "juvenile court"; defined the procedure for committing children, and provided for their commitment during minority, or a shorter period, to the care of some citizen or organization, or the schools named; authorized the appointment of a probation committee and officers; transferred to the juvenile court jurisdiction over charges against persons under 18, and over felony charges against persons between 18 and 20 years; made it a misdemeanor for the custodian of a dependent or delinquent child to contribute to its dependency or delinquency; and repealed certain statutes on the same question. *Held*, that the act did not violate Const. art. 4, § 24, requiring every act to embrace but one subject, which shall be expressed in its title.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 110½.*]

2. STATUTES (§ 64*)—TITLE AND SUBJECTS.

Under Const. art. 4, § 24, requiring every act to embrace but one subject, which shall be expressed in its title, and providing that, if any subject embraced in the act is not expressed in its title, the act shall be void only as to so much thereof not so expressed, the invalidity of a provision unexpressed in the title would not make the statute invalid as a whole.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58–66; Dec. Dig. § 64.*]

3. STATUTES (§ 109*)—SUBJECTS AND TITLES—CONSTITUTIONAL PROVISIONS—PURPOSE.

The purpose of Const. art. 4, § 24, requiring every act to embrace but one subject, which shall be expressed in its title, was chiefly to prevent the legislators and public from being misled by statutes relating to one subject being contained under titles relating to different subjects, and to prevent disconnected provisions from being included in the single act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 136–139; Dec. Dig. § 109.*]

4. STATUTES (§ 109*)—SUBJECTS AND TITLES.

There is a sufficient compliance with Const. art. 4, § 24, requiring every act to contain but one subject which shall be expressed in its title, if the statute has but one general subject which is fairly indicated by its title; it not being essential that every means necessary for the accomplishment of such general object be contained in a separate enactment.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 136–139; Dec. Dig. § 109.*]

5. STATUTES (§ 159*)—REPEAL—IMPLICATION.

A statute repeals by implication all existing statutes plainly inconsistent therewith.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 229; Dec. Dig. § 159.*]

6. STATUTES (§ 109*)—SUBJECTS AND TITLES.

A repeal of a prior statute dealing with the same subject is germane to the purpose of any act within Const. art. 4, § 24, requiring every act to contain but one subject, which shall be expressed in its title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 136, 139; Dec. Dig. § 109.*]

7. INFANTS (§ 16*)—CUSTODY AND PROTECTION—JURISDICTION OF JUVENILE COURT.

Under Juvenile Court Law of 1909 (St. 1909, p. 214) § 2, authorizing the court to act under the act upon the filing of a petition "showing that there is within the county or residing within the county" a delinquent child, etc., it is not essential to give it jurisdiction over a child that the child have a technical residence within the state.

[Ed. Note.—For other cases, see Infants, Dec. Dig. § 16.*]

8. HABEAS CORPUS (§ 92*)—QUESTIONS REVIEWABLE.

A court's finding of a jurisdictional fact or other finding of fact cannot be reviewed on habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 81–87; Dec. Dig. § 92.*]

In Bank. Application for habeas corpus in the matter of Mabel Maginnis, a minor, sometimes called Mabel Hand. Writ dismissed, and minor remanded to custody pursuant to an order of the juvenile court.

Henry B. Lister, for petitioner. Thomas E. Hayden, W. T. Kearney, and T. J. Crowley, for respondent.

SLOSS, J. A writ of habeas corpus was issued by this court on the petition of Marie Maginnis, who alleged that Mabel Maginnis, a minor child, was unlawfully restrained of her liberty by the Children's Agency.

By the return to the writ it appeared that under proceedings instituted by one Fairweather the child, aged 10 years, had been brought before the superior court of the city and county of San Francisco, sitting as a juvenile court, and that, after a hearing, an order had been made finding that Mabel Maginnis was a dependent child, and committing her to the care of the Children's Agency until the further order of the court. The petitioner had had the custody of the child prior to the proceedings above referred to. The Children's Agency is a branch or department of the Associated Charities of San Francisco, a corporation, and has for its purpose, among other things, the caring for and obtaining homes for dependent or neglected children. The petition for the writ avers that the mother of the child resides in the state of Montana, and that the child herself is a resident of that state.

The proceedings for the commitment of the child were taken under the provisions of the "Juvenile Court Law" of 1909. Stats. 1909, p. 213. The regularity of the procedure leading up to such commitment is not questioned; the petitioner's sole contentions being: (1) That the juvenile court law is invalid as being in conflict with article 4, § 24, of the Constitution, providing that "every act shall embrace but one subject, which subject shall be expressed in its title;" and (2) that the superior court had no jurisdiction of the child by reason of the fact that the residence of the child's mother, and of the child itself, was in another state.

[1] 1. The title of the act in question reads as follows: "An act concerning dependent and delinquent minor children, providing for

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

their care, custody and maintenance; providing for their commitment to the Whittier State School and the Preston State School of Industry, and the manner of such commitment and release therefrom; establishing a probation committee and probation officers to deal with such children, and fixing the salaries of probation officers; providing for detention homes for such children; providing for the punishment of persons responsible for, or contributing to the dependency or delinquency of children; and giving to the superior court jurisdiction of such offenses, and repealing inconsistent acts." The general scope of the act is fairly indicated by the foregoing title.

[2] Whether or not it contains provisions not covered by the title is a question which does not now concern us, as the invalidity of such provisions would not affect the validity of the law as a whole. Deyoe v. Superior Court, 140 Cal. 476, 488, 74 Pac. 28, 98 Am. St. Rep. 73. The act defines dependent and delinquent children, confers jurisdiction of the matters covered by the act upon the superior court, which is, for this purpose, designated the "juvenile court," defines the procedure for bringing dependent or delinquent children under the jurisdiction of the court, and provides for the commitment of such children, during minority or for a shorter period, to the care of some reputable citizen or child-caring organization, or to the Preston or the Whittier State School. It authorizes the appointment of a probation committee, and of probation officers, to assist the court in the performance of its functions and the execution of its orders, and transfers to the juvenile court a certain jurisdiction over charges of crime against persons under the age of 18 years, and over felony charges against persons between the ages of 18 and 20 years. It further makes it a misdemeanor for any parent or other person having the custody of a dependent or delinquent child to encourage, cause, or contribute to such dependency or delinquency. Certain earlier acts dealing with matters covered by the act in question are repealed.

The petitioner finds in this act and in its title four distinct subjects, which she enumerates as follows: First. The act "makes provision for a certain state charity to provide homes for the care, custody, and maintenance of dependent and delinquent minor children." Second. "It provides for the punishment of persons responsible for or contributing to the dependency or delinquency of children." Third. "It confers jurisdiction on the superior court of such offenses, which the act declares to be misdemeanors." Fourth. "The act repeals inconsistent acts."

[3] The constitutional provisions with respect to the titles of acts were designed, mainly, "to prevent legislators and the public from being entrapped by misleading titles to bills whereby legislation relating to one subject might be obtained under the title to another." Abeel v. Clark, 84 Cal. 226, 24 Pac. 383. The particular requirement that acts should contain but a single subject, which should be expressed in the title, was, no doubt, intended to guard against the inclusion in a single or general act of various disconnected provisions—a practice which might well prevent the consideration upon its own merits of legislation on each of the various subjects embraced in the bill. Thus, the Constitution of New Jersey prefixes to a similar provision a recital that its purpose is "to avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other." Article 4, § 7, par. 4. See Cooley, Const. Lim. (7th Ed.) 203. All of these limitations are to receive "a reasonable, and not a narrow, construction." Abeel v. Clark, supra; Ex parte Liddell, 93 Cal. 633, 29 Pac. 251.

[4] The requirement that an act shall not contain more than one subject does not mean that a number of specific provisions, all designed to aid in the accomplishment of a single purpose, may not be united in one act. "The general purpose of these provisions," says Cooley (Const. Lim. [7th Ed.] p. 205), "is accomplished when a law has but one general object, which is fairly indicated by its title. To require every end and means necessary or convenient for the accomplishment of this general object to be provided for by a separate act relating to that alone would not only be unreasonable, but would actually render legislation impossible." The same view has been expressed by this court. In Ex parte Kohler, 74 Cal. 38, 41, 15 Pac. 436, it was said: "However numerous the provisions of an act may be, if they can be fairly considered as falling within the subject-matter of legislation, or as proper methods for the attainment of the end sought by the act, there is no conflict with the constitutional provision. * * *" And constitutional provisions, like the one under consideration, have universally been construed in accordance with the expressions just quoted. See cases cited in Cooley, Const. Lim., supra.

The question, then, is whether the various matters covered by the act and indicated by its title are cognate to the main or general purpose of the legislation. "The main purpose of the act," as was said by this court in Nicholl v. Koster, 157 Cal. 416, 108 Pac. 302, "is to provide for the care and custody of children who have shown, or who from lack of care are likely to develop, criminal tendencies, in order to have them trained to good habits and correct principles." The statement might perhaps be broadened to the extent of saying that the act aims, as its principal object, at the proper custody and education of children who lack the care and control deemed essential to their right development, whether or not their situation be such as to be likely to lead them to actual crime. This is the purpose declared by the opening words of the title, viz., "An act concerning dependent and delinquent minor children, providing for their care, custody and maintenance." That the other "purposes" pointed out by petitioner are mere adjuncts to this main end—means to facilitate its proper accomplishment—seems to us perfectly clear. The second purpose, as above stated, is to provide for "the punishment of persons responsible for, or contributing to, the dependency or delinquency of children." It needs no argument to show that the existence of dependent or delinquent children is detrimental to the best interests of the community. Ultimately, of course, the acts seeks to prevent such dependency or delinquency. One method of doing this is to take the child out of the custody of the person who has caused or permitted it to become dependent or delinquent. Another is to punish the person who is responsible for the condition which is sought to be cured. Both methods are directly related to the final purpose of protecting the growing generation from conditions detrimental to its welfare.

What we have just said sufficiently answers the point that a third separate subject is the granting to the superior court of jurisdiction over the offense of contributing to or causing delinquency or dependency. If the offense is created by the statute, it is certainly proper, in the same enactment, to confer jurisdiction to punish the offense.

[5] Finally, the point that the repeal of inconsistent statutes forms a separate subject of legislation is obviously without merit. The enactment of a law works a repeal, by implication, of all existing statutes plainly inconsistent with it. If this be so, there can be no objection to a declaration, in the law, that it shall have the effect which it would have in the absence of such declaration.

[6] But in any view, a repeal of other statutes dealing with the same subject is clearly germane to the purpose of any act. Cooley, Const. Lim. (7th Ed.) p. 208.

[7] 2. Petitioner's second point is that the juvenile court had no jurisdiction over the child, because said child was a resident of the state of Montana. The statute does not limit the power of the court to children who have a technical residence in this state. By section 3 the action of the court is invoked by the filing of a petition "showing that there is within the county, or residing within the county," a dependent or delinquent child. It is claimed, however, that, regardless of the declaration of the statute, the principles of international law prohibit the courts of one state from assuming guardianship of children who may happen to be within the jurisdiction, but whose legal residence or domicile is elsewhere. The decisions in this court, so far as they go, are to the contrary. In De la Montanya v. De la Montanya, 112 Cal. 131, 44 Pac. 354, Temple, J., delivering the opinion of the court, says: "I do not doubt that the mere presence of infants within the jurisdiction is sufficient to confer jurisdiction, although they may be residents of another state."

But it is not necessary, in the case at bar, to go into this question. The petition of Fairweather, initiating the proceedings in the juvenile court, alleges that the minor is residing in the city and county of San Francisco, and the order committing the child to the custody of the Children's Agency finds, as a fact, that this allegation is true.

[8] The petition, therefore, presented to the juvenile court a case which, under any view, was within its jurisdiction, and the court had power to decide whether the averments of jurisdictional facts were true. Its decision on the facts, however erroneous, cannot be reviewed on habeas corpus. The sufficiency of the evidence to sustain the finding "is a matter into which we cannot inquire upon this writ. Under the writ, the court can only inquire into the jurisdiction to find, not into the correctness of the findings. * * *" Ex parte Spencer, 83 Cal. 460, 23 Pac. 395, 17 Am. St. Rep. 266; Ex parte Williams, 87 Cal. 78, 24 Pac. 602, 25 Pac. 248.

The writ is dismissed, and the minor remanded to the custody of the Children's Agency, pursuant to the order of commitment of the juvenile court.

We concur: ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.

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162 Cal. 181

GNARINI v. SWISS AMERICAN BANK OF LOCARNO, SWITZERLAND.

(S. F. 5,437.)

(Supreme Court of California. Feb. 5, 1912.)

1. BANKS AND BANKING (§ 134*)—MORTGAGES—CHANGE IN FORM OF INDEBTEDNESS—APPLICATION OF DEPOSITS TO DEBT.

A partner gave a mortgage reciting that it was to secure the payment of all other and further advances made by the mortgagee, a bank, to the firm. The bank subsequently made a loan to the firm, taking its note for the amount. The members of the firm formed a corporation with the same name, and a new note was given by the corporation in place of that of the partnership. The corporation became bankrupt, and the bank applied the balance on deposit with it to the payment of the note. *Held*, that the indebtedness represented by the note was secured by the mortgage, since the original indebtedness was so secured, and the giving of the note by the corporation, even conceding that it was a third party, distinct from the firm, was not payment of the firm debt, in the absence of a special agreement to that effect, and hence that the bank could not apply the deposit to the payment of the secured debt.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 353–374; Dec. Dig. § 134.*]

2. PRINCIPAL AND SURETY (§ 128*) — DISCHARGE OF SURETY — ALTERATION OF CONTRACT—CONSENT.

The evidence indicating that the taking of such new note was not without the mortgagor's consent, he was not discharged, even if he be considered as a surety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 356–365; Dec. Dig. § 128.*]

3. BANKRUPTCY (§ 166*) — PREFERENCES — KNOWLEDGE AND INTENT OF PARTIES.

A bank held the note of a partnership, which, after the giving of the note, had been incorporated. The corporation did its banking business with such bank. A few days before the institution of bankruptcy proceedings against the corporation, the note was surrendered, and a new note of the corporation taken. A few days later, but before the bankruptcy proceedings, the bank applied the balance of the corporation's deposit to the payment of the note. *Held*, that the bank must have known of the corporation's financial condition, and the circumstances would justify the belief that it knew it was obtaining a preference, and hence that its action constituted the obtaining of a preference which was void under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 166.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by A. A. Gnarini, as trustee in bankruptcy of Cain, Boyd & Corriea, against the Swiss American Bank of Locarno, Switzerland. From a judgment for defendant and an order denying a motion for new trial, plaintiff appeals. Reversed.

Charles A. Shurtleff and Robert B. Gaylord, for appellant. E. B. Young, F. A. Denicke, H. S. Young, and Metson, Drew & Mackenzie (Horatio Alling, of counsel), for respondent.

PER CURIAM. The justices of the District Court of Appeal for the First Appellate District being unable to agree upon a decision in the above entitled cause, it was certified to this court for determination. Justice Kerrigan of the Court of Appeal had prepared the following opinion, which, meeting and expressing, as it does, the views of this court, is hereby adopted as its opinion, and for the reasons therein stated the judgment and order appealed from are reversed.

"This is an appeal from a judgment in favor of the defendant and from an order denying plaintiff's motion for a new trial.

"On July 1, 1904, Cain, Boyd & Corriea, a corporation, was, upon petition of its creditors, declared and adjudged to be a bankrupt, and subsequently the plaintiff was duly elected trustee of said bankrupt. On June 10, 1904, the bankrupt had a considerable balance to its credit with the defendant bank, and the account was closed and balanced by the bank by charging to the account a note executed in its favor by Cain, Boyd & Corriea. The bankrupt was originally a copartnership doing business in this state under the firm name of Cain, Boyd & Corriea, but afterwards it was incorporated, and conducted business under the same identical name, and was composed of the old firm members with the exception of two nominal holders of two shares of stock. The indebtedness to the bank arose in the following manner: On January 27, 1903, Cain, a member of the said firm, and his wife, to secure a personal loan to Cain, executed a mortgage in favor of the bank, which mortgage among other provisions recited that it was given to secure 'the repayment of all other and further advances made or which may in the future be made by said mortgagee * * * to the firm of Cain, Boyd & Corriea.' On February 2, 1903, the defendant bank loaned the firm of Cain, Boyd & Corriea the sum of $2,000, taking their note for this sum. After the firm was incorporated the note was marked 'Paid,' and surrendered by the bank to the corporation, and $100 having been paid on account thereof a new note dated June 4, 1904, was made in favor of the bank for $1,900. Both of these notes bore the same signature; i. e., Cain, Boyd & Corriea. Eleven days after the giving of this note, and immediately prior to the institution of the proceedings in bankruptcy of the corporation, the bank applied the amount on deposit to the credit of the corporation to the payment of this note, which application still left due thereon a balance of $56.40, which Cain personally paid in cash three days later. The manager of the bank testified that it was in consideration of the mortgage security that any money at all was loaned to the firm. It is also to be observed that the bank has never made any release of the mortgage.

[1] "The plaintiff contends that the indebtedness represented by the note was secured by this mortgage, and that, therefore, the bank had no right to charge this note to the deposit account. It seems to be conceded—as indeed it must be—that if the mortgage given by Cain and his wife still subsists, and is security for the indebtedness represented by the second note, the bank had no right to apply the deposit to its payment. This was squarely decided in the case of McKean v. German Savings Bank, 118 Cal. 334, 339, 50 Pac. 656, where it was held that, if a bank has mortgage security for a debt, it must exhaust that security before it can apply in reduction or cancellation of the

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

debt any money on deposit with it belonging to the debtor.

"This is the doctrine, too, where the mortgage was not given by the debtor himself, but by a third party. Commercial Bank v. Kershner, 120 Cal. 495, 52 Pac. 848. In either case the debt is secured by mortgage, and, as only one action may be maintained to enforce a debt thus secured (section 726, Code Civ. Proc.), it follows that the mortgage security must be exhausted before recourse can be had to the bank account or personal responsibility of the debtor. Nor can the mortgage be waived, and an action brought on the indebtedness. Barbieri v. Ramelli, 84 Cal. 154, 23 Pac. 1086.

"These observations bring us to the first question in the case, namely, Was the debt due the bank evidenced by the second note secured by the mortgage given by Cain and his wife?

"We think it was. It is a settled principle of law in this state and one often recognized that the taking of a note, either of the debtor or of a third person for a pre-existing debt, is not payment, unless it is distinctly understood that the note is taken as such. The note only postpones the time of payment of the old debt until default is made in payment of the note. In Griffin v. Grogan, 12 Cal. 317, it was held that, when a promissory note is received upon an antecedent debt, such debt is not extinguished thereby, unless the new note was, by express agreement, received in payment of the antecedent debt; that it only operated to extend until the maturity of the note the period of the payment of the debt. So in Brown v. Olmsted, 50 Cal. 162, 165, it was said: 'This court has repeatedly recognized the rule that an express agreement must be shown to establish the fact that a bill or note of either the debtor or of a third person was taken by the creditor in payment of a pre-existing debt.' In Welch v. Allington, 23 Cal. 322, Allington gave Welch a note for the amount due him. Subsequently Allington, being the holder of a nonnegotiable promissory note executed by one Smith, gave this note to Welch upon surrender of his note, which was then destroyed. The Smith note was not paid upon maturity, and Welch, learning that Smith had a set-off against Allington, sued Allington on the original note. In that case it was held that, inasmuch as there was no agreement that the Smith note was to pay the debt, the action against Allington could be maintained; that the acceptance of the Smith note only operated as an extension of the time of payment of Allington's note until the maturity of Smith's note. The court in that case said: 'There is no evidence in this case of any express agreement that the new note was to be in payment of the old one, or that the debt due on the old note was to be extinguished by accepting the new one.' There the only fact tending to show such express agreement was that the old note was surrendered when the new one was received, and this circumstance the court held to be insufficient to prove such agreement. See, also, Tolman v. Smith, 85 Cal. 287, 24 Pac. 743. 'Canceling a note or bill or stamping it "Paid" does not necessarily constitute or show payment.' 7 Cyc. 1007. In the case at bar the first note was marked 'Paid' and surrendered; and, while this might be regarded as payment of that note, it certainly was not payment of the original indebtedness.

"To digress for a moment, it must be observed that in the case at bar the note we are now discussing—the second one given to the bank—bore no corporate seal, and did not purport to be signed by any officer of the corporation. Both notes bore the same signature, namely, 'Cain, Boyd & Corriea.' The books of the bank and the method of keeping the account underwent no change by reason of the incorporation. This incorporation was had as a matter of convenience, and no change took place in the business or in the personnel of the proprietors. For these reasons it is claimed by the plaintiff that, so far as the bank is concerned, the firm and the corporation should be regarded as one entity. But the necessities of the case require no consideration of that point, and we may return to the discussion where we dropped it a moment ago, for, even treating the firm and the corporation as two separate and distinct entities, we have the corporation—a third party—taking up the note of the maker, and giving in its place its own note, without any understanding or agreement that the latter was accepted in payment of the original indebtedness, so that this case falls squarely within the rule laid down in the cases just cited.

"The mortgage in this case in express terms was made to secure the payment of an indebtedness and not of any particular note, and was still available for that purpose at the time the defendant applied to the reduction of that indebtedness the amount standing on its books to the credit of the corporation, and the form by which that indebtedness was evidenced was not important.

"This was held to be the law in London & San Francisco Bank v. Bandman, 120 Cal. 220, 222, 52 Pac. 583, 65 Am. St. Rep. 179. There two promissory notes evidenced an indebtedness, and, as four years had elapsed after the maturity of these notes, it was contended on behalf of the mortgagor that the lien of the mortgage had become extinguished, but as the mortgage was given to secure a 'present indebtedness,' and as those two notes had been replaced by a new note, it was held that, the statute of limitations not having run against the new note, the indebtedness had been kept alive, and that 'as long as an action could be brought to recover the debt the mortgage lien was not extinguished.' In that case the court quoted from Flower v. Elwood, 66 Ill. 446, where it is said: 'As a general rule the mere change in the form of the debt does not satisfy a mortgage given to secure it, unless it is intended to so operate. The lien of the debt attaches to the mortgaged property, and the lien can, as between the parties, only be destroyed by the payment or discharge of the debt or by a release of the mortgage. Mere change of the form of the evidence of the debt in no way affects the lien.'

[2] "We pass to another point in the case. Uncontradicted evidence was given that $1,500 of the $2,000 loan represented the amount that Cain had agreed to contribute to the capital of the firm, and to that extent he was in fact the principal; but ignoring this argument, and treating Cain as a surety as to the whole loan, still as the transaction was not altered in any respect without his consent he was not, as suggested by respondent, exonerated. A surety is exonerated when, without his consent, 'the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal in respect thereto are in any way impaired or suspended.' Civ. Code, §§ 2819, 2844. It is obvious that knowing of the impending bankruptcy proceedings, and desiring to have his property freed from the mortgage lien, Cain was acting for himself, and not for the corporation, when he replaced the old note with a new one. The fact that he paid out of his own pocket the sum of $56.40 to balance the account with the bank demonstrates that the taking of the new note was not without his consent.

[3] "Finally, the defendant was the bank with which the corporation transacted its banking business, and must have known of its embarrassed financial condition. The second note was taken only 11 days before the institution of the bankruptcy proceedings. These circumstances, together with the haste with which the bank account was offset by the note, lead us to believe that the bank, in applying the corporation's deposit to the payment of the note, knew that it was availing itself of a preference over other creditors of the corporation. Therefore, if it was necessary for a decision in the case, we would have no hesitation in holding that the bank's action constituted the obtaining of a preference, and, having occurred within four months of the filing of the petition in bankruptcy, that it was void under the bankruptcy act. Collier on Bankruptcy, p. 471."

162 Cal. 224

NATIONAL LUMBER CO. v. WHALLEY et al. (L. A. 2,747.)

(Supreme Court of California. Feb. 10, 1912.)

1. Mechanics' Liens (§ 59*)—Right to Lien —"Reputed Owner."

Where one entered into possession of land under a contract with the authorized sales agent of the owner, which contract was in effect one of purchase and sale, though containing a provision that it should not be considered a contract of sale, and held himself out as the owner and contracted for the erection of a building on the land, he was, as against the vendor, the reputed owner of the land within Code Civ. Proc. § 1192, giving a lien upon property for labor and material furnished with knowledge of the owner or the person having or claiming any interest in the property.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 75, 76; Dec. Dig. § 59.*

For other definitions, see Words and Phrases, vol. 7, p. 6120.]

2. Mechanics' Liens (§ 75*) — Right to Lien—"Knowledge" of Owner.

Where an agent of the authorized sales agent of the owner of lots upon which one in possession was erecting a building had an office, which he visited daily, in plain view of the building being erected, the owner was put on such inquiry as to charge him with knowledge under Code Civ. Proc. § 1192, giving a lien upon property for labor and material furnished with knowledge of the owner.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 103–107; Dec. Dig. § 75.*

For other definitions, see Words and Phrases, vol. 5, pp. 3940–3942.]

3. Mechanics' Liens (§ 211*)—Satisfaction by Note.

A note given to secure the payment of money due for material furnished in the erection of a building did not constitute payment so as to deprive the materialman of his lien, where it showed on its face that it was merely in recognition, and not in payment, of the debt.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 387–392; Dec. Dig. § 211.*]

Department 2. Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by the National Lumber Company against L. C. Whalley and others. From a judgment for plaintiff, one defendant, Merchants' Trust Company, appeals. Affirmed.

Wm. T. Blakely, for appellant. R. L. Horton, for respondent.

HENSHAW, J. This is an action brought to foreclose a materialman's lien, plaintiff alleging that one Whalley was the owner and reputed owner of the land upon which the dwelling house was built, and that it furnished lumber to him, at his special instance and request, to the value of $676.98. The answer of the Merchants' Trust Company denied that Whalley was the owner or reputed owner, alleged ownership in itself, and set out as a separate defense that it posted the written notice of nonresponsibility contemplated by section 1192, Code of

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Civil Procedure, within 10 days after it had knowledge that a building was being erected upon the property. Judgment passed for plaintiff, and defendant appeals from that judgment and from the order denying its motion for a new trial.

[1] 1. The lot upon which the dwelling house was erected was one of a tract owned by defendant, of which tract the firm of Holmes-Walton Company was the selling agent. A written contract was entered into with Whalley which was in all respects a contract for purchase and sale, saving that it contained the following clause signed by Whalley: "I agree that the above is not to be considered a contract for the sale of said land." It is unnecessary to enter into a discussion of the legal effect of this contract. Certain it is that under it Whalley entered into possession of the land with the knowledge of defendant, held himself out as the owner of the land to plaintiff and to others, made contracts for the erection of the building on the land, and caused the work of construction of this building to be begun. There was here sufficient evidence of reputed ownership.

[2] 2. Not only was Whalley thus in possession with the knowledge of the defendant (through its agent), but the defendant is charged with knowledge of the construction of the building by Whalley. One Braun was the "tract agent" of the Holmes-Walton Company, the agency for the sale of these lots. He had an office upon the tract, visited the property daily, and from his office there was a plain view of the building in process of construction upon the land. Mr. Holmes of the Holmes-Walton Company testified that the entire selling of the tract was left to this agent, and that he was informed by the agent that the building had been commenced, and subsequently that the work had been stopped. If it can be said that these facts in any way fall short of actual knowledge, they are ample evidence of circumstances sufficient to put a prudent man upon inquiry, which, under the authorities, is sufficient to charge the true owner under section 1192 of the Code of Civil Procedure. Evans v. Judson, 120 Cal. 282, 52 Pac. 585; James on Liens, § 117. They are, of course, sufficient under section 19 of the Civil Code. Moore v. Jackson, 49 Cal. 109; Santa Monica v. Hege, 119 Cal. 376, 51 Pac. 555; Hines v. Miller, 122 Cal. 517, 55 Pac. 401; Prouty v. Devin, 118 Cal. 258, 50 Pac. 380.

[3] 3. Whalley gave his note to secure the payment of the amount due to plaintiff. It is contended that this note was given and received in full satisfaction of the claims of plaintiff, and thus constitutes a payment releasing the defendant. Whether a note, or even a check, is received in absolute payment of a debt, or merely as a recognition of the debt with an understanding as to time and terms of payment, are questions which, as between the parties, are determined by their agreement, and, in the absence of an agreement to this effect, the acceptance is not a payment of the debt. Brewster v. Bours, 8 Cal. 502; Comptoir, etc., v. Dresbach, 78 Cal. 20, 20 Pac. 28; Savings Society v. Burnett, 106 Cal. 514, 39 Pac. 922; Durfee v. Seale, 139 Cal. 603, 73 Pac. 435. The note itself gives evidence that it was not received in payment of the debt, but was no more than a recognition of the debt and a promise to make monthly payments on account of it. The finding against payment is therefore justified.

For these reasons the judgment and order appealed from are affirmed.

We concur: MELVIN, J.; LORIGAN, J.

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162 Cal. 214

TEDFORD v. EICHLER et al. (L. A. 2,772.)

(Supreme Court of California. Feb. 7, 1912. Rehearing Denied March 8, 1912.)

1. QUIETING TITLE (§ 44*)—EVIDENCE—SUFFICIENCY—DELIVERY OF DEED.

In an action to quiet title, evidence *held* sufficient to sustain a finding that the deceased, prior to his death, delivered to his purported wife the deed which she recorded, and upon which the decision was based.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 89–92; Dec. Dig. § 44.*]

2. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action to quiet title, where the court based its decision upon a deed executed and delivered by a deceased party to his purported wife, the admission of evidence of a will of the deceased in no way related to the basis of the decision, if error, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153–4160, 4166; Dec. Dig. § 1050.*]

3. NEW TRIAL (§ 108*)—NEWLY DISCOVERED EVIDENCE—EFFECT.

Where, in a suit to quiet title, the affidavit in support of a motion for a new trial set up as newly discovered evidence a will which disclosed no attempt to convey the property in question, a new trial was properly denied.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 226, 227; Dec. Dig. § 108.*]

Department 2. Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by Sarah J. Tedford against Maime L. Eichler and others. From judgment for defendants, plaintiff appeals. Affirmed.

G. L. Whitham, for appellant. D. C. Burrey and Harris & Swanwick, for respondents.

HENSHAW, J. The action was to quiet title. Judgment passed for defendants, and from that judgment and from the order denying her motion for a new trial plaintiff appeals.

[1] Certain of the matters hereinafter stated appear only inferentially from the record,

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and there may possibly be error in the declarations concerning some of them. The essential facts, however, are made sufficiently plain. A. C. Tedford, at the time of his death, was living with Emily J. Tedford, who was, or was reputed to be, his wife, and in the household were children of Emily. Tedford and Emily seemed to have been tenants in common of the land here in controversy. However that may be, the contention of plaintiff is that they made deeds to the property in controversy, each to the other, deposited those deeds in escrow with one Dr. Fasig, to be delivered to the survivor upon the death of either; that this delivery to Fasig was not irrevocable; that after the death of Tedford, upon request, Dr. Fasig delivered the sealed package to Emily, who placed of record the deed from Tedford to herself. It is contended that there was no delivery, under the authority of Young's Estate, 123 Cal. 337, 55 Pac. 1011, and Kenney v. Parks, 125 Cal. 146, 57 Pac. 772. Upon the other hand, however, for respondents, it is shown that, quite independent of this transaction Mr. Burrey, the attorney for the Tedfords, visited them a few days before Tedford's death; that Tedford declared to him that he had made a deed of the property to his wife Emily; that his wife had the deed; that at Mr. Burrey's suggestion Mrs. Emily Tedford brought the deed into the room, restored it to the possession of Mr. Tedford, who then, in the presence of Mr. Burrey, made redelivery of it to Mrs. Tedford, who took it, retained possession of it, and caused it to be recorded. This evidence, notwithstanding the conflict, believed as it was by the trial court, supports the judgment which it rendered.

[2] The asserted error of the court in permitting the introduction in evidence of a will of the deceased, Tedford, is without significance; for, if error, the admitted evidence was entirely foreign to the testimony of Mr. Burrey, upon which the court based its decision.

[3] Upon motion for a new trial, affidavits of newly discovered evidence were offered, and counter affidavits thereto filed. These affidavits are to the effect that plaintiff, who appears to be the true wife of the deceased, had but recently discovered that Tedford made a will a few days before his death, and this affidavit is accompanied by the production of the will and by affidavits of those who were witnesses to its making. The counter affidavits are to the effect that the people who declared themselves to have been witnesses were not at the Tedford home during the time prior to his death at which it is declared the will was made, and that Tedford at that time was incapable of writing a will. The will itself discloses no attempt to devise specifically the property in controversy. It is a mere inference, even assuming the validity of the will, that it contemplated the devise of this particular real estate. The action is in equity. All this evidence would be addressed to the judge, sitting as a chancellor. It is clear that he either discredited these affidavits, or believed, as he well might, that if they were true they would not countervail against the testimony of Mr. Burrey of a delivery of the deed to this precise property. It was not error, therefore, to deny the motion for a new trial.

For these reasons, the judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; MELVIN, J.

162 Cal. 178

ST. PAUL TITLE & TRUST CO. v. STENSGAARD. (L. A. 2,758.)

(Supreme Court of California. Feb. 3, 1912. Rehearing Denied March 4, 1912.)

1. Limitation of Actions (§ 183*)—Foreign Judgment—Pleadings.

An answer in an action on a foreign judgment which pleads in bar Code Civ. Proc. § 336, without designating subdivision 1 thereof, specifically limiting the time to sue on foreign judgments, as the provision relied on, is sufficient, since such subdivision is the only one that may be relied on.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 683-692; Dec. Dig. § 183.*]

2. Limitation of Actions (§ 184*)—Answer—Amendment—Discretion of Court.

Where the original answer in an action on a foreign judgment sufficiently pleaded in bar Code Civ. Proc. § 336, though it did not specifically designate subdivision 1 thereof as the provision relied on, the court did not abuse its discretion in allowing an amendment to the answer, specifically setting up such subdivision as the provision relied on.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 693; Dec. Dig. § 184.*]

3. Limitation of Actions (§ 165*)—Plea to the Merits.

A plea of the statute of limitations is to the merits.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 649; Dec. Dig. § 165.*]

4. Judgment (§ 934*)—Foreign Judgment—Limitations.

A judgment debtor in a judgment of a sister state, obtained in 1891, lived in the sister state until 1897, when he openly departed without intent to defraud creditors. He continuously resided in a designated county in California since 1900 under an assumed name, but he did not change his name until 1899. *Held*, that an action on the foreign judgment, begun December 1, 1909, was barred by the five-year statute of limitations (Code Civ. Proc. § 336, subd. 1).

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1764-1768; Dec. Dig. § 934.*]

5. Limitation of Actions (§ 91*)—Assumed Name—Suspending Limitations.

Living in the state under an assumed name will not prevent one, when sued on a foreign judgment, from pleading limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 468; Dec. Dig. § 91.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Munroe, Judge.

Action by the St. Paul Title & Trust Company, formerly known as the St. Paul Real Estate Title Insurance Company, against Louis T. Stensgaard, alias Alton B. Hill. From a judgment for defendant, plaintiff appeals. Affirmed.

Constan Jensen, for appellant. Gibson, Dunn & Crutcher (Edward E. Bacon, of counsel), for respondent.

MELVIN, J. Appellant sued upon a judgment for something more than $5,000, recovered in the state of Minnesota on May 6, 1891, against the defendant and respondent herein, under the name of Louis T. Stensgaard. The complaint in this action was filed December 1, 1909. It was alleged in the complaint that the defendant surreptitiously left the state of Minnesota within one year after the recovery of the judgment pleaded; that he concealed his whereabouts from his family and acquaintances at all times after his departure from that state; and that he changed his name to Alton B. Hill, and concealed his identity and kept his place of residence a secret for the purpose of defrauding his creditors. While admitting the recovery of judgment against him as alleged in the complaint, he denied by his answer that he left Minnesota surreptitiously, or that he had fraudulently concealed his identity. He pleaded the statute of limitations.

The court found that defendant lived in Minnesota with his family after the entry of the judgment against him until the year 1897; that in that year he openly departed from Minnesota; that he did not change his name until 1899; that he had not fraudulently concealed his identity for the purpose of defrauding any creditor; and that he had continuously resided in the county of Los Angeles since the year 1900 under the name of Alton B. Hill. The court found that long prior to the year 1909 the judgment had ceased to be of any effect in the state of Minnesota, and that the plaintiff's cause of action was barred by the provisions of section 336, subd. 1, and section 361, of the Code of Civil Procedure. From the judgment against it, plaintiff appeals.

[1-3] In his original answer, respondent pleaded the bar of section 336 of the Code of Civil Procedure, but did not specify the subdivision on which he relied. Before final submission of the cause, the court permitted him to amend his pleading by designating the first subdivision of that section as the one upon which he placed special reliance. Appellant asks us to hold that the granting of permission to amend was an abuse of discretion by the trial court. We do not think so. Indeed, the original pleading of the section of the Code, without special reference to the particular part of it upon which defendant depended, was sufficient, because the first subdivision is the only one that could possibly apply to the facts of this case. Hence there was no uncertainty, or, in any event, any such uncertainty as plaintiff could urge, in the absence of special demurrer to the answer. Subdivision 1 of section 336 of the Code of Civil Procedure applies to an action upon "a judgment or decree of any court of the United States or of any state within the United States." The only other subdivision relates to "an action for mesne profits of real property." It will therefore be seen that the original pleading of the statute was sufficient. Churchill v. Woodworth, 148 Cal. 675, 84 Pac. 155, 113 Am. St. Rep. 324. But the court, in the exercise of its discretion permitted an amendment which removed all possible criticism of the plea of the statute. Such a plea is to the merits, and the court is clothed with discretion to permit the defense of the statute of limitations, just as it is given authority to allow the pleading of any other meritorious defense. Lilly-Brackett Co. v. Sonnemann, 157 Cal. 196, 106 Pac. 715; Trower v. City and County of San Francisco, 157 Cal. 769, 109 Pac. 617.

[4] We can see no escape from the court's conclusion that the cause of action was barred because not brought within the time limited by subdivision 1 of section 336 of the Code of Civil Procedure. Appellant cites Stewart v. Stewart, 152 Cal. 163, 92 Pac. 87, and Palmer v. Shaw, 16 Cal. 95, in support of the proposition that a clandestine entry into this state with intent to defraud creditors does not operate to begin the period of limitation in favor of the debtor thus secretly coming to California. But in this case the court found that defendant's coming to this state and his change of name were without fraudulent intent. The case of Stewart v. Stewart, supra, is authority for the proposition that neither the creditor's ignorance of nor his inability to discover the presence of the judgment debtor will prevent the running of the statute in the latter's favor.

[5] It has been held in this federal circuit, and we think correctly, that living in this state under an assumed name will not prevent a defendant, sued on a judgment recovered in another state, from pleading the statute of limitations. Chemical Nat. Bank v. Kissane (C. C.) 32 Fed. 429. The court, after hearing all of the evidence, concluded that the defendant had not been guilty of fraud, either in coming to California, or in changing his name, and that he had resided in this state for about nine years prior to the filing of the complaint in this action. The only judgment possible, therefore, was the one sustaining the defense urged under subdivision 1 of section 336 of the Code of Civil Procedure, and our conclusions upon the applicability of that section make it unnecessary to review the findings and conclusions

with reference to the laws of Minnesota and the availability of section 361 of the Code of Civil Procedure as a defense.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

162 Cal. 188

In re MORCEL'S ESTATE. (S. F. 5,788.)

(Supreme Court of California. Feb. 5, 1912. Rehearing Denied March 6, 1912.)

1. WILLS (§ 163*)—UNDUE INFLUENCE—BURDEN OF PROOF.

In a will contested for undue influence, the burden is on contestant to show facts from which an inference of undue influence may reasonably be drawn.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 388–402; Dec. Dig. § 163.*]

2. WILLS (§ 155*) — UNDUE INFLUENCE — WHAT CONSTITUTES.

Undue influence sufficient to justify denial of probate of a will must be such as to have in effect destroyed testator's free agency and substituted for his own the will of another, constraining him to make a disposition of his estate contrary to and different from what he would have done, had he been left to the free exercise of his own inclination or judgment. Influence, not brought to bear on the testamentary act, and not amounting to coercion destroying the testator's free agency, is not undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 375–381; Dec. Dig. § 155.*]

3. WILLS (§ 155*) — UNDUE INFLUENCE — FRAUD.

Mere fraud does not constitute undue influence sufficient to void a will, though in and of itself it is made a distinct ground for invalidating a will by Code Civ. Proc. § 1312.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 375–381; Dec. Dig. § 155.*]

4. WILLS (§ 166*)—UNDUE INFLUENCE—DEGREE OF PROOF.

In a suit to set aside a will for undue influence, proof sufficient only to raise a suspicion that undue influence may have been used is insufficient; but there must be substantial proof of a pressure which overpowered the testator's volition at the time the will was made.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421–437; Dec. Dig. § 166.*]

5. WILLS (§ 166*)—UNDUE INFLUENCE—EVIDENCE.

Evidence *held* insufficient to establish undue influence in the execution of a will, by which testatrix left all her property to proponent, with whom she had lived affectionately as proponent's wife for 30 years, though without being married, having practically disinherited contestant, who was her natural daughter, but who had been estranged from her for a long time.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421–437; Dec. Dig. § 166.*]

In Bank. Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Petition for the probate of the will of Therese Berthol Morcel, otherwise known as Therese Berthol. From a judgment denying probate, and from an order denying proponent's motion for a new trial, he appeals. Reversed.

E. K. Taylor, for appellant. R. B. Tappan, for respondent.

ANGELLOTTI, J. This is an appeal from a judgment refusing to admit to probate a paper offered as the last will of deceased, and from an order denying the proponent's motion for a new trial.

The paper was one executed by "Therese Berthol" on January 30, 1908, with all the formalities required by law for the execution of wills. By its provisions, the contestant, a natural daughter of deceased, was given $10 only, one Marie Doyen Morcel, wife of J. Vincent Morcel, was given the jewelry and personal effects of deceased, and all the rest of her property, amounting in value to some $18,000 or $20,000, was given to Joseph Morcel. Said Joseph Morcel and Gustave Kleinclaus were appointed executors without bonds.

The ground of contest was undue influence on the part of said Morcel, who was alleged by the contestant to have lived with her mother for many years in the relationship of man and wife, although never legally married. The contest was tried with a jury, to which were submitted the issue of undue influence and the issue of marriage or no marriage between deceased and Morcel. The jury found in favor of contestant upon both issues, viz., that the will was procured to be made through undue influence of Joseph Morcel, and that deceased was never married to said Morcel. Both of these conclusions are assailed as unsupported by the evidence.

At the outset, it may properly be stated that the validity of the alleged will is, of course, in no way dependent on the question of marriage between deceased and Morcel. If the will was not procured by undue influence, the fact, if it be a fact, that Morcel was not legally the husband of deceased could in no way affect it or impair its provisions. The question whether the relationship between Morcel and deceased was illicit can be material only as a circumstance in determining whether the will was procured by undue influence, and, as will be disclosed by our statement of undisputed facts shown by the record in this case, it is apparent that here the question whether such parties were lawfully married is of no importance whatever in the determination of the question of undue influence. The substantial contention on this appeal is that the finding of undue influence is without sufficient support in the evidence.

As said before, contestant was the natural daughter of deceased. She was born in France in the year 1860, and, so far as appears, was never in the care and custody of deceased, and never has been supported in whole or in part by deceased. In 1872 deceased, who had never married, met Morcel in France. Morcel had a few months before married a woman who had then left him, and whom he has never since seen. During that year, deceased and Morcel came together from France to California. According to his testimony, this woman brought a divorce action against him in October, 1872, and obtained such divorce in October, 1873. He said that he received the papers showing that such divorce had been granted in the year 1877. This was the only evidence on the question of divorce. Some four years after their arrival in California, deceased and Morcel agreed to live together as husband and wife, with the understanding that their several earnings should be kept separate. From that time to the day of death of deceased, a period of over 30 years, the parties lived together as husband and wife. There is nothing to indicate that the relationship thus formed was not entirely satisfactory to both parties to the end, and there was absolutely nothing to distinguish it, in the eyes of the world, from the relationship of husband and wife, save the single fact that deceased used her maiden name in some matters of business, such as her bank deposit, and her will, and was referred to in the same way in some letters written to the contestant. To the public generally, she was known as Madame Morcel, the wife of Morcel, and the parties held themselves out to the world as husband and wife. Apparently happy in their relations with one another, they were also industrious and frugal, and each accumulated money; Morcel becoming very well to do, and deceased accumulating, as already said, something in the neighborhood of $20,000. The deceased was illiterate, being unable to read or write, except to the extent of signing her name, and Morcel generally attended to her investments and business affairs, as well as to writing her letters. Everything indicates that he was scrupulously honest with relation to her business, and without any desire to mingle anything fairly belonging to her with his own property. He knew nothing of the existence of contestant until the year 1887. From 1872 to 1887 there was no correspondence whatever between deceased and her daughter. After Morcel learned from deceased of the existence of the daughter, a correspondence was commenced. Some of the letters on the part of deceased were signed "Therese Berthol," and others were signed in his own name by Morcel. All the letters so written which are contained in the record were written by Morcel, and these letters show, as does the other evidence on the subject, a friendly feeling upon the part of both Morcel and deceased for the contestant and her husband, a desire on their part that the contestant and her husband should come to California and live near her mother, and a disposition to assist them financially in getting a home, if they did come. During a few years next preceding their coming to California, it appears to have been the desire of deceased to make contestant a beneficiary under her will. The record shows that there was no dissent to this on the part of Morcel, and in his expressions to both contestant and her husband he took it for granted that contestant was to share in the property left by deceased at her death.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Finally, in January, 1907, in response to repeated invitations on the part of deceased and Morcel, contestant and her husband came to California. They were received by deceased and Morcel in the most affectionate manner. For a short time they lived with the old people, but soon established themselves in another place. Morcel introduced the husband at the French Bank in San Francisco, where he obtained a position. Deceased assisted contestant in the purchase of a home by contributing $2,000 of the purchase money. As long as the relations between the deceased and her daughter continued to be friendly, Morcel was apparently most friendly, and the record shows that he assisted in keeping the parties on friendly terms on one or two occasions when strained relations had followed quarrels between them. But it speedily became evident that the contestant and deceased could not get along together. There were several quarrels between deceased and contestant, and finally, in the latter part of December, 1907, a dispute arose between the two at contestant's house, Morcel not being present, ending, according to the claim of deceased, in the ejection of deceased from the house by her daughter. Deceased and contestant never met after that occasion, and there was apparently no real attempt at reconciliation on the part of either. The evidence of one of contestant's witnesses showed that contestant avoided meeting her mother at the home of the witness on one occasion, leaving the house at once when she saw that her mother was a visitor there. The record shows that the deceased felt that she had been treated very badly by her daughter, and that she was satisfied that the daughter had no affection whatever for her and cared only for her money. The testimony as to a feeling of bitterness toward the daughter, continuing practically to the end of her life, and her determination not to leave her any property, repeatedly expressed to various parties, is substantially shown without conflict. On January 30, 1908, she went with Morcel to the office of Mr. A. Comte, Jr., in San Francisco, an attorney of the highest standing and repute, for the purpose of making a new will. Morcel testified that deceased insisted on making this will, and that he accompanied her at her request. Mr. Comte testified that he had made a previous will for her, before the fire of April, 1906, which was destroyed in his office by the fire. Mr. Comte testified that he took his directions as to the provisions of the will from her, and drew it according to those directions, and that he saw nothing to indicate that the will was not freely and voluntarily made by her. The only evidence as to what was done with the will, when executed, was the evidence of Morcel that deceased kept it a few days and then requested him to keep it for her, and that he kept it with his papers until about eight months before her death, when he gave it back to her. He said that four days after her death he found it among her other papers in a drawer used by her for the purpose of keeping her private documents. The fact of the making of this will was never concealed, and contestant herself knew within a few days of January 30, 1908, that her mother had made it, and that she was given substantially nothing thereby.

Deceased was about 70 years of age at the time of the execution of the will. While physically she was a small woman, there is absolutely nothing to indicate that she was ever weak mentally, or that Morcel was of "stronger * * * mind and will power" than she. The evidence relied upon to show that she was subject to his control in matters affecting her property or actions was so trivial and inconsequential as not to require notice here. Undoubtedly she relied upon his judgment and honesty in the matter of the investment of her small earnings, and that this reliance was justified is shown by the fact that there had been accumulated as her property nearly $20,000 at the time of her death. Nor does it appear that her health was so impaired as to render her more susceptible to the influence of another.

[1, 2] Coming to a consideration of the circumstances relied upon as sufficient to sustain a conclusion that the will was the result of any undue influence on the part of Morcel, we find nothing that, to our minds, reasonably warrants an inference of such undue influence. The burden of proof was on contestant to show facts from which such an inference could reasonably be drawn. The kind of influence that may be held to be undue influence warranting a repudiation of a will "must be such as in effect destroyed the testator's free agency, and substituted for his own another person's will." Estate of Motz, 136 Cal. 563, 69 Pac. 295. It must be such "as destroys free agency, constraining the testator at the time the will is made to make a disposition of his estate contrary to and different from what he would have done, if he had been left to the free exercise of his own inclination or judgment." Estate of Ricks, 160 Cal. 450, 460, 117 Pac. 536. Mere general influence, not brought to bear on the testamentary act, is not undue influence; but "the influence must be used directly to procure the will," and must amount "to coercion destroying free agency on the part of the testator." Estate of Keegan, 139 Cal. 127, 72 Pac. 829. To warrant setting a will aside on this ground, the evidence must be "of such a nature as to warrant the inference that the will was the direct result of the influence exerted for the purpose of procuring it, and was not the natural result of the uncontrolled will of the testatrix." Estate of Snowball, 157 Cal. 307, 107 Pac. 601. If the will as made expresses the then well-settled determination of the testator *himself* concerning the disposition of his property, and there is nothing affirmatively shown to warrant the conclusion that the making of the will was suggested by any other party, we cannot see how it can be held to have been obtained by undue influence, even though the determination of the testator to exclude a relative from participation in his property has been in part or even wholly caused by mere misrepresentation of fact by others as to such relative, or is the result of a quarrel or dispute with such relative, inspired and encouraged by another for the very purpose of bringing about a breach and a consequent disinheritance to his benefit.

[3, 4] Mere fraud does not constitute undue influence, but is an entirely separate and distinct ground for invalidating a will (Code Civ. Proc. § 1312); and, while undue influence may be exerted by means of fraud, there can be no undue influence without an impairment of the free agency of the testator. Estate of Ricks, 160 Cal. 467, 117 Pac. 539. And it must also be borne in mind that a mere suspicion that undue influence *may* have been used is not sufficient to warrant the setting aside of a will on that ground. Estate of Keegan, 139 Cal. 127, 72 Pac. 828. The evidence against the will must "do more than raise a suspicion. It must amount to proof, and such evidence has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator." In re McDevitt, 95 Cal. 33, 30 Pac. 106. "In order to set aside a will for undue influence, there must be substantial proof of a pressure which overpowered the volition of the testator at the time the will was made." In re Langford, 108 Cal. 623, 41 Pac. 705.

In this case, even if we concede that the evidence was of such a nature as to support a conclusion that, by reason of a prior marriage, Morcel and deceased were never legally married, it is nevertheless clear that, so far as may be pertinent to any question of undue influence, there was nothing to distinguish their relationship from that of a husband and wife who for 30 years had lived affectionately together as such. For full that time, they had lived together as man and wife, holding themselves out to the world in that light. There is not the slightest evidence to indicate that either did not entertain for the other the respect, affection, and confidence incident to a long and happy married life. Under these circumstances, there was nothing unnatural or unreasonable about the will, nothing about its provisions, in view of the admitted facts as to the mother's feelings toward her daughter, to give rise to a suspicion that it was not her spontaneous act. Other than Morcel, there was no living being, except the daughter, to whom she would naturally be expected to give any part of her property, and the evidence, without any conflict whatever, shows that the relations of the mother and daughter for some time preceding the execution of the will, and up to the time of the death of deceased, 15 months thereafter, were of such a nature as to render the exclusion of the daughter from participation in her estate entirely natural and reasonable. It is to be borne in mind in this connection that, in addition to the absolute and long-continued breach, the daughter was practically a stranger to her mother until she came to California in 1907. What more natural under the circumstances than that the deceased should desire to give her property to Morcel? We repeat that, under the circumstances admitted by contestant, there is nothing in the provisions of the will to give rise to even a suspicion of improper influence, or to impose upon Morcel the burden of showing that he had not used undue influence to procure its execution.

[5] Undoubtedly the relation between Morcel and deceased was confidential, in the same sense and to the same extent that the relation of husband and wife living together in harmony is always confidential, and there was in this case the added feature of the trust and confidence reposed by deceased in Morcel in the matter of her business affairs; but we do not understand that it has ever been held that any inference of undue influence in the matter of the execution of a will by one of the spouses in favor of the other can be drawn from the mere existence of a confidential relation; or, in other words, that, by reason of such relation alone, the beneficiary is called upon to assume the burden of showing the absence of any undue influence, and, in the absence of such showing by him, the will may be set aside. Such relationship is, of course, a matter to be considered in connection with other evidence tending to show undue influence, and sometimes, in view of the nature of the provisions of the will and other circumstances, a most important matter, but in the face of an entirely natural and reasonable will, and in the absence of other evidence tending to show undue influence, is not sufficient to warrant the setting aside the will. This general question was fully discussed in the recent case of Estate of Ricks, 160 Cal. 450, 461, 117 Pac. 537, and it was there declared as follows: "There is no legal suspicion of undue influence arising from the existence of such a relationship, which imposes upon the son the necessity, when a will in his favor is attacked, of assuming the burden of proof that he had not unduly influenced his mother in making the will. The confidential relation and the opportunity afforded therefrom to exercise undue influence may, of course, always be taken into consideration with other evidence, when the question of undue influence is in issue. But the relation itself and opportunity are not sufficient alone to warrant a finding that undue influence was actually exerted. Proof merely that confidential relations existed between a testator and the main beneficiary under his will is not sufficient to destroy its validity; but there must be some proof, in addition to the relation, of facts or circumstances showing the use of that relation at the time the will was made overcoming the free will and desire of the testator, in order to invalidate the testament."

The fact that Morcel went with the deceased to the office of the lawyer, when she executed the will, and was present while she gave her directions as to its provisions, and while she executed the same, is, of course, a circumstance to be taken into consideration in determining whether there was undue influence. There is, however, nothing to indicate that she went to Mr. Comte's office at the instigation or request of Morcel beyond the fact that he went with her, and he said that he went at her request, and because she insisted on making a will and did not know where Mr. Comte, who had previously made a will for her, then had his office. It is clear that nothing occurred in the office of Mr. Comte that indicated that deceased was not acting entirely in accord with her own desire, uninfluenced by any one, and, in view of the circumstances shown by the record, we cannot see that the mere fact that Morcel accompanied her to the office and was present while she executed the will afforded any ground for an inference of undue influence.

The effort to show that Morcel had, as it is put, "the master mind," and unduly controlled, or had the power to unduly control, the action of deceased was not sustained by any substantial evidence. We have carefully examined the evidence offered in this regard and find it entirely insufficient.

The same may properly be said as to the effort to show that Morcel endeavored to keep the deceased and contestant apart. Concededly, up to the time when the final breach occurred, there was absolutely nothing to indicate any desire or effort on his part to keep deceased and contestant away from one another. On several occasions he had brought them together again after a quarrel. The letter written to the husband of contestant immediately after the final quarrel was but the natural outburst of an affectionate husband who felt that his wife had been outrageously treated, and that it was apparent that it was useless to hope that the mother and daughter would get along peaceably together, and that any meeting between them would result only in distressing the mother. Doubtless he retained this feeling to the end; but the only evidence that he, subsequent to his letter, tried to prevent a meeting was the incompetent evidence given by Madame E. Couturier to the effect that the deceased told her long after the execution of the will that Morcel told her "she must not call to see her daughter." The same witness testified that the deceased told her that she did not speak to her daughter; that they had different tastes and did not agree; that they were both very angry at each other; and that the last quarrel they had made her sick and unhappy. It is not surprising, in view of the admitted facts as to the relations between mother and daughter, and the effect on the mother of intercourse with the daughter, that Morcel should have advised the mother to keep away from her daughter; but there was no substantial showing that he did anything more in that behalf. That neither mother nor daughter desired to meet at any time after the final quarrel was shown plainly enough.

The evidence which, it is claimed, tends to show that Morcel, prior to the final quarrel, sought to instigate differences between the mother and daughter by remarks calculated to inspire jealousy and suspicion on the part of the mother, with a view to a final breach between them, was practically all given by the daughter. In view of the conclusion of the jury, we must assume the evidence so given to be true; but it throws very little, if any, light, on the vital question of undue influence operating at the time of the execution of the will.

We have now very briefly stated the matters shown by the record upon which contestant must rely for a setting aside of this will on the ground of undue influence. In the light of the other facts shown by the undisputed evidence, they are entirely insufficient for that purpose. At the time of the making of the will, the mother and daughter, never bound together by the ties common to that relation, had finally separated, and were bitterly antagonistic. This state of affairs continued for a month before the making of the will, and was ended only by the death of the mother fifteen months after. The mother made no secret of her intentions to keep from the daughter the property, to obtain which she believed was the only reason for any show of affection on the part of the daughter. The evidence of her declarations to this effect to others than Morcel, both before and after the making of the will, was uncontradicted. Under the circumstances, Morcel was the only remaining natural object of her bounty. The evidence does not warrant the conclusion that she was weakened as to either body or mind by age or disease to such an extent as to render her more subject to the influence of Morcel, or that she was in fact subject to his control in matters relating to her property. There was no concealment of the fact of the making of the will. Deceased made no secret of the making of the will, but openly declared that she had made it, and that she had left her daughter only $10, and gave her reasons for thus cutting the daughter off with a nominal bequest. Having thus made such a will, she allowed it to stand for 15 months, to the time of her death, without any expression tending to indicate a change in her desire as to the disposition of her property.

In the face of these facts that, in view of the evidence, cannot be disputed, there is, in our opinion, nothing in the evidence relied on by contestant that is capable of doing more, at the most, than warranting a mere suspicion or surmise that undue influence *may* have been exerted in the matter of the execution of the will. This, as we have seen, is not enough to justify the setting aside of a will. In the absence of proof reasonably warranting the conclusion that the execution of the will has been obtained by undue influence, a verdict for the contestant on that ground must be set aside.

The judgment and order denying a new trial are reversed.

We concur: SHAW, J.; HENSHAW, J.; LORIGAN, J.; SLOSS, J.; MELVIN, J.

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162 Cal. 206

CAMPBELL v. SHAFER. (L. A. 2,598.)

(Supreme Court of California. Feb. 6, 1912. Rehearing Denied March 6, 1912.)

1. TAXATION (§ 810*)—TAX DEEDS—PRESUMPTIONS.

The burden was on defendant, in an action to quiet title, in which plaintiff claimed under a tax deed from the state, to show that the sale to the state was void, because for a larger amount than the taxes and legal charges, contrary to Pol. Code, § 3785, unless the tax deeds themselves showed that fact.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1605–1608; Dec. Dig. § 810.*]

2. TAXATION (§ 788*)—TAX DEEDS—RECITALS—EFFECT AS EVIDENCE.

Pol. Code, § 3785 requires a tax deed to recite, among other things, the amount for which the land was sold, that it was sold for delinquent taxes, and the assessed value. Section 3786 provides that the matters recited in the certificate of sale must be recited in the deed; section 3776 requires the certificate of sale to recite, among other things, "the amount and year of the assessment"; and section 3787 provides that a tax deed is conclusive evidence of the regularity of all proceedings from the assessment to the execution of the deed. *Held*, that the recitals in a tax deed to the state could not be considered as evidence that the land was sold for a larger amount than the legal taxes and charges; section 3776 not requiring the certificate of sale to recite the amount of "taxes," charges, etc., due at the time of sale, but only the amount of the assessment.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1555, 1557, 1559–1569; Dec. Dig. § 788.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. TAXATION (§ 764*)—DEEDS—DESCRIPTION OF LAND.

A description of land in a tax deed as being "in the city of L., Main street tract, lot 3, block A," is, by itself, insufficient.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1519–1522; Dec. Dig. § 764.*]

4. TAXATION (§ 764*)—TAX DEED—DESCRIPTION OF LAND.

A tax deed to the state described the land sold as "in the city of L., Main street tract, lot 3, block A"; but the evidence showed that there was only one tract so designated in the city, a map of which was recorded in the county recorder's office, and that lot 3, block A, was clearly shown thereon. *Held*, that the description, aided by the extrinsic evidence, was sufficient.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1519–1522; Dec. Dig. § 764.*]

5. TAXATION (§ 319*)—PRESUMPTIONS—PERFORMANCE OF OFFICIAL DUTY.

In view of the presumption raised by Code Civ. Proc. § 1963, subd. 15, that official duty has been regularly performed, if no address is given on an assessment, it must be assumed, in absence of contrary evidence, that the property owner's address was not known to the assessor, since Pol. Code, § 3650, subd. 1, requires the assessment to show the owner's address, if known; and the mere fact that the owner had in fact resided in a certain place in the city for a number of years would not overcome the presumption.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 527–529, 532–534; Dec. Dig. § 319;* Evidence, Cent. Dig. § 105.]

6. TAXATION (§ 661*)—TAX DEED — SALE—MAILING NOTICE OF SALE.

If the party to whom the land was last assessed has no known post office address, it is not necessary that a copy of the notice of sale of the land for taxes be mailed to such party at his last known post office address, as required by Pol. Code, § 3897.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1341; Dec. Dig. § 661.*]

In Bank. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by R. W. Campbell against Z. R. Shafer. From a judgment for defendant and an order denying a motion for a new trial, plaintiff appeals. Reversed.

Walter J. Horgan and C. A. Stice, for appellant. Hester, Merrill & Craig, for respondent.

ANGELLOTTI, J. This is an appeal from a judgment in favor of defendant, and from an order denying plaintiff's motion for a new trial, in an action brought by plaintiff to quiet his alleged title to a lot of land in the city of Los Angeles, being lot 3 in block A of the "Main street tract," in said city. The answer denied plaintiff's claim of ownership, and also denied that defendant's claim to said property is without right. The trial court found that plaintiff was not the owner of said property. The question presented by this appeal is whether the evidence is sufficient to support such finding. There is no conflict in the evidence given on the trial.

Plaintiff's claim is based entirely on an attempted sale of said property by the state to him on June 10, 1908, on account of nonpayment of state and county taxes thereon for the year 1898. It is claimed that plaintiff acquired no title thereunder for three reasons, which will be considered in the order in which they are stated in defendant's brief.

[1] 1. It is claimed that the deed of the property to the state, made July 2, 1904, under the provisions of section 3785 of the Political Code, is void, because the sale to the state for the delinquent taxes of 1898, made July 1, 1899, upon which sale such deed was based, was thereby shown to be for a larger amount than the legal charges then existing against the property. It may be assumed, for all the purposes of this decision, that proof that the specific amount for which the land was declared by the deed to be sold to the state was 20 cents in excess of the taxes and costs actually due on the property would invalidate the sale. In the face of the deeds, that by the tax collector to the state, and that from the state to plaintiff, the burden of proof was on defendant, however, to establish this fact, unless such deeds themselves furnished the evidence thereof. The deed from the state to plaintiff did not recite anything inconsistent with the conclusion that the amount for which the property was declared to be sold to the state of California, viz., 92 cents, was the exact amount then due for taxes, costs, and charges. The only evidence relied upon by defendant in this connection consists of certain recitals in the deed to the state, together with proof that the first installment of the tax for the year 1898 was, in fact, paid. The record furnishes no other evidence throwing any light upon the question of the amount of tax, costs, and charges remaining unpaid. The deed to the state did contain recitals to the effect that the amount of the tax levied on the property for the year 1898 was 40 cents; that such amount was segregated into two installments in accordance with law, viz., one-half, or 20 cents each; that the costs and charges which have since accrued amount to 2 cents; and that the second installment only had not been paid. This would show only 22 cents still due for taxes and costs, with the further sum of 50 cents, chargeable under section 3770 of the Political Code, making in all 72 cents, while the deed recites that the property was sold to the state for the amount of 92 cents, which would be 20 cents too much.

[2] But we find nothing in the law that warrants a court in accepting these recitals as to the amount of taxes, costs, and charges due as evidence of the amount due. It was nowhere provided, either expressly or by implication, that such deed to the state should be even prima facie evidence of all the facts recited therein. The law express-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ly required the recital of certain specified matters in such deed (Pol. Code, §§ 3785 and 3786), and, as to such matters, of course, the recitals constituted at least prima facie evidence of the facts stated therein. There was nothing in the law giving such effect to any other recital. The deed itself, containing the necessary recitals, was expressly made primary evidence of certain things and conclusive evidence of other things (Pol. Code, §§ 3786 and 3787); but there was nothing effectual to make recitals as to matters not required to be stated in the deed evidence of the truth of such recitals. The law practically prescribed the form of the tax collector's deed to the state, so far as recitals are concerned, and by its enumeration of the things that should be recited rendered attempted recitals as to all other matters superfluous and ineffectual for any purpose. A consideration of the requirements of the law as to the recitals to be made in such a deed forces us to the conclusion that it was nowhere required that the amount of taxes due, or taxes, costs, and charges due, should be stated in such a deed. Section 3785, Political Code, required that the deed should recite (a) the name of the person assessed (when known), (b) the date of sale, (c) a description of the land sold, (d) the amount for which it was sold, (e) that it was sold for delinquent taxes, giving the assessed value and the year of assessment, (f) the time when the right of redemption had expired, (g) and that no person has redeemed the property within the time allowed by law for its redemption. Obviously there was nothing herein to require a recital of the amount actually due on account of taxes, costs, and charges. Section 3786, Political Code, provided that "the matters recited in the certificate of sale must be recited in the deed." As it stood from the time when the system of selling to the state all property delinquent for taxes was inaugurated, section 3776, Political Code, provided that the certificate of sale must be dated on the day of sale, and must state (a) when known, the name of the person assessed, (b) a description of the land sold, (c) that it was sold for delinquent taxes to the state, (d) "*the amount and year of the assessment*," (e) and when the state will be entitled to a deed. Up to the year 1911, section 3785, Political Code, was a more recently enacted statute than section 3786, Political Code, which had never been amended since its original enactment in 1872; and it may well be argued that the amendment of section 3785, making the section state what the deed to the state shall contain, took the place of section 3786, in so far as that section required the deed to recite the matters recited in the certificate of sale. Be that as it may, we do not think section 3776, Political Code, can reasonably be construed as requiring the certificate of sale to recite the amount of taxes, or taxes and costs and charges, due at the time of the sale. The only portion of the section upon which the pretense of a claim to that effect can be based is the portion requiring the certificate to state "the amount and year of the assessment." The word "assessment" is used throughout our revenue law as meaning something entirely different from "tax," and where the tax is referred to it is referred to as "tax" or "taxes." Giving to the word the meaning it clearly has throughout our revenue law, the requirement that the certificate shall state "the amount and the year of the assessment" is the same as the requirement of section 3785, Political Code, that the deed shall give "the assessed value and the year of assessment," and does not refer to the amount of tax, or taxes, costs, etc., due. This was expressly held by the District Court of Appeal for the First District in Griggs v. Hartzoke, 13 Cal. App. 429, 433, 109 Pac. 1104, in which case a petition to have the cause heard here after decision by such court was denied by this court. It follows that there was not evidence before the trial court to support a conclusion that the land was declared by the deed to be sold to the state for an amount in excess of the actual amount due on account of taxes, costs, etc.

[3, 4] 2. It is claimed that the description of the land upon the assessment roll, in the deeds, and in all the tax proceedings was insufficient for want of certainty. The description throughout the proceedings was as follows: "In the city of Los Angeles, Main street tract, lot 3, block A." In regard to this claim, the District Court of Appeal for the Second District said, in deciding this case: "Standing alone and unaided by other evidence, this description is concededly insufficient. Baird v. Monroe, 150 Cal. 560 [89 Pac. 352]; Miller v. Williams, 135 Cal. 183 [67 Pac. 788]; Best v. Wohlford, 144 Cal. 733 [78 Pac. 293]. Notwithstanding this prima facie insufficiency in description, plaintiff, in aid of the same and for the purpose of showing that the description was in fact sufficient, offered in evidence, without objection, a map recorded in Book 30, p. 41, Miscellaneous Records of the Recorder's Office of the County of Los Angeles, which map had indorsed thereon the following: 'Map of the Main St. tract, being the east ½ of the southwest ¼ of the southeast ¼ of section 7, T. 2 S., R. 13 W., S. B. M. Surveyed by Jno. Goldsworthy, county surveyor, 1888. Scale, 100 ft. to 1 in. Variation, 14° 50′ east.' Delineated upon this map are lots, blocks, and streets, together with the lines and dimensions thereof. Lot 3 of block A is clearly delineated thereon as being a lot with a specified width and depth fronting on Main street. This was followed by the uncontradicted evidence of the county recorder to the effect that this was the only map in his office of any tract of land in the city of Los Angeles and designated and known as the 'Main

Street Tract.' Inasmuch as the lot was described as being in the Main street tract in the city of Los Angeles, and it being made to appear that there is in said city only one tract so known and designated, map of which is of record in the county recorder's office, and that lot 3, block A, is clearly marked and designated thereon, it must follow that, aided by such evidence, the description contained in the assessment offered sufficient means for the identification of the property. It is true that defendant offered in evidence another map, entitled 'Main Street Tract,' shown to be recorded in Book 21, p. 7, Miscellaneous Records of the Recorder's Office of Los Angeles County; but, since it was shown by the uncontradicted evidence of the county recorder that the map so designated and recorded in Book 30, p. 41, Miscellaneous Records, was the only map or subdivision of lands situated in the city of Los Angeles, it must necessarily follow that the map so offered by defendant and recorded in Book 21, p. 7, was a plat and subdivision of lands outside the city, to which the assessment, since it described the lot as situated within the city, could have no reference."

We are satisfied with this statement, and adopt the same as a part of this opinion. It may properly be said that there is no pretense in this case that the Main street tract, shown by the map recorded in Book 21, p. 7, is located within the city of Los Angeles; and there is nothing about the map itself to so suggest. In view of the evidence introduced on the trial—evidence sanctioned by the decisions cited by the District Court of Appeal in the foregoing quotation—the description of the land was certain and definite and sufficient to answer all the requirements of the law.

[5, 6] 3. It is claimed that the requirement of section 3897, Political Code, as to the mailing of a copy of the notice of the sale by the state to the party to whom the land was last assessed next before the sale at his last known post office address, was not complied with; and that the attempted sale by the state to plaintiff must therefore be held ineffectual, in accord with the rule declared in Smith v. Furlong, 160 Cal. 522, 117 Pac. 527. No copy of such notice was mailed to any person; the deed of the state reciting substantially that, the address of such party being unknown, a copy of such notice was not mailed, and the deputy tax collector having charge of such matters testifying that no notice of such sale was at any time sent or mailed to the owner of the property, or to the person to whom the same was last assessed. It was shown that the last assessment of the property was that for the year 1904, and that the property was then assessed to "Mary B. Scott," the same person to whom, under the name "May B. Scott," it was assessed for the year 1898. Said Mary B. Scott, who was sometimes called "May B. Scott," had at all times since before the year 1897 resided at No. 687 Burlington avenue in the city of Los Angeles. The assessment for the year 1898 did not show her address as required, "if known," by subdivision 1 of section 3650, Political Code; and it was not made to appear that any subsequent assessment showed any address, or that any address could be ascertained from any of the tax records. If no address is given on any assessment, in the absence of evidence to the contrary, it must be assumed, in accord with the presumption of law, that official duty has been regularly performed (subdivision 15, § 1963, Code Civ. Proc.), that the address of the person assessed was not known to the assessing officer. The mere fact that such person had in fact resided at a certain place in the city of Los Angeles for a number of years would not be sufficient to overcome the force of this presumption. By section 3898, Political Code, the recitals in the deed from the state to the purchaser are made "prima facie evidence of all facts recited therein," and there is absolutely nothing in the evidence given on the trial to overcome the effect of the recital in such deed, which was substantially and practically that there was no "last known post office address." As was substantially said by the District Court of Appeal, the law does not contemplate the performance of impossibilities, and, where there is no known post office address, such fact is sufficient excuse for the failure to mail a notice; and the deed from the state will not be invalidated by reason of such failure.

It is not essential to a decision on this appeal to determine whether evidence aliunde the tax records is competent for the purpose of showing that there was in fact a post office address known to the tax collector, or which, with the exercise of reasonable diligence, would have been known to him; and, as that question has not been fully argued, we deem it advisable not to consider it at this time.

Referring, again, to the first point discussed in this opinion, if, on a new trial, it is shown by the evidence that the amount for which the property was in fact sold to the state, viz., the amount of tax, penalties, costs, and charges then due, was less than the amount stated in the deed to the state as the consideration for said sale to the state, the question will then be presented of the effect of a failure to recite correctly in the deed a matter expressly required to be recited therein by the law then in force.

What we have said disposes of all the points made by defendant in support of the judgment.

The judgment and order denying a new trial are reversed.

We concur: SLOSS, J.; SHAW, J.; HENSHAW, J.; MELVIN, J.

162 Cal. 217

KEHLET et al. v. BERGMAN et al.

(L. A. 2,754.)

(Supreme Court of California. Feb. 8, 1912. Rehearing Denied March 9, 1912.)

1. Taxation (§ 659*)—Tax Deeds—Validity—Notice of Sale.

Since, under Pol. Code, § 3897, requiring the assessor to mail a copy of the notice of a tax sale to the party to whom the land was last assessed next before the sale at his last known post office address, the assessor is not required, in order to obtain the addresses of owners, to resort to sources of information outside the assessment rolls from the assessment upon which the tax became delinquent down to the assessment roll next before the sale, tax deeds reciting that the addresses of the owners were unknown were not invalid because the notices were not mailed, where the rolls which the assessor was required to search did not contain the addresses of the owners, though the addresses may have been contained in assessment rolls made prior to the delinquent assessment, and the owner's address could have been found in the city directory.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 659.*]

2. Taxation (§ 421*)—Assessment—Description of Property—Sufficiency.

Under Pol. Code, § 3650, authorizing land to be listed in the assessment books by any description sufficient to identify it, owners of land sold for delinquent tax assessments and described in the assessment book according to a recorded map which accurately showed and described it, were chargeable with notice of such description, though they took title by a description from a map of later record.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 720-735; Dec. Dig. § 421.*]

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Oswald Kehlet and another against Charles A. Bergman and others. From a judgment for defendants, plaintiffs appeal. Reversed.

Walter J. Horgan and C. A. Stice, for appellants. Charles Lantz, for respondents.

HENSHAW, J. This action is to quiet title. It is brought by plaintiffs, claiming under a tax title from the state, against defendants, owners of the land at the time the assessment for which the property was sold became delinquent. Judgment passed for defendants, and from that judgment, and from the order denying their motion for a new trial, plaintiffs appeal.

[1] The notice contemplated by section 3897 of the Political Code was not mailed; the deeds reciting that the addresses of the owners were unknown. It is contended in support of the judgment that upon the authority of Smith v. Furlong, 160 Cal. 522, 117 Pac. 527, the failure to send this notice, the post office addresses of the defendants being known, was fatal to the validity of the deed. The court made no specific finding upon the matter; but the following unquestioned facts are disclosed by the evidence: The delinquent assessment for which the property was sold was levied in 1896. Neither the assessment roll for that year, nor for any succeeding year, down to and including the last assessment next before the sale, disclosed the residence or the "last known post office address," or, indeed, any address, of the defendants. Defendants were permitted to show that earlier assessment rolls showed addresses of the defendants or of their predecessors in interest; and that the residences of the defendants were given in the Los Angeles city directory during the year for which the lots were last assessed and the year just prior thereto. The contention upon this evidence is that the tax collector was charged with notice that, in the exercise of the diligence required in the performance of his duties, he should have resorted to these means of information, and that he should have searched the records of the assessor's office to discover whether statements had been handed in to the assessor by the property owners, and whether these statements contained the property owners' residences; and that his admitted failure so to do was an additional circumstance showing that he did not make use of the notice and of sources of information which were at hand, and

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

which it was his duty to inspect. This, however, is carrying the principle of Smith v. Furlong much further than it was carried in that case, and is an extension of it far beyond reasonable bounds. Section 3650 requires the assessor to prepare an assessment book showing "the name and post office address, if known, of the person to whom the property is assessed." Under the assumption that official duty has been performed, if the assessment roll does not contain these addresses, the conclusion is that the taxpayer was delinquent in not presenting to the assessor the statement contemplated by law, containing his address. If he has not done so, and has not in some other appropriate manner made known his address to the assessor, he, and no other person, is responsible for his own delinquency. If he has properly advised the assessor of his address, and the assessor has failed to note it upon the assessment roll which he delivers to the tax collector, and from this omission loss results to the taxpayer, he would unquestionably have recourse against the assessor. But, so far as the tax collector is concerned, if the assessment roll is delivered to him containing no address, he will be charged only with the notice of address which may be conveyed by some assessment roll from and including the assessment upon which the tax became delinquent down to the last assessment roll next before the sale. These assessment rolls cover all the period of time affecting the sale of the property, and it is unreasonable to hold that the tax collector is officially required to do more than inspect them. It would impose upon him onerous duties, and duties not contemplated by the law, to hold that he must inspect all assessment rolls, or that he must have resort to the assessor's office and determine for himself whether, in the accumulated files of that department, there may have been a statement containing such address. It is unnecessary in this decision, and it is not decided, to determine whether, in case the address is actually known to the tax collector, though not appearing on the assessment roll, he is required to mail the notice. It is sufficient for the purposes of this case to declare that he is not compelled to resort to outside sources of information to learn the address, and that his inquiry, so far as the records of the assessor's office are concerned, is limited to an inspection of the assessment rolls from the date of the delinquent assessment to that last made before the sale. It follows, therefore, that the judgment is not supported by the implied finding that the deeds were void for failure to mail the notice required by section 3897 of the Political Code.

[2] The second proposition turns upon the description in the assessment. It is admitted that the description was in terms sufficient. It was of certain lots, as shown upon the recorded map, known as "Hellman & Stassforth's subdivision map of lot five (5) of Workman & Hellman's subdivision of block 73 of Hancock's survey." Subsequent to the filing of this map, Davin & Jullien acquired title to part of the property and filed a later map, known as "Davin & Jullien's subdivision of part of lots 6 and 7, block 73 of Hancock's survey." The contention of respondents is that they took title by a description under this later map; that the later map superseded the earlier map; that they were not charged with notice of a description given under the earlier map; and that therefore the description actually made contained misleading elements which rendered it invalid. Burroughs on Taxation, p. 204. Thus it will be seen that the contention is, not that the description does not accurately describe their property in accordance with a recorded map, but that they are not charged with notice of such a description, because they took title by a description making reference to a map of later record. This very statement of the contention shows its untenableness. Section 3650 of the Political Code authorizes any "description sufficient to identify" the land. This general language is considered in Best v. Wohlford, 144 Cal. 733, 78 Pac. 293, where the Supreme Court of Nebraska is quoted with approval to the following effect: "Where the description was by lot and block according to a map which had been filed and afterwards vacated, it was objected that the description was defective as referring to lots which had no legal existence. The court overruled this objection, saying, 'Where, for the purposes of taxation, a description is used so certain in its terms that it must, as to the taxpayer, have apprised him of the proceedings and of the land assessed, he cannot avoid his share of the public burden merely because there is nothing of record which ascertains the property described,'" Much stronger in this case, where the map was and is of record, and where the property of defendants to which respondents claim title is accurately shown upon and accurately described by it.

What has been said renders unnecessary any consideration of the cross-complaint of defendants, which sought to quiet title to these same lands under a description in accordance with the Davin & Jullien map. If the description covers the same lands, the cross-complaint was unnecessary; if it covered different lands, it was improper, since plaintiffs were laying no claim to them.

For the foregoing reasons, the judgment and order appealed from are reversed.

We concur: MELVIN, J.; LORIGAN, J.

162 Cal. 241

Ex parte TIMOTHY. (Cr. 1,728.)

(Supreme Court of California. Feb. 14, 1912.)

HABEAS CORPUS (§ 92*)—COMMITTING ACCUSED ON CRIMINAL CHARGE—EVIDENCE—SUFFICIENCY.

Where the evidence under which accused has been committed on a charge of murder discloses that he fired the shot that killed decedent, the court, on habeas corpus, will not discharge him, under Pen. Code, § 1487, subd. 7, on the ground that he has been committed without probable cause.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 81, 83, 87–96; Dec. Dig. § 92.*]

In Bank. Appeal from Superior Court, San Mateo County; J. A. McCormick, Judge.

Habeas corpus by S. R. Timothy for his discharge under a commitment on a criminal charge without reasonable cause. Denied.

Albert Mansfield, for petitioner. Franklin Swart, Dist. Atty., for the People.

PER CURIAM. Petitioner applies for a writ of habeas corpus, and seeks his discharge thereunder upon the ground that he has been committed on a criminal charge without reasonable or probable cause. Pen. Code, § 1487, subd. 7. The crime charged is murder and the evidence discloses that petitioner fired the shot that killed one J. J. Moore. If our examination of the evidence convinced us that the petitioner had been held to answer without reasonable or probable cause, a full discussion of that evidence would become pertinent and proper; but where, as here, the result of that examination has been to convince us that the respondent is not held without reasonable cause, such a discussion can serve no useful purpose, and might work unpremeditated injury.

The application for the writ is denied.

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162 Cal. 221

SMITH v. CITY OF SANTA MONICA et al. (L. A. 2,770.)

(Supreme Court of California. Feb. 10, 1912. Rehearing Denied March 11, 1912.)

1. TAXATION (§ 183*)—PROPERTY SUBJECT TO TAXATION—PUBLIC PROPERTY OF MUNICIPALITY.

An assessment for state and county taxes levied on public property of a municipal corporation is void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 295; Dec. Dig. § 183.*]

2. TAXATION (§ 183*)—TAX SALES—LIEN—MERGER.

Where a city brought an action to condemn land which was sold to the state for taxes prior to judgment of condemnation, the state could not thereafter sell the land and execute tax deeds to an individual, since the lien of the state was merged in the title of the city, holding under trusts for the public, as distinguished from the state, and for the state.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 295; Dec. Dig. § 183.*]

Department 2. Appeal from Superior Court, Los Angeles County; D. E. Crow, Judge.

Action by J. H. Smith against the City of Santa Monica and others. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Affirmed.

Chas. S. McKelvey, Walter J. Horgan, and C. A. Stice, for appellant. S. W. Odell, Ex City Atty., H. W. Taft, City Atty., and Tanner, Taft & Odell, for respondents.

HENSHAW, J. Plaintiff by this action seeks to quiet title to certain lots in the city of Santa Monica. Judgment passed for defendants, and from the judgment, and from the order denying his motion for a new trial, he appeals.

[1] Plaintiff's ownership of the land in controversy rests upon certain tax deeds from the state. Two tracts of land are involved. The assessment under which one was sold was for the year 1895; the other for the year 1894. The one was sold to the state in 1896; the other in 1895. The controller's order to the tax collector to sell in both cases was on May 9, 1908, and the tax collector's deed in both instances was made on June 10, 1908. The city of Santa Monica had brought an action in 1895 to condemn these lands for public purposes as a city park. The judgment in this action in favor of the city was entered December 20, 1897. It results therefore that at the time the controller's order was executed and the sale made to plaintiff the title to the property, excepting such title as the state itself acquired by the tax collector's deed to it, was vested in the city of Santa Monica; or, in other words, that the state, to enforce the payment of state and county taxes, was selling into private ownership the public property of one of its agencies. It is well settled that an assessment for purposes of taxation levied upon public property of such a mandatary or agency is void. The reasoning leading irresistibly to this conclusion is well set forth in People v. McCreery, 34 Cal. 432, People v. Doe, 36 Cal. 220, Low v. Lewis, 46 Cal. 552, and Doyle v. Austin, 47 Cal. 360. That reasoning is that, wherever a municipal corporation or public agency of the state owns real property used for the purposes of such agency, the ultimate title is in the state itself. The agency holds the title upon the twofold trusts, the one for the public, the other for the state; and that to countenance taxation of such property would be to countenance the folly of the sovereign taxing its own property "and taking money out of one pocket to put in another." In People v. Doe, supra, summing up the reasoning, it is said: "The Constitution and laws upon the subject of taxing property are therefore to be understood as referring to private property and

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

persons, and not including public property and the state, or any subordinate part of the state government, such as counties, towns, and municipal corporations."

[2] While these cases dealt with assessments levied upon property when it was in the ownership of the municipality, the reasoning is none the less applicable to the conditions presented by the case at bar. The state does not tax the property of a municipality for state and county purposes, because this would be a taxation of its own property. For the same reason, when the property has come into the ownership of a municipal corporation, it will not attempt to enforce the tax by the sale of the property. The absurdity of its so doing would be apparent in the case where a county had acquired such property under the circumstances here present, and the state should sell it. To do what? To retain a portion of the tax in its own treasury, and to pay to the county a portion of the money derived from the sale of the county's own land. It may safely be said that when a municipal corporation acquires property under such circumstances the title which the state takes by the tax collector's deed is merged into the larger title which the municipality holds under the trusts, both for the public, as distinguished from the state, and also for the state, as the supreme sovereign, as well. In this case the question is not of the merger of a lien held by the county for a county tax—the question which was presented in City of Santa Monica v. Los Angeles County, 15 Cal. App. 710, 115 Pac. 945. Here the lien itself is merged and lost in the title which the state itself has taken. The present question is, Has the limited title which the state holds (limited in the sense that it is designed to operate rather as a common-law mortgage—a conveyance of the title, subject to divestiture at any time before sale by payment of the taxes and accrued charges by the property owner) been merged in the title which the municipality has acquired? The answer, we think, must be in the affirmative. The moneys which are thus made a charge upon the property are moneys of the state. The disposition and division of them is wholly a matter of state policy, and it cannot be supposed that it was ever in contemplation that the controller could authorize the sale of public lands of municipal corporations for such a charge, even though the charge in its origin was a valid lien on the lands.

It is held, therefore, that the controller's order to the tax collector to sell on May 9, 1908, was without authority of law and void, and that the sale by the tax collector pursuant to such order is also void.

Wherefore the judgment appealed from is affirmed.

We concur: LORIGAN, J.; MELVIN, J.

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162 Cal. 239

HENLEY v. SUPERIOR COURT et al.

(S. F. 6,102.)

(Supreme Court of California. Feb. 13, 1912.)

DRUNKARDS (§ 2*)—ARREST AND EXAMINATION—AFFIDAVIT AND WARRANT OF ARREST—JURISDICTION.

Act March 21, 1911 (St. 1911, p. 396) adds to the Political Code section 2185c, which provides that, whenever it appears by affidavit that any person is so far addicted to the use of stimulants as to have lost his self-control, a magistrate may issue a warrant, directing that such person be arrested and taken before a judge of the superior court for an examination on such charge, and that such affidavit and warrant of arrest must be as provided by Pol. Code, § 2168, for the arrest of a person charged with insanity. *Held* that, upon the arrest of a person on an affidavit, which did not state any specific acts in support of the conclusion of the affiant, nor any evidence to support the magistrate's conclusion as a foundation for the arrest, as required by section 2168, Pol. Code, an examination was beyond the jurisdiction of the superior court, and the person arrested was entitled to a writ of prohibition.

[Ed. Note.—For other cases, see Drunkards, Dec. Dig. § 2.*]

In Bank. Application by William Henley for writ of prohibition against the Superior Court and J. W. Hughes, Judge thereof. Writ granted.

R. Platnauer, for petitioner.

PER CURIAM. By the act of March 21, 1911 (St. 1911, p. 396), a new section, numbered 2185c, was added to the Political Code, providing that, "whenever it appears by affidavit to the satisfaction of a magistrate of a county or city and county that any person is so far addicted to the intemperate use of narcotics or stimulants as to have lost the power of self-control or is subject to dipsomania or inebriety he must issue and deliver to some peace officer a warrant directing that such person be arrested and taken before a judge of the superior court for a hearing and examination on such charge. Such officer must thereupon arrest and detain such person until a hearing and examination can be had. * * * *Such affidavit and warrant of arrest* must be substantially in the form provided by section 2168 of the Political Code for the arrest of a person charged with insanity."

The petitioner herein was arrested under a warrant, issued upon the filing of an affidavit, worded as follows: "In the Matter of Wm. Henley, an Alleged Intemperate User of Stimulants. State of California, County of Sacramento—ss.: Nellie H. Tayler, being duly sworn, deposes and says that there is now in said county, in the city or town of Sacramento, a person named Wm. Henley, who is so far addicted to the intemperate use of stimulants as to have lost the power of self-control. That by reason thereof said person is a fit subject for commitment to a state hospital for the care and treatment of the insane and ought to be confined therein as an inebriate, under the provisions of section 2185c of the Political Code of the state of California. Wherefore affiant prays that such action may be had as the law requires in such cases."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The petitioner was arrested, his objection to the jurisdiction of the respondent to proceed with his examination was overruled, and he asked this court for a writ of prohibition, which was allowed upon the grounds here briefly stated.

The form of affidavit prescribed by section 2168 of the Political Code, and to which the statute here in question requires the affidavit for the arrest of a person alleged to have lost the power of self-control substantially to conform, embraces as one of its requirements a statement of the specific acts and doings of the person alleged to be insane upon which the conclusion of the affiant is based. His naked opinion that a person is insane is not sufficient. There must be furnished evidence to support that conclusion on the part of the magistrate, as a foundation for the proceeding, before the arrest and detention of such person is authorized; and for the same reasons the failure of the complainant to state any facts tending to support the conclusion that a person has lost the power of self-control is a fatal objection to the power of the magistrate to issue the warrant of arrest under section 2185c.

The warrant being, for these reasons, invalid, the respondent was without jurisdiction to proceed with the examination, and petitioner was entitled to the writ of prohibition.

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162 Cal. 242

PEOPLE v. SAINZ. (Cr. 1,693.)

(Supreme Court of California. Feb. 15, 1912.)

1. Homicide (§ 231*)—Evidence—Sufficiency.

Evidence in a prosecution for murder *held* sufficient to show the deliberate taking of a human life with malice, and without provocation.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 479; Dec. Dig. § 231.*]

2. Homicide (§ 233*)—Trial—Proof—Motive.

While proof of motive is permissible in a murder trial, it is not essential.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 481; Dec Dig § 233.*]

3. Homicide (§ 234*)—Trial—Evidence—Sufficiency.

In a prosecution for murder, a finding that the defendant shot the deceased *held* sustained by the evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 482–493; Dec. Dig. § 234.*]

4. Witnesses (§ 245*)—Examination—Conduct of Counsel—Harmless Error.

Where the court erroneously excluded evidence of the defendant's escape and flight, it was not prejudicial error for the district attorney to ask a second question to elicit the evidence so excluded.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 827, 828; Dec. Dig. § 245.*]

5. Criminal Law (§ 670*)—Examination—Explanation of Flight—Conversation—Foundation.

Questions by which it was sought to secure an explanation of the flight of accused by asking him to give a conversation had by him with an unknown man were properly excluded, where the court was not first informed of the nature of the conversation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1593–1596; Dec. Dig. § 670.*]

6. Criminal Law (§ 351*)—Evidence of Flight—Probative Effect.

Flight is evidence of guilt only where the party, at the time of his flight, knew he was charged with a crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 779; Dec. Dig. § 351.*]

7. Homicide (§ 311*)—First-Degree Murder—Trial—Instructions—Penalty.

In the trial for murder in the first degree, it was erroneous to instruct that the jury should not consider the penalty prescribed for the offense; it being the jury's duty to fix the penalty, and the court's duty to inform them in respect to their responsibility.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 662, 663; Dec. Dig. § 311.*]

8. Homicide (§ 340*)—First-Degree Murder — Trial — Instructions — Penalty—Curing Error.

The error in giving such instruction was not cured by delivering to the jury forms of verdict prescribing the penalty.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 340.*]

In Bank. Appeal from Superior Court, Orange County; Z. B. West, Judge.

Rosario Sainz was convicted of murder, and he appeals. Reversed and remanded.

Weisel & Dutton, for appellant. Attorney General U. S. Webb and Deputy Attorney General George Beebe, for the People.

HENSHAW, J. The defendant, an Indian or Mexican, was tried and convicted of the crime of murder, was found guilty of murder in the first degree, and sentenced to be hanged. From the judgment, and from the order denying his motion for a new trial, he appeals.

[1] 1. His first contention is that the judgment is not supported by the evidence, and is contrary to the evidence. This necessitates a brief statement of the circumstances of the homicide. Defendant was sheepshearer and a member of Santos Carrissosa's sheepshearing camp, which contained 20 or 30 Indians and Mexicans. The deceased, Jose Machado, was likewise a member of the camp. The camp was composed of two tents or encampments, one known as Carrissosa's tent, where Machado lived; the other known as Mirando's tent. The sheepshearing was over. The defendant began to drink, became somewhat intoxicated, and fell into an ugly and quarrelsome mood.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

With his sheep shears, he went to the entrance of Carrissosa's tent and challenged the occupants generally to come out and fight him. Thereafter he took his Winchester rifle and began shooting at a can upon the ground, firing six or eight shots, and declaring that "this is the way I am going to kill one or two to-night." He then, still carrying his rifle, went into the Mirando tent, stumbled over some harness, fell down, got up, and asked who had pushed him. Being told that nobody had, he said, "I'll go out and kill two or three." He walked outside and began firing his rifle. He discharged three shots, the third striking Machado, who was standing at the entrance of Carrissosa's tent, a short distance away, killing him instantly. Thereupon defendant requested one of the men, Tiburcio Pollorena, to have Santos Carrissosa, the camp foreman or "boss," send him $5. He then fled from the camp, and was arrested in Mexico several months later. Defendant's defense was that he had been drinking heavily in the afternoon; that he fell into a drunken slumber, did not remember anything that took place, and on awakening from his drunken slumber was told that he had better leave, and did so. He knew that he did not fire pistol cartridges from his rifle. The empty shells found on the ground at the place of the shooting were shells of 44-caliber pistol cartridges.

Appellant's contentions against the sufficiency of the evidence resolve themselves into two propositions: First, that he was drunk at the time of the shooting; that there is no proof of malice on his part toward or against Machado; that no enmity between them is shown to have existed, and there was therefore no motive for the crime. Second, that he did not in fact fire the shot which killed Machado. The evidence leaves little doubt but that the defendant's ugly passions were aroused by the liquor which he voluntarily drank; that, as the Indians phrase it, "his heart was bad." There is no evidence of personal enmity or hostility on the part of defendant against the deceased; but there is evidence that his blood lust had been aroused, and that he was willing to slay, and did slay, without provocation. This evidence clearly indicates malice. Whether it be called express or implied (Pen. Code, § 188) is immaterial. There is enough to justify the jury in finding that he stepped to the door of the tent with the deliberate intention unlawfully to take human life; and, upon the other hand, there is enough to support the finding that there was no provocation at all, and that the circumstances attending the killing showed an abandoned and malignant heart. Of course, his voluntary intoxication was no excuse for his crime (Pen. Code, § 22), and the question whether, by reason of that intoxication, he was incapable of forming a specific criminal intent was one for the jury to pass upon under proper instruction, which the court gave, and they decided the question against him.

[2] There was no motive for the crime in the sense that it was shown to have been for revenge or the outgrowth of pre-existing hostility; but, while evidence of motive is always permissible and ofttimes valuable, it is never essential to the proof of the crime. People v. Durrant, 116 Cal. 179, 48 Pac. 75. Yet, in another sense, motive sufficiently appears. The act was the expression of a mind inflamed by intoxicants, brutal, malignant, and on murder bent.

[3] 2. The evidence which appellant contends indisputably shows that he did not fire the fatal shot is the following: The rifle was a 44-caliber Winchester repeating rifle. From it could be discharged 44-caliber Colt pistol cartridges. The bullet which killed Machado was a bullet from such a cartridge. The shells near the door of Mirando's tent where the defendant stood when the shots were fired were shells of exploded pistol cartridges. Experts testified that these pistol cartridges were not fired from the rifle, because the indentations made in the caps of the shells by the firing pin were different indentations from those that would have been made by the firing pin of the rifle. It is sufficient as against this, to state that there was the positive testimony of one eyewitness, Tiburcio Pollorena, that he saw the defendant actually fire the shots from his rifle. But, in addition, the jury was not bound to believe the testimony of the experts, and might have concluded, since no evidence was offered to the contrary, that the firing pin of the rifle had been tampered with after the homicide. Indeed, if such were the case, it would not be the first instance in which an attempt has been made to defeat justice in precisely this way. Taylor v. Commonwealth, 90 Va. 109, 17 S. E. 812.

[4] 3. The prosecution undertook to show that after his arrest the defendant escaped from jail and fled. The offer of evidence to this effect was excluded. The district attorney, after one objection had been sustained, a second time asked the sheriff, who was on the witness stand, if the defendant continuously remained in his custody, and a second time the question was ruled to be improper. Misconduct is predicated upon this. But there was no such willful persistence in asking improper questions as to merit censure, much less reversal, since the ruling erred in favor of the defendant. People v. Schafer, 119 Pac. 920.

[5, 6] 4. By questions directed to the defendant, it was sought to be shown that he fled because he was told by a man (unknown and unnamed) that two other men with guns were in pursuit of him. The defendant was asked to give the conversation which he had with this unknown man, and an objection to this question was properly sustained. There was not disclosed to the court, as it could and should have been, the nature of the con-

versation sought to be elicited. On the other hand, under proper interrogatories and proper showing, the defendant would have the clear right to explain his flight. In this connection the court gave the usual instruction upon the subject of flight, such an instruction as has recently been considered by this court in People v. Jones, 117 Pac. 176. It is unnecessary to repeat what is there said discountenancing the giving of such an instruction and the criticism upon the instruction given, because of an absence of the qualification that the defendant, at the time of his flight, knew he was charged with the crime. We would not feel impelled to reverse this case for this sole reason; but this admonition has been deemed proper in view of the reversal which must be ordered for the reason next to be considered.

[7] 5. At the very outset of his instructions, at the request of the district attorney, the court instructed the jury as follows: "It is the duty of the jury to decide whether the defendant be guilty or not guilty of the offense charged, considering all the evidence submitted to you in the case. It is not for you to consider the penalty prescribed for the punishment of the offense at all. If you are aware of the penalty prescribed by law, it is your duty to disregard that knowledge. In other words, your sole duty is to decide whether the defendant is guilty or not guilty of the offense with which he is charged." However appropriate such an instruction may be in criminal cases other than murder, the giving of it in the case of murder is grave and manifest error. For in the crime of murder in the first degree, the crime with which this defendant was charged, it is the exclusive province of the jury, and not at all of the court, to fix the punishment. So true is this that, so far from its being the duty of a jury to disregard its knowledge, if it is aware of the penalty prescribed, it is the duty of the court carefully to instruct the jury as to the solemn responsibility of fixing the punishment which the law has imposed upon it. People v. Olsen, 80 Cal. 122, 22 Pac. 125; People v. Leary, 105 Cal. 486, 39 Pac. 24; State v. Melvin, 11 La. Ann. 535; State v. Gilbreath, 130 Mo. 500, 32 S. W. 1023. Nor need time be spent in pointing out the gravity of such an error and the tremendous consequences which may follow to a defendant from it. Suffice it to say that it involves the difference between life and death.

[8] There is left but the one inquiry: Was the error and injury of this instruction anywhere, in any way, averted or cured? A review of all of the instructions given compels an answer in the negative. Nowhere was the jury told what alternative punishments for murder in the first degree the law has prescribed; nowhere were they told that the decision as to which of the two punishments should be inflicted was a high duty imposed by law upon them. All that appears further in this connection is that the court stated to the jury before their retirement: "The clerk has prepared five forms of verdict. You will use the one which will comply with whatever verdict you will arrive at." In connection with this language, there was handed to the jury five forms of verdict, the first of which was as follows: "We, the jury in the above-entitled action, find the defendant guilty of murder in the first degree." The second: "We, the jury in the above-entitled action, find the defendant guilty of murder in the first degree, and shall suffer imprisonment in the state prison for life." But if it be conceded that these verdicts so delivered to the jury by the clerk form a part of the court's instructions, it would be impossible to say that they did or could operate to control the minds of the jury against the solemn admonition of the court that it was not for them to consider the penalty prescribed for the punishment of the offense at all. It could only result in the giving of instructions radically conflicting and involving not only the question of human liberty, but of human life.

None of the rulings of the court upon the reception or rejection of evidence requires specific comment; but for the reasons given the judgment and order appealed from are reversed, and the cause remanded.

We concur: BEATTY, C. J.; SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.

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162 Cal. 226

BUCK v. CANTY. (S. F. 5,340.)

(Supreme Court of California. Feb. 21, 1912. Rehearing Denied March 11, 1912.)

1. TAXATION (§ 679*)—TAX SALE—RESALE—NOTICE—REQUISITES.

Under Pol. Code, § 3897, relating to resale of lands bought by the state at tax sales, as amended in 1905 (St. 1905, p. 31), publication of notice of the sale and mailing of a copy of such notice to the last known post office address of the party to whom the land was last assessed, as therein required, are both jurisdictional prerequisites to a valid sale.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1361, 1362; Dec. Dig. § 679.*]

2. TAXATION (§ 615*)—TAX SALE—RESALE—STATUTES GOVERNING.

After the amendment of 1905 (St. 1905, p. 31) to Pol. Code, § 3897, requiring a notice of a resale of lands bought by the state at tax sale to be mailed to the person to whom the land was last assessed, was passed, but before it took effect, the Controller authorized a tax collector to sell land which had previously been deeded to the state for nonpayment of taxes, and the collector published the notice of sale, as required by the original section, but did not mail a copy of the notice to the owner, as required by the amendment. The sale was had after that amendment took effect. *Held*, that the sale was void, since, by the re-enactment and publication of the amended section, as required by Const. art. 4, § 24, the original section under which the steps preliminary to the sale were taken had ceased to exist before the sale, and the amendment contained no saving clause.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 615.*]

3. Taxation (§ 614*)—Tax Sales—Resale—Power of Legislature.

The method of conducting tax sales, and resale of land bought by the state, including the determination of the character of notice required, is wholly within the control of the Legislature.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1263; Dec. Dig. § 614.*]

4. Taxation (§ 679*)—Tax Sales—Resale—Notice—Object.

The object of the amendment of 1905 (St. 1905, p. 3) to Pol. Code, § 3897, requiring the giving of notice by mail to the owner of land to be sold by the state after tax deed to it, is to give him a better opportunity to redeem.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1361, 1362; Dec. Dig. § 679.*]

5. Constitutional Law (§ 106*)—Statutes—Vested Rights—Notice of Tax Sale.

The amendment of 1905 (St. 1905, p. 31) to Pol. Code, § 3897, requiring the mailing of a notice to the owner of land to be sold by the state after tax deed to it, construed to apply to sales after its passage, although the notice required by the old section had been given before the amendment took effect, does not impair any vested rights, since the state had no vested right to sell the land under the old section, and, if it had, the amendment would not impair the right, but merely change the method of exercising it.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 106.*]

6. Constitutional Law (§ 191*)—Retroactive Statutes—Validity.

The amendment of 1905 (St. 1905, p. 31) to Pol. Code, § 3897, requiring the mailing of a notice to the owner of land to be sold by the state after the tax deed to it, construed to apply to sales after its passage, although the notice required by the old section had been given before the amendment took effect, is not invalid on the ground that it is retroactive, since it affects only the remedy under which the right of sale may be exercised, and such a statute may be retroactive.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 534; Dec. Dig. § 191.*]

7. Taxation (§ 788*)—Tax Deeds—Jurisdiction—Burden.

Although, by Pol. Code, § 3898, recitals of jurisdictional facts in a tax deed are prima facie evidence of their existence, yet, if the deed does not recite a jurisdictional fact, the party claiming title thereunder must prove such fact.

[Ed. Note.—For other cases, see Taxation. Dec. Dig. § 788.*]

8. Appeal and Error (§ 1071*)—Review—Harmless Error—Findings.

Where, in an action to quiet title, defendant claimed under a tax deed, and the court found that notice of the sale was not mailed to the owner, as required by the amendment of 1905 (St. 1905, p. 31) to Pol. Code, § 3897, which finding did not rest for its sufficiency on any other findings, or on testimony admitted over objection, judgment for plaintiff will not be reversed, although other findings and rulings were erroneous, since this finding alone justified the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234–4239; Dec. Dig. § 1071.*]

9. Appeal and Error (§ 173*)—Issues in Lower Court—Relief Not Asked.

In an action to quiet title, the complainant did not show the particulars of defendant's claim. In the amended answer, defendant claimed title under a tax deed, and alleged the payment of a certain sum to the state, therefor, but merely as showing his title, and not as the basis of a lien or claim against plaintiff. No claim for repayment was made on the trial. *Held*, that judgment for plaintiff would not be reversed for failure to provide for repayment of the amount paid by defendant, since judgments will not be reversed for failure to give relief not embraced in the pleadings, or urged on the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079–1120; Dec. Dig. § 173.*]

In Bank. Appeal from Superior Court, Fresno County; Geo. H. Church, Judge.

Action by George H. Buck against D. J. Canty. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Carter & Carter and Stanton L. Carter, for appellant. Frank H. Short and F. E. Cook, for respondent. Edward C. Harrison, amicus curiæ.

LORIGAN, J. This is an action to quiet title to lands in Fresno county of which plaintiff is conceded to be the owner, unless, as is claimed by defendant, the latter acquired title thereto under a tax deed from the state.

The trial court found this tax deed to be void, and entered judgment in favor of the plaintiff, from which, and an order denying his motion for a new trial, defendant appeals.

The land in controversy was sold to the state on July 3, 1896, on account of delinquent taxes for the year 1895, and on March 31, 1905, a deed to the state therefor was made by the tax collector. On April 6, 1905, written authorization was issued by the Controller of the state, directing said tax collector to sell said property as required by section 3897 of the Political Code, as amended in 1897. Pursuant to the section referred to, the tax collector published notice that a public sale of the property would be made by him on May 16, 1905, on which date it was made, the defendant becoming the purchaser, and on June 6, 1905, receiving from the said tax collector the tax deed, the validity of which is in question.

On the trial, both the deed to the state and the deed from the state under the tax sale proceedings were attacked by respondent, and the findings of the court were that both were void. The same claim of invalidity as to both is relied on here by respondent in support of such findings in response to the attack made upon them by the appellant. We deem it necessary, however, to consider only the question of the validity of the sale under which the deed from the state to the appellant was made, and restricting that consideration to the question whether the jurisdictional prerequisites to a valid sale of the property by the state were observed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Section 3897 of the Political Code, as amended in 1897, provided, as to property acquired by the state under delinquent tax sales and which the Controller might order sold by the tax collector, that in making sale under such authorization the tax collector "must give notice of such sale by first publishing a notice for at least three consecutive weeks in some newspaper published in the county or city and county, or if there be no newspaper published therein, then by posting a notice in three conspicuous places in the county, or city and county. * * *" Thus the section stood at the time the Controller, on April 6, 1905, issued his authorization, and when the tax collector commenced the publication of his notice of sale thereunder. The section was, however, amended by the Legislature at its session in 1905. St. 1905, p. 31. The amendment, while still providing for a notice of sale by publication and the contents of the notice, added this additional requirement as to notice, to wit: "It shall be the duty of the tax collector to mail a copy of said notice, postage thereon prepaid, to the party to whom the land was last assessed next before the sale, if such address is known." This amendatory act was approved by the Governor on March 1, 1905, which was over a month prior to the date of the authorization of the Controller, directing the sale, and necessarily, at least, for as long a period before any publication of the notice could be made by the tax collector, and the act was in effect for 15 days prior to the date fixed for the sale, which was noticed for May 16, 1905. The tax deed here in question from the state to the defendant shows that the only notice given was by publication, commenced and completed under the section as it stood prior to the amendment; and the court found, and it is conceded, that no other notice was given by the tax collector.

On this appeal two questions are presented and arise under the amendment: First, is it a jurisdictional prerequisite to a valid tax sale that, in addition to publication of notice of sale, a copy thereof shall be mailed by the tax collector to the last known post office address of the party to whom the land was last assessed; and second, if it is a jurisdictional prerequisite, was it necessary to give it where, in the instant case, the sale was actually made after the amendment took effect, but where notice of sale was published under the old section, and the publication completed prior to the taking effect of the amendment?

[1] As to the first point. Since this appeal was taken, it was decided by this court that it is just as essential to the validity of a sale under the amendment to section 3897 to mail the notice to the person to whom the land was last assessed, when his last post office address is known to the tax collector, as it is to give notice by publication; that both notice by publication and by mail, where the last post office address is known, are essential to the validity of the tax sale. Smith v. Furlong, 160 Cal. 522, 117 Pac. 527. This matter is there fully discussed, and nothing further need be said on that subject.

[2] As to the second point. Appellant insists that it was not intended that the amendment should operate retrospectively, and that, as notice by publication was all the section required at the time notice was given, and it had been fully given under it when the amendment went into effect, this was a sufficient compliance with the statute, in order to authorize and validate the subsequent sale; that by the tax collector's deed to it, under delinquent tax sale, the state had acquired a vested right in this property, and a vested right to sell it under the statute as it stood before the amendment, which right to sell it had proceeded to exercise, and the amendment cannot be given retroactive construction, so as to impair or abridge those rights.

We do not think those points are well taken. Prior to a sale of property acquired by the state at delinquent tax sales, the only persons having relations to each other with respect to the property are the state and the delinquent owner. Property owners owe the duty to the state to pay the taxes which it has levied upon their property, and on their failure to do so the state takes their property in aid of the collection of its revenues. While provision is made for the sale of such property on behalf of the state by its public officers after the state has held title to it for five years, the settled policy of the state is to afford an opportunity to the delinquent owner to redeem the property at any time before an actual sale by the state has been made. To this end, it has provided that the owner shall, during a period of five years, have an absolute right to redeem, and has further provided, by section 3817 of the Political Code, that he shall have this right to redeem "at any time * * * before the state shall have disposed of the same," which, of course, means before an actual sale by the state.

[3] The authority of the Legislature to provide a system under which the state may be enabled to collect its revenues, its right to provide for the acquisition by the state of the property of delinquent taxpayers, for its redemption after such acquisition or its sale, and (as to the latter) the method and procedure under which it shall be sold on behalf of the state by its agents may not be questioned. These are all matters within the control of the Legislature, and this control over the method by which the state shall dispose of the property acquired by it for delinquent taxes involves the right to determine at any time the extent and character

of notice which shall be given by the agents of the state before the right to make a sale of it shall attach. Having plenary power over the matter, the Legislature had provided under the old section—in harmony with the policy of according an opportunity to the delinquent owner to redeem at any time before the sale by the state took place—that a sufficient last opportunity would be given him by a publication alone of the notice of intended sale.

[4] The obvious policy of the amendment to the section was to afford a better opportunity to the delinquent owner to redeem the property before actual sale by the state by requiring, not only notice by publication, but the additional and more efficacious notice by mail, under the condition provided for in the amendment.

The amendment contained no saving clause as to proceedings theretofore had under the old section. The section, as amended, was re-enacted and published in conformity with article 4, § 24, of the Constitution, and as to such a re-enactment it is said, in Billings v. Harley, 6 Cal. 381: "If a statute or section of a statute is re-enacted, it is totally inconsistent with the idea that the old statute or section still remains in force, or has vitality for any purpose whatever. The reenactment creates a new rule of action, and even if there was not the slightest difference in the phraseology the latter alone can be referred to as the law, and the former stands, to all intents and purposes, as if absolutely and expressly repealed." Bensley v. Ellis, 39 Cal. 309; Huffman v. Hall, 102 Cal. 26, 36 Pac. 417.

So that, within the rule of these authorities, before the sale here in question was actually made, the section which was in force, and under which the preliminary jurisdictional steps to authorize it had been taken, had ceased to exist. It had no force as part of the law under which a sale could be made. An entirely different method of notice had been provided and was in operation, and the proceedings taken under the old section became functus officio immediately after the amendment went into effect.

But it is insisted by appellant that to construe the amendment requiring the additional notice to be applicable to all sales made after it went into effect, although the requisite notice under the old section had still been given and a right to sell thereunder had been acquired, would be violative of the constitutional provision (article 1, § 16) prohibiting the passage of laws which are retroactive in character; and it is also insisted that the amendment, as sought to be applied to this sale, is open to a further objection, under the same constitutional provision, as an impairment or abridgment of a right which was vested in the state to make a sale of this property upon the notice provided for and given under the old section.

[5] As to this claim of impairment of a right, there was no vested or fixed right in the state to sell property under the old section, or any other section. That such a right existed is merely the assumption of counsel. The Legislature has full control over the sale of property belonging to the state, which it may direct sold, and to regulate or change at any time the method of its disposition. If there was any merit in this claim advanced by counsel, however considered, it would be sufficient to say that the amendment does not at all impair the right of the state to sell. In furtherance of the policy of the state, and to afford better opportunity of redemption by the delinquent owner before actual sale, the Legislature has simply provided for additional notice to be given before a sale may be made. This does not impair the right of the state to sell. That right is still secured to it. The amendment simply effects a change in the method by which the right may be exercised; a change in the remedy, whereby additional opportunity is given to the former owner, before an actual sale, to regain his property by redemption, without impairing the right of the state to proceed to sell, in case he does not.

[6] Nor is there any force in the objection to the amendment on the ground that it is retroactive. As we have said, this amendment only operates upon the remedy under which the right of sale may be exercised. It is well settled that the Legislature may pass a statute which shall be retroactive in character, and open to no constitutional objection upon that account, when it affects the remedy only and does not disturb vested rights or obligations of a contract. "Remedial statutes which are retrospective, but do not impair contracts or disturb vested rights, are not unconstitutional, and the Legislature may from time to time, alter, change, or modify the remedy, provided that in so doing they do not affect the right; but whenever they so far alter the remedy and impair property rights, or change or render the right scarcely worth pursuing, they necessarily impair the obligation of the contract upon which such right is founded." Teralta Land, etc., Co. v. Shaffer, 116 Cal. 518, 523, 48 Pac. 613, 614 (58 Am. St. Rep. 194). As pointed out, this amendment does not interfere with the right of sale by the state. It is addressed to the procedure to be taken in exercising the right. It affected merely a change in the remedy which it was within the power of the Legislature to regulate.

That an amendment of the character here under consideration affects merely the remedy, and hence is open to no constitutional objection, either on account of retroactive character, or as impairing rights, is settled in Oullahan v. Sweeney, 79 Cal. 537, 21 Pac. 960, 12 Am. St. Rep. 172, discussed in Johnson v. Taylor, 150 Cal. 201, 88 Pac. 903, 10 L. R. A. (N. S.) 818, 119 Am. St. Rep. 181. In that case, there was involved an amendment to section 3785 of the Political Code (St. 1891, p. 133), which amendment provided that a purchaser at tax sales should, 30 days previous to the expiration of the time for redemption, or 30 days before he applies for a deed, give notice to the owner of the property purchased, or the occupant of it, of the time when the right of redemption would expire, or when the purchaser will apply for a deed, and unless he did so the owner of the property would have the right of redemption indefinitely until such notice was given and the deed applied for. When the tax sale in that case was made section 3785 provided that a redemption could be made in 12 months, and if not made the purchaser could obtain his deed without notice to the owner. The point made in the case was that it was not within the power of the Legislature to extend the time for redemption on sales which had been made previous to the amendment; that the attempted extension of the period as to them impaired the validity of the contract. It was held that the amendment requiring notice applied to applications for deeds on sales made before, as well as after, it took effect; and to the claim that it impaired the validity of a contract it was answered that the change affected the remedy merely, which was within the control of the Legislature; that the purchaser still could obtain his deed at the expiration of the year by taking the proper proceeding under the amendment. The same principle applies here. The state may still sell the lands. The method to be employed, the procedure to be taken as to notice, is changed, but this affects the remedy merely, not the substantive right to sell, which may still be enforced under an ample remedy provided therefor.

Reaching the conclusion, then, that the amendment was in effect and operation before and at the time the sale in question took place, it follows that, as notice of the sale had not been given by the tax collector as required by the amendment, no jurisdiction to make the sale was acquired, and the deed to appellant, purporting to be made thereunder, was void. There was no evidence in this case as to whether or not the name of the party to whom the land was last assessed next before the sale appeared on the assessment roll. It only appears that subsequent to 1895 the land was each year assessed to respondent, and the taxes paid by him. In fact, the matter of such address being known, or not, was not gone into on the trial, and it was found and conceded that no notice, other than by publication, was attempted to be given.

[7] Section 3898 of the Political Code provides that, on receipt of the amount bid on a sale in behalf of the state, "the tax collector must execute a deed to the purchaser reciting the fact necessary to authorize such sale and conveyance, which deed shall convey all the interest of the state in and to such property and shall be prima facie evidence of all facts recited therein." Under this section, and by virtue of the provisions of the amendment we have been considering, it is made the duty of the tax collector to set forth in a tax deed, as far as notice is concerned, that it had been published, and either that notice by mail had been given, or that it had not been on account of the address of the party to whom the land was last assessed not being known. When these matters are set forth in the deed, it is prima facie evidence of the truth of the facts recited; but when, however, the deed is silent upon the matter of notice by mail—the giving of which, when the condition for it exists, is just as essential to the validity of the sale and tax deed under it as notice by publication—if the deed is not void on account of the absence of such recital, it is at least incumbent on the party asserting title under it to make proof of these matters in support of his tax deed. When there is a recital in the deed, it is prima facie evidence of the fact; but this is only made so by virtue of the statute, and when there is a recital. If there is no recital of a matter affecting the jurisdiction or power of the tax collector to make a valid sale and execute a valid deed, and which, if inserted, would by force of the statute constitute prima facie evidence, the common-law rule prevails, and it is essential that the person asserting title under the tax deed shall make proof of the facts necessary to support its validity. In Blackwell on Tax Titles, in considering the tax deed from a common-law standpoint, it is said, at section 845: "This deed, according to principles of the common law, is simply a link in the chain of the grantee's title. It does not ipso facto transfer the title of the owner, as in grants from the government or in deeds from man to man. The operative character of it depends upon the regularity of the anterior proceedings. The deed is not a title itself, nor even evidence of it. Its recitals bind no one. It creates no estoppel on the former owner, and no presumption arises on the mere production of the deed that the facts upon which it is based had any existence." The rule at common law has, by virtue of section 3898, been changed to the extent of making the recitals of fact necessary to authorize the sale prima facie evidence of such authorization. When there is no recital on the subject, the common-law rule obtains, and the claimant under a tax deed must make proof of the facts which authorized the sale, and which sustain the validity of his tax deed. No effort in this behalf was made by appellant.

[8] An attack is made by appellant on a number of other findings made by the court and rulings respecting the admission of evidence. But, assuming that all these points are well taken, it would not warrant a re-

versal of the judgment or the order denying a new trial. The finding that the only notice given by the tax collector was by publication under the old section is entirely separate and distinct from any other finding made in the case, and does not rest for its sufficiency on any of the other findings which are attacked, or on any testimony, the admission of which appellant assigns as error. Under these circumstances, as this finding of itself warranted a judgment in favor of plaintiff against the asserted title of appellant under the tax deed from the state, it is immaterial to consider other findings or matters as to evidence which have no relation to and could not affect this particular uncontested finding.

[9] Appellant makes the further point that judgment should not have been awarded respondent without requiring the latter to refund to appellant the amount of taxes, penalties, charges, and costs paid by him at the tax sale, under the general rule that "he who seeks equity must do equity." 1 Pom. Eq. Jur. § 385. It may be admitted that in a proper case, and where the point is properly presented to the trial court, such reimbursement should be ordered. As the question is involved in other cases now pending in this court under submission, we do not here discuss it. In the present case, we do not think the record shows that the question was presented to the court below. Under our rules of pleading in actions to quiet title, the plaintiff need not set out the particulars of the claim of the defendant which he is attacking. He may merely allege that the defendant asserts some interest or claim which is without right. This the plaintiff did, and nothing more. The complaint, therefore, does not show that there was any equitable right in the defendant or duty justly owing to him from the plaintiff upon which the rule above quoted could be invoked. The equity of the defendant not being apparent on the face of the complaint, the only other way by which it could be presented would be by setting it up in the answer. The defendant made no such answer. He merely denied plaintiff's title, and alleged in general terms that he was himself the owner. By leave of court, after the trial and before the decision below, he filed an amendment to his answer. In this he alleged that he was the owner under and by virtue of a deed from the state, based upon a delinquent tax sale, that the plaintiff's claim to the land was without right, and he thereupon asked that plaintiff take nothing, and that the defendant be adjudged the owner, and the plaintiff be enjoined from asserting any title or claim to the land, and for such other and further relief as should be meet and proper. In setting out his title under the deed from the state, he alleged that he had paid to the state as the purchase price of the land the sum of $25.56. The findings declare this allegation to be true. The record does not show that this money was applied on taxes, or that the defendant paid any other sum. The fact of such payment is alleged merely as one of the incidents leading up to the defendant's acquisition of the title, and not as a basis for a lien on the land or claim against the plaintiff. Perhaps such payment might have been set up as a basis for the claim that the judgment should provide for its repayment. If, on the trial, the point had been urged and judgment for repayment given accordingly, it is probable that the judgment would not have been reversed on appeal by plaintiff, on the ground that there was no pleading to support it. However this may be, it is clearly apparent from the answer as a whole and from the proceedings at the trial that the allegation was not made as a basis for such relief, and that the claim for such relief was not brought to the attention of the trial court. The case comes within the familiar rule that a judgment will not be reversed on appeal because of the failure of the lower court to give relief not embraced in the pleadings, and which it was not asked to give; that is, in effect, for an error which the trial court did not make.

The judgment and order appealed from are affirmed.

We concur: SHAW, J.; HENSHAW, J.; ANGELLOTTI, J.; MELVIN, J.

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18 Cal. App. 19

BRADFORD v. BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 969.)

(District Court of Appeal, First District, California. Jan. 10, 1912. Rehearing Denied by Supreme Court March 9, 1912.)

1. Constitutional Law (§ 205*)—Statutes (§ 96*)—Privileges and Immunities—Special Laws—Greek Letter Fraternities.

St. 1909, p. 332, which prohibits secret fraternities in public schools, does not violate Const. art. 1, § 21, or article 4, § 25, prohibiting special privileges or immunities, because the act does not extend to normal schools, nor because it provides that it shall not prevent membership in the order of the Native Sons of the Golden West, or other kindred organizations not directly associated with the public schools.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 205;* Statutes, Dec. Dig. § 96.*]

2. Statutes (§ 122*)—Title—Sufficiency.

St. 1909, p. 332, entitled "An act to prevent the formation and prohibit the existence of secret, oath-bound fraternities in the public schools," and prohibiting pupils to join any "secret fraternity, sorority or club, wholly or partly formed from membership of pupils attending such public schools," etc., does not violate Const. art. 4, § 24, which requires that the subject of an act shall be expressed in its title.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 122.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 172½,* New, vol. 14, Key No. Series)—FRATERNITIES —"OATH-BOUND"—"SECRET."

"Oath-bound" and "secret," as used in St. 1909, p. 332, prohibiting "secret, oath-bound" fraternities in the public schools, are synonymous.

4. SCHOOLS AND SCHOOL DISTRICTS (§ 172½,* New, vol. 14, Key No. Series)—"FRATERNITIES."

The word "fraternities," as used in St. 1909, p. 332, which prohibits secret fraternities in the public schools, includes organizations of both sexes, sororities, and clubs.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, p. 2943.]

5. CONSTITUTIONAL LAW (§ 206*)—PRIVILEGES AND IMMUNITIES—PUBLIC SCHOOLS.

St. 1909, p. 332, which prohibits secret fraternities in public schools, does not violate Const. U. S. Amend. 14, providing that no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States in that it deprives a citizen of the right to attend a public school.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 206.*]

6. CONSTITUTIONAL LAW (§ 206*)—PRIVILEGES AND IMMUNITIES.

The rights and privileges granted to citizens dependent solely upon the laws of the state are not within Const. U. S. Amend. 14, which provides that no state shall make or enforce any law abridging the privileges and immunities of citizens of the United States.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 206.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Petition for writ of mandate by Doris Bradford, through Ruth Bradford, her guardian ad litem, against the Board of Education of the City and County of San Francisco and others. From a judgment denying the writ, plaintiff appeals. Affirmed.

Weinmann, Wood & Cunha and L. R. Weinmann, for appellant. Percy V. Long, City Atty., and John F. English, Asst. City Atty., for respondents.

KERRIGAN, J. This is an appeal from an order and judgment, denying the petitioner a writ of mandate to compel the respondents, the board of education of the city and county of San Francisco and the members thereof, to admit petitioner as a pupil to the Girls' High School of San Francisco, said board having theretofore suspended her for the reason that, while enrolled as a pupil in said school, she joined and became a member of a secret, oath-bound Greek letter sorority existing in said school in violation of a recent act of the Legislature.

In the year 1909 there was enacted in this state the following statute:

"An act to prevent the formation and prohibit the existence of secret, oath-bound fraternities in the public schools.

"The people of the state of California, represented in Senate and Assembly, do enact as follows:

"Section 1. From and after the passage of this act, it shall be unlawful for any pupil, enrolled as such in any elementary or secondary school of this state, to join or become a member of any secret fraternity, sorority or club, wholly or partly formed from the membership of pupils attending such public schools, or to take part in the organization or formation of any such fraternity, sorority or secret club; provided that nothing in this section shall be construed to prevent anyone subject to the provisions of the section from joining the order of the Native Sons of the Golden West, Native Daughters of the Golden West, Foresters of America or other kindred organizations not directly associated with the public schools of the state.

"Sec. 2. Boards of school trustees and boards of education shall have full power and authority to enforce the provisions of this act and to make and enforce all rules and regulations needful for the government and discipline of the schools under their charge. They are hereby required to enforce the provisions of this act by suspending, or, if necessary, expelling a pupil in any elementary or secondary school who refuses or neglects to obey any or all such rules or regulations." St. 1909, p. 332.

Following the enactment of this statute, the board of education of the city and county of San Francisco promulgated certain rules and regulations and passed resolutions having for their object the enforcement of this act. It appears from the respondents' answer (the allegations of which are admitted to be true by petitioner's demurrer thereto and by a subsequent stipulation of the parties): "That subsequent to the adoption of the aforesaid act of the Legislature Doris Bradford, petitioner herein, was a pupil enrolled as such in the Girls' High School, a secondary school in the state of California; that subsequent to the said adoption of the said act of the Legislature and while such an enrolled pupil said Doris Bradford joined and became a member of a secret, oath-bound Greek letter sorority existing in said Girls' High School and known as the Omega Nu (Gamma Beta Chapter), partly formed from the membership of pupils attending the said Girls' High School; that said Omega Nu Sorority was at the time said Doris Bradford became a member of the said Omega Nu Sorority, ever since has been,and now is directly associated with the public schools of the state of California; and that Doris Bradford ever since so joining said sorority has been and still is a member of said Omega Nu Sorority." The said answer also set up the facts as to the adoption of said rules by said board after the passage of said act, and the adoption by said board of a resolution suspending said petitioner as a member of said school. To this answer the petitioner demurred, and a hearing was had upon this demurrer. The demurrer being overruled and the foregoing facts being stipulated by the parties, the court gave judgment dismissing the petition and denying petitioner all relief. The appeal is from said judgment.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Before proceeding to a discussion of the case, a brief reference to the growth and effect of secret societies in the public schools of this country may not be wholly superfluous. The first Greek letter society in a secondary school was Alpha Phi, a literary society, which became a part of a fraternity in 1876. Subsequently secret societies, patterned after college and university fraternities, sprang into existence in the high schools all over the country until now they have "become so numerous," says a writer on the subject, "as to make it necessary to manipulate the Greek alphabet in an artful way in order to make the necessary distinctions." In time many educators came to believe that whatever good might be claimed for college fraternities was not shared by secret fraternities organized among boys and girls attending the preparatory schools whose characters are yet unformed. It has been said of such societies that they tend to engender an undemocratic spirit of caste, to promote cliques, and to foster a contempt for school authority. Doubtless these organizations have many redeeming features, and, we may say, the standard of excellence of some of them is such that they are not opposed by school authorities. Report of Commission of Education, Annual Reports, 1907, of Interior Department, vol. 1, pp. 437, 441; Encyclopedia Britannica (11th Ed.) vol. 11, p. 40. Nevertheless, in order to curb what is said to be their evil effects in secondary schools, rules and regulations have recently been adopted by boards of education in many of the cities of the country; laws have also been enacted in Ohio, Indiana, Minnesota, Kansas, and other states, either absolutely forbidding them or placing them under control. Cases arising under these laws and local regulations have come before the courts of those states, and such courts have uniformly held valid reasonable rules adopted by school authorities to prevent the establishment and development of these secret societies in preparatory schools. Wayland v. Board of School Directors, 43 Wash. 441, 86 Pac. 642, 7 L. R. A. (N. S.) 352; Wilson v. Board of Education, 233 Ill. 464, 84 N. E. 697, 15 L. R. A. (N. S.) 1136, 13 Ann. Cas. 330; Favorite v. Bd. of Ed., 235 Ill. 314, 85 N. E. 402; People v. Wheaton College, 40 Ill. 186.

[1] Coming now to a consideration of the case at bar, it is the contention of appellant that the statute in question is void in that it contravenes several provisions of our Constitution. Much is said in the interesting and instructive briefs of counsel about the policy of the Legislature in enacting laws of this character. With that, however, this court has no concern. We are simply required to decide whether or not, in passing the law in question, the Legislature acted within the limits imposed upon it by the Constitution. As was said in the case of Wilson v. Bd. of Education, 137 Ill. App. 192, where this very question of secret fraternities among school pupils was being considered: "There may be a contrariety of opinion as to whether secret societies in schools among pupils are beneficial or harmful to either the pupil or the cause of education. In such condition, who shall decide whether the pupils should be encouraged or not in making affiliation with any of them? The courts or the board? It makes no difference which of them shall control so far as affecting the ultimate conclusion is concerned, for the courts have been quite outspoken in their condemnation of such societies in schools as hurtful to the pupil and detrimental to his educational progress. Even if it were otherwise, if the rule is reasonable and equal in its operation, the courts cannot impose their judgment or opinion contrary or in opposition to that of the board, which, in the promulgation of such rules, acts judicially."

In support of her contention that the act is void, appellant first claims that it contravenes section 21 of article 1 of the Constitution, providing, "Nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens"; and also that part of section 25 of article 4 providing that the Legislature shall not pass local or special laws, "granting to any corporation, association or individual any special or exclusive right, privilege or immunity."

It is argued by counsel that this contravention of constitutional provisions arises because the act grants an immunity to certain pupils in the public schools of the state, viz., those in the normal schools, in that only the elementary and secondary schools come within the provisions of the act; that it grants a special privilege to such pupils by allowing them to join fraternities, sororities, and secret clubs while other students in the public schools are punished for doing the same thing; that it grants a privilege and immunity to certain fraternities, viz., the order of the Native Sons of the Golden West, the Native Daughters of the Golden West, the Foresters of America, and other kindred organizations not directly associated with the public schools, because pupils in said schools may join such societies and not come within the inhibition of the act.

The question of the construction and application of said section 21 of article 1 has come before the Supreme Court of this state in many cases, and among them quite recently in the case of Wheeler v. Herbert, 152 Cal. 233, 92 Pac. 357, where that court said (speaking through Mr. Justice Shaw): "A law applying uniformly to all citizens of a particular class does not violate this section (Const. art. 1, § 21), if the class is one founded upon some natural, intrinsic or constitutional distinction differentiating its members from the general body from which the class is selected"—citing California cases.

Again, in Ex parte King, 157 Cal. at page 164, 106 Pac. at page 579, the Supreme Court had the same question before it, and said: "* * * A law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction. * * * If the individuals to whom the legislation is applicable constitute a class characterized by some substantial qualities or attributes of such a character as to indicate the necessity or propriety of certain legislation restricted to that class, such legislation, if applicable to all members of that class, is not violative of our constitutional provisions against special legislation. * * * The question whether the individuals affected by a law do constitute such a class is primarily one for the legislative department of the state, and it is hardly necessary to cite authorities for the proposition that when such a legislative classification is attacked in the courts every presumption is in favor of the legislative act. When, upon the facts legitimately before a court, it is reasonable to assume that there were reasons, good and sufficient in themselves, actuating the Legislature in creating that class, though such reasons may not clearly appear from a mere reading of the law, such assumption will be made, and the legislation upheld. To warrant a court in adjudging the act void on this ground, it must clearly appear that there was no reason sufficient to warrant the legislative department in finding a difference and making the discrimination."

Applying this construction to the act under consideration, it is quite apparent to us that the younger and more immature pupils of the public schools may quite properly form a class and be made the subject of this character of legislation. Normal schools and colleges are attended by students who are preparing for the serious affairs of life; and being older in years and with wider experience are better fortified to withstand any possible hurtful influence attendant upon membership in secret societies and clubs than the younger pupils attending elementary and secondary schools, who are less experienced and more impressionable.

We have no doubt that there is a sufficient difference between these last-mentioned schools and the normal to constitute a proper basis for classification, and that the statute applies equally to all of the particular class mentioned. Neither does the exception in the statute of the order of the Native Sons of the Golden West and similar fraternal societies constitute, in our opinion, an invalid discrimination. The act itself requires that they be not "directly associated with the public schools of the state." It is clear that the Legislature intended to discountenance only secret societies in the elementary and secondary schools which are formed almost entirely of the pupils of such schools, and which, in the opinion of the Legislature, were calculated to diminish the efficiency of the educational system of the state and exert a harmful influence upon the younger pupils of its schools as such. No such deleterious effect has been or could be attributed to the occasional membership of such pupils in the fraternal orders excepted in the statute, and such exception therefore cannot be said to be arbitrary or invalid.

We hold, therefore, that the act is general in its character and not special, and does not contravene the provisions of the Constitution referred to.

[2] The next ground of attack urged by appellant is that the act does not conform to that portion of section 24 of article 4 of the Constitution which provides that "every act shall embrace but one subject, which shall be expressed in its title."

It will be observed that the title of the act states that it is an act to prohibit the formation and existence of "secret, oath-bound fraternities in the public schools," while the body of the act forbids the formation and existence of "secret fraternities, sororities or clubs." Basing her argument upon this difference of language, it is the contention of appellant that the act is broader in its scope than the title, for the reasons: First, that the expression "secret fraternities" is broader than "secret, oath-bound fraternities"; and, second, that the title mentions only fraternities, whereas the body of the act deals also with sororities and clubs.

[3] In order that a fraternity may be secret, a promise or an agreement must be made by its members not to reveal its proceedings or secret work, and as to various other matters, which undertaking is doubtless invariably in the form of a pledge, an obligation, or of a nonjudicial oath. As here used, the compound word "oath-bound" is synonymous with the word "secret." We have no doubt that this is the sense in which the term was employed by the Legislature. Dictionary definitions warrant this interpretation of the language, and judicial authority for the same may be found. In the case of State v. Gay, 59 Minn. 6, 60 N. W. 676, 50 Am. St. Rep. 389, it is said that an oath "in its broadest sense includes any form of attestation by which a party signifies that he is bound in conscience to perform an act faithfully and truthfully." See, also, Com-

monwealth v. Jarboe, 89 Ky. 143, 12 S. W. 138.

[4] We think, also, that the word "fraternities" in its popular sense and as here used includes organizations of both sexes, sororities, and clubs. In this state our Codes contain sections declaring that "words used in the masculine gender include the feminine." While such sections apply specifically to the Codes alone, they emphasize the fact that in the enactment of laws the Legislature frequently employs the masculine gender in matters where it is evident that the feminine is not excluded. Even if the word "fraternity" could be said to mean an organization of males only, it might still be apparent from the context that it was used in a sense to include the opposite sex also. But without resorting to any such latitude of construction, the word itself has a broader signification. We find the following dictionary definitions of "fraternity": Standard Dictionary: "Brotherhood or sisterhood in general;" "a body of persons associated or held to be associated together by common interests or characteristics;" "a brotherhood or sisterhood." "Greek-letter fraternities. (U. S.) College literary or social organizations known by the initial letter of a Greek motto or the like, and consisting usually of affiliated chapters. * * *" Webster's International Dictionary: "The state or quality of being fraternal or brotherly; brotherhood * * * company; a brotherhood; a society." Thus it is manifest that the word "fraternity" in the title is broad enough to include "sorority" and "club" mentioned in the body of the statute. We conclude therefore that the body of the act is not broader than the title.

[5] Finally, we are unable to perceive that the statute is, as claimed by appellant, repugnant to the fourteenth amendment to the federal Constitution, because it deprives a citizen of the right to attend a public school of the state. The part of the constitutional provision relied upon by appellant reads: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

[6] It has been held that rights and privileges granted to citizens which depend solely upon the laws of a state are not within this constitutional inhibition. Cory et al. v. Carter, 48 Ind. 327, 17 Am. Rep. 738; Marshall v. Donovan, etc., 10 Bush (Ky.) 681; People ex rel. King v. Gallagher, 93 N. Y. 438, 45 Am. Rep. 232. The system of public schools of this state is a state institution, and is subject to the exclusive control of the constitutional authorities of the state. It is, of course, true that the right of attending a public school is capable of enforcement at law, but it is not such a right as is guaranteed by the above-quoted provision of the federal Constitution. "The privilege of receiving an education at the expense of the state is not one belonging to those upon whom it is conferred as citizens of the United States, and therefore, so far as the 'privileges and immunities' clause of the fourteenth amendment is concerned, might be granted or refused to any individual or class at the pleasure of the state." 6 Am. & Eng. Ency. of Law, p. 77. In Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405, it was said: "It will indeed be readily conceded that the privilege accorded to the youth of the state by the law of the state, of attending the public schools maintained at the expense of the state, is not a privilege or immunity appertaining to a citizen of the United States as such; and it necessarily follows, therefore, that no person can lawfully demand admission as a pupil in any such school because of the mere status of citizenship; and it is perhaps hardly necessary to add that assuredly no person can be said to have been deprived of either life, liberty, or property because denied the right to attend as a pupil at such schools, however obviously insufficient and untenable be the ground upon which the exclusion is put."

We are of the opinion that the statute attacked by appellant is valid and constitutional, and that the judgment appealed from should be affirmed, and it is so ordered.

We concur: LENNON, P. J.; HALL, J.

18 Cal. App. 1

Ex parte HENLEY. (Cr. 175.)

(District Court of Appeal, Third District, California. Jan. 4, 1912.)

1. Drunkards (§ 2*)—Confinement in Hospitals.

An affidavit for the arrest and commitment under St. 1911, p. 396, of an inebriate, which alleges that accused is so far addicted to the intemperate use of stimulants as to have lost the power of self-control, and that by reason thereof he is a fit subject for commitment to a state hospital for the insane as an inebriate, is sufficient to justify a warrant for the arrest of accused pending a hearing.

[Ed. Note.—For other cases, see Drunkards, Cent. Dig. § 2; Dec. Dig. § 2.*]

2. Evidence (§ 478*)—Conclusion of Witness—Admissibility—Mental Capacity.

The rule that a witness must state facts, and not opinions deduced therefrom, does not apply to questions concerning mental and moral aspects, such as disposition, temper, intoxication, etc.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2242-2244; Dec. Dig. § 478.*]

3. Bail (§ 42*)—Persons Entitled to Bail.

One arrested under St. 1911, p. 396, authorizing the arrest of inebriates, and providing that an officer receiving a warrant for such arrest must "arrest and detain" accused "until a hearing and examination can be had," is entitled to bail under Const. art. 1, § 6, declaring that persons shall be bailable by sufficient sureties.

[Ed. Note.—For other cases, see Bail, Dec. Dig. § 42.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Application for habeas corpus by William Henley for his discharge under a warrant. Denied, but petitioner admitted to bail.

R. Platnauer, for petitioner. J. Q. Brown, Deputy Dist. Atty., for the People.

BURNETT, J. [1] Petitioner, held on a warrant of arrest by the sheriff of Sacramento county, claims that said warrant was issued without authority of law, and is therefore void. The proceeding against petitioner was instituted under the statute passed by the Legislature of 1911, providing for the "arrest, hearing and commitment of inebriates and drug habitues." Stats. 1911, p. 396. The affidavit upon which the warrant herein was predicated set forth: "That there is now in the said county in the city or town of Sacramento a person named William Henley, who is so far addicted to the intemperate use of stimulants as to have lost the power of self-control. That by reason thereof said person is a fit subject for commitment to a state hospital for the care and treatment of the insane and ought to be confined therein as an inebriate under the provisions of section 2185c of the Political Code of the state of California." Said section, as far as necessary to quote, provides that, "whenever it appears by affidavit to the satisfaction of a magistrate of a county or city and county, that a person is so far addicted to the intemperate use of narcotics or stimulants as to have lost the power of self-control or is subject to dipsomania or inebriety, he must issue and deliver to some peace officer for service a warrant," etc. It is thus to be seen that the affidavit corresponds substantially with the language of the statute. It describes the defendant, so that he appears as a suitable subject for the operation of this beneficent law. No attack is made upon the validity of the statute itself. The competency of the Legislature to enact it is not brought into question; but the contention is made that the magistrate had no jurisdiction to issue the warrant, for the reason that sufficient facts are not alleged in said affidavit from which the magistrate could legally infer that petitioner belongs to a class contemplated by said law. We think, however, it should not be held that said affidavit is so deficient in that respect as to entitle petitioner to be discharged on habeas corpus. The affiant expressed more than a mere opinion. The loss of the power of self-control and the intemperate use of stimulants are facts, although, of course, the knowledge of them may be the result of inference from other facts. But these concepts are so intimately connected with the observation of the appearance or of the conduct of a person as to be properly placed within the category of knowledge or observation, rather than of opinion. They do not require the exercise of judgment so much as of the faculty of perception.

[2] But if we regard the allegations of the affidavit as the expression of an opinion that petitioner is an inebriate, the case falls within the principle of Holland v. Zollner, 102 Cal. 633, 36 Pac. 930, 37 Pac. 231. Therein it is said that, as a general rule, witnesses must state facts, and not opinions deduced from the facts; but to this rule there are several exceptions as thoroughly established as the rule itself. One of these exceptions applies to questions "concerning various mental and moral aspects of humanity, such as disposition and temper, anger, fear, excitement, intoxication, veracity, general character, etc. Note to Wharton on Evidence, § 573. The reason underlying the exception is that, from the very nature of the subject in issue, it cannot be stated or described in such language as will enable persons, not eyewitnesses, to form an accurate judgment in regard to it. De Witt v. Barly, 17 N. Y. 340." As further stated therein: "Various mental and moral operations find outward expression as clear to the observer as any fact coming to his observation; but he can only give expression to the fact by giving what to him is the ultimate fact, and which, for want of a more accurate expression, we call opinion." So here, affiant states what to her is an ultimate fact, deducible probably from other facts, and partaking somewhat of the nature of an opinion, but being strictly legal evidence of the mental condition of petitioner superinduced by excessive indulgence in stimulants. We can see no reason why this might not, within the meaning of the law, "satisfy" the magistrate that petitioner should be examined as to whether he is subject to said provision. The proceeding, it may be remarked, is simply preliminary to the examination of the charge to be had after the notice prescribed by the statute, and the affidavit sufficiently informs petitioner of the nature of the accusation.

We do not consider in point the cases cited by petitioner as to the publication of summons. Of these, Ricketson v. Richardson, 26 Cal. 149, is the pioneer, and is typical of the others. Therein it is said that "it is not sufficient to state generally that after due diligence the defendant cannot be found within the state, or that the plaintiff has a good cause of action against him, or that he is a necessary party; but the acts constituting due diligence, or the facts showing that he is a necessary party, should be stated." The propriety of so holding is apparent, as the consideration of "due diligence," "a good cause of action," and "a necessary party" involves questions of law to be determined by the court after an examination of the facts.

[3] Petitioner also urges that, in case the said affidavit is considered sufficient to authorize the magistrate to issue the warrant, then he should be admitted to bail pending the examination of the charge. It appears

that bail was denied by said magistrate, but upon what ground does not appear; nor is any reason advanced here for the order, except that it is a matter of right under the provision of the Constitution of the state that "all persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great." Article 1, § 6. This is a wise and salutary measure, and the scope of it is sufficiently comprehensive to include a person charged with being an inebriate. His right as to bail should certainly not be more restricted than that of a person accused of a grave crime. In the latter contingency, no question would be raised, except in the case of a capital offense, as provided in the Constitution.

There might be instances under this statute where, for the safety of the individual or of society, it would be proper to deny bail; but, unless such a showing is made, the said provision of the Constitution should be held, we think, to apply. It is provided in said statute that the officer to whom the warrant of arrest is delivered must "arrest and detain such person until a hearing and examination can be had." This, of course, must be read in connection with said constitutional provision, as no one would contend that the legislative enactment could operate to modify or repeal any portion of the Constitution.

It is ordered that petitioner be admitted to bail in the sum of $250 pending the examination, the bond to be approved by the Honorable J. W. Hughes, judge of the superior court of Sacramento county.

We concur: CHIPMAN, P. J.; HART, J.

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17 Cal. App. 789

PEOPLE v. RHODES. (Cr. 349.)

(District Court of Appeal, First District, California. Jan. 4, 1912.)

1. Homicide (§ 309*)—Manslaughter—Evidence—Instructions.

Where there is no evidence proving manslaughter, it is not error to refuse a charge thereon.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 652; Dec. Dig. § 309.*]

2. Criminal Law (§ 1122*)—Evidence—Instructions—Review.

Where the evidence is not in the record on appeal from a conviction of second-degree murder, error in the refusal to charge on manslaughter is not shown.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2942; Dec. Dig. § 1122.*]

3. Criminal Law (§ 977*)—Judgment—Time of Rendition—Jurisdiction.

The rendition of a judgment ten days after conviction where no continuance was had for a time longer than five days, as authorized by Pen. Code, § 1191, is not an act in excess of jurisdiction, but is error reviewable on appeal only.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2492; Dec. Dig. § 977.*]

4. Criminal Law (§ 1144*)—Appeal—Affirmative Showing of Error.

Where it does not affirmatively appear that an extension to the tenth day after verdict for rendition of judgment thereon was not made for the purpose of hearing a motion for a new trial, as authorized by Pen. Code, § 1191, and the record shows that on the rendition of the verdict the court fixed the time for judgment on the tenth day thereafter, and that at the appointed time a motion for new trial was made and denied, and judgment rendered on the verdict, the court on appeal must presume that the trial court acted regularly, and that the continuance for judgment was for the purpose authorized by the statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3035; Dec. Dig. § 1144.*]

5. Criminal Law (§ 865*) — Coercion of Jury.

A murder case was submitted to the jury at 5:25 p. m. of the third day of the trial. At 9:00 p. m. the court directed the sheriff to prepare beds for the jury. At 9:50 a. m., on the jury being brought before it, the court stated that a verdict should be arrived at, and that it was the court's duty to keep the jury locked up to give them ample opportunity to deliberate. At 1:55 p. m. the court told the jury that it was their duty to reconcile their views as much as possible, and detained them for further deliberation. At 3:30 p. m. the jury returned a verdict for second-degree murder, with a request for mercy. *Held*, not to show coercion by the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2069; Dec. Dig. § 865.*]

6. Criminal Law (§ 864*)—Deliberation of Jury—Communications by Judge—Indication of Nature of Verdict.

The remarks of the court to the jury during their deliberation that a verdict should be reached, and that they would be detained for opportunity for deliberation, that it was their duty to reconcile their views as much as possible, and to argue the case dispassionately, were not objectionable, as indicating that the court thought that the verdict should be one of guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2068; Dec. Dig. § 864.*]

Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Carl Rhodes was convicted of second degree murder, and he appeals. Affirmed.

B. A. Herrington, for appellant. Attorney General Webb, for the People.

HALL, J. Defendant was convicted of murder in the second degree, and has appealed from the judgment without bringing up any testimony. The appeal is before us upon the record provided for by section 1246 of the Penal Code only.

The first point urged for a reversal is that the court erred in refusing to give instructions, requested by defendant, upon the question of manslaughter.

[1] Unless there was evidence before the jury tending to prove a case of manslaugh-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ter, it was not error to refuse to give any instruction upon that subject. People v. Byrnes, 30 Cal. 207; People v. Lee Gam, 69 Cal. 552, 11 Pac. 183; People v. Turley, 50 Cal. 469; People v. Estrado, 49 Cal. 171; People v. Fellows, 122 Cal. 233, 54 Pac. 830; People v. Chaves, 122 Cal. 140, 54 Pac. 596.

[2] It is necessary for the appellant to affirmatively show error in the action of the trial court before this court will reverse the judgment or order appealed from. People v. Russell, 156 Cal. 450, 105 Pac. 416. There being no evidence in the record before us, it does not and cannot appear affirmatively that the court was not perfectly justified in refusing to give any instruction upon the question of manslaughter, and we must presume that no error was committed in refusing such instructions. People v. Clark, 121 Cal. 633, 54 Pac. 147.

[3] The fourth point urged for a reversal is that the court lost jurisdiction to render judgment by reason of the fact that judgment was not pronounced until after the expiration of more than five days after the rendition of the verdict, although, as it is claimed, no continuance was had beyond such time for any purpose, as authorized by section 1191 of the Penal Code. But the rendition of judgment upon a verdict of conviction after a continuance for a longer time than is permitted by section 1191 of the Penal Code is not an act in excess of jurisdiction, but is error, to be reviewed upon appeal only. This is the rule laid down in Rankin v. Superior Court, 157 Cal. 189, 106 Pac. 718, where a writ of prohibition was refused for the reason that the rendition of judgment under such circumstances would not be in excess of jurisdiction, but an error only, to be reviewed upon appeal.

[4] Treating the action of the court as a possible error, appellant is again met by the rule that it is incumbent upon him to affirmatively show error. This he has failed to do. The record shows that upon the rendition of the verdict the court fixed the time for pronouncing judgment upon the tenth day thereafter. This was within the time allowed by section 1191 of the Penal Code, where such extension is granted for the purpose of hearing a motion for a new trial. At the time appointed for the rendition of judgment, a motion for a new trial was made and denied, and judgment thereupon rendered. While it does not affirmatively appear that the time for pronouncing judgment was extended to 10 days for the purpose of hearing such motion for a new trial, it does not affirmatively appear that the extension was not made for such purpose; and we must therefore presume that the court acted regularly, and that the continuance was for such purpose. People v. Scott, 13 Cal. App. 301, 109 Pac. 498. Petition for rehearing in Supreme Court denied June 23, 1910. It therefore does not appear that the court erred in pronouncing judgment on the tenth day after the rendition of the verdict.

[5] The only other points relied upon for a reversal are that the court, by certain remarks that it made in the presence of the jury, coerced the jury into rendering a verdict, and that it also in effect charged them that they should render a verdict of conviction. As the facts upon which these contentions are predicated are closely connected, it is convenient to consider them together.

The cause was submitted to the jury at 5:25 p. m. of the third day of the trial. At 9 p. m. of the same evening, the jury were brought into court, and in answer to questions put by the court the foreman stated that they were numerically divided on their verdict seven to five, and that they had taken several ballots; the last three or four being the same—seven to five. Whereupon the court said: "Mr. Sheriff, prepare the beds in the jury room. The court will be here at any time before 11, providing you agree upon a verdict. Mr. Clerk, make an order that the sheriff take the jury out to breakfast, dinner, and supper until the further order of the court." At 9:50 a. m. the next day, the jury was again brought into court, and the court, after learning that upon their last ballot they stood eight to four, said: "It strikes the court, gentlemen, that this is a case wherein a verdict should be arrived at, and it seems to be my duty to keep you locked up until such time as you have had ample opportunity to deliberate on your verdict. It has not been my habit to keep the jurors too long; but this is an important case, and I think a verdict should be arrived at. You will be sent back to the jury room, and the court will be within call at any time during the day." At 1:55 p. m. of the same day, the jury was brought into court, and stated that they stood seven to five, and for the first time stated that "there is no possible chance for a verdict." Whereupon the court said: "The court may differ with you upon that subject. A case of this kind, involving as much as it does, it is the duty of the jury to reconcile their views as much as possible, and for that reason it is the duty of the court to give them ample time to deliberate upon a verdict. The case is one in which some sort of verdict should be arrived at, and I deem it nothing but my duty to see that the jury endeavor to arrive at a verdict. I am not keeping the jury in the box as a mere matter of feeling; but I think it is my duty to assist them as much as possible to finally come to an understanding, and for that reason I feel it incumbent upon me to keep you there. I shall send you back to the jury box, gentlemen. I told you that I shall be within call until 11 o'clock tonight. I will say further that you, in discussing this matter among yourselves, it is your duty to argue it dispassionately, and carefully consider all the testimony that was introduced before you, and the instructions that have been given you by the court; allow no personal feeling among yourselves. Sometimes jurors get passionate and quarrel among themselves; but this party of men seem to be too intelligent to do anything like that, and you should discuss the matter dispassionately, and if you desire to see me at any time prior to 11 o'clock tonight I shall be on hand." The jury again retired, and at 3:30 p. m. of the same day returned a verdict of murder in the second degree, with a request for the extreme mercy of the court.

We do not find anything of coercion towards the jury in the action of the court. It is true that the jury understood from the remarks of the judge that he intended to give the jury ample time to carefully consider the case. At the outset, they learned from the directions given to the sheriff and clerk that they would be made as comfortable as possible. At no time prior to 1:55 p. m. of the day upon which the verdict was returned was it stated by any of the jurors that a verdict could not be reached. A verdict was reached within less than 2 hours thereafter, and within about 22 hours from the submission of the cause to the jury. Neither do we think that by any of the remarks made by the court the case was brought within the rule laid down in People v. Kindleberger, 100 Cal. 367, 34 Pac. 852, and followed in People v. Conboy, 15 Cal. App. 97, 113 Pac. 703.

[6] While the court did say that he thought some sort of a verdict should be rendered, there is nothing to indicate that he thought that such verdict should be one of guilty. The court did not know how the jury stood at any time, except that it was divided numerically in certain proportions. The remarks of the court, when taken as a whole, were evidently intended as an explanation of why he detained them as he did, and to impress upon them that the case was an important one, requiring careful and dispassionate consideration.

The facts disclosed by this record are similar in their essential features to the facts in People v. Miles, 143 Cal. 636, 77 Pac. 666, where a verdict of conviction was affirmed, and where the court said, "that it was proper for the court to urge the importance of reaching a verdict, and as it intimated no opinion of its own, or suggested how the verdict should go, the defendants were not prejudiced."

In both People v. Kindleberger and People v. Conboy, the remarks of the court and the circumstances under which they were made were such as to intimate that the court thought that the jury should find a verdict of guilty. In the case at bar, the court told the jury that it thought some sort of a verdict should be reached, and this was said in connection with remarks about the importance of the case, and not, as in the Kindleberger and Conboy Cases, in connection with remarks pointing to the clearness and satisfactory character of the evidence.

We do not think that the defendant was or could have been prejudiced by the remarks of the court, and the judgment should not be reversed because thereof; yet we agree with what the late Justice McFarland said, in concurring in the judgment of affirmance in People v. Miles, supra, to the effect that such remarks are hazardous and should be avoided.

The judgment is affirmed.

We concur: LENNON, P. J; KERRIGAN, J.

18 Cal. App. 30

THOMPSON v. SAN FRANCISCO GAS & ELECTRIC CO. (Civ. 881.)

(District Court of Appeal, First District, California. Jan. 12, 1912.)

1. ELECTRICITY (§ 11*)—DUTY TO FURNISH—APPLICATION.

Where defendant electric company refused to furnish electricity to plaintiff, because he refused to sign an application, by which he would have agreed to comply with certain illegal regulations, it was no defense to a suit to recover damages for its alleged wrongful refusal that plaintiff did not offer to pay the legal rate, to abide by all reasonable regulations, and that he did not specify how much electricity he would require.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 11.*]

2. ELECTRICITY (§ 11*) — REFUSAL TO GIVE SERVICE—DAMAGES.

Where an electric company, which was a public service corporation, wrongfully refused to furnish plaintiff with electricity, plaintiff could recover damages at common law, independent of Civ. Code, § 629, providing that if, for a space of 10 days after application for service, the corporation refuses to furnish the same the applicant may recover $5 a day as liquidated damages.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 11.*]

3. ELECTRICITY (§ 11*)—REFUSAL OF SERVICE—ACTION FOR DAMAGES—PLEADING.

Where, in a suit by an applicant for electric service to recover liquidated damages for defendant's refusal to furnish service as authorized by Civ. Code, § 629, the complaint stated facts sufficient to constitute a cause of action for ordinary damages at common law, independent of the statute, it was not subject to general demurrer, under a claim that the statute was unconstitutional, as discriminatory.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 11.*]

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by Henry Thompson against the San Francisco Gas & Electric Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Henry Thompson, in pro. per. William B. Bosley, for respondent.

LENNON, P. J. Action for damages for wrongful refusal to furnish electricity to light plaintiff's apartment.

Plaintiff alleges in his complaint that the defendant is a corporation organized and existing in the state of California for the purpose of supplying for public use gas and electric light; that the plaintiff was at all times mentioned in the complaint the occupant of a certain described apartment in the city and county of San Francisco, which apartment was fitted for using electricity, and was situated within the territory served by said company with gas and electric illumination. That in the month of October, 1909, the plaintiff made an application in writing to the defendant to be supplied with electricity at said apartment; but the defendant refused to furnish electricity for said apartment, unless plaintiff would first fill out and sign a certain form of application (a copy of which is set forth in the complaint), and pay to the company the sum of $2.50 for installing a meter and making service connections. Plaintiff also alleges that at all times mentioned he was willing, ready, and able to pay all reasonable and proper charges for said electricity, but that he refused to sign said application, and that defendant declined to furnish him with the requested current, and has failed and neglected to do so. By reason of all of which, the plaintiff alleges that he was damaged in the sum of $540, for which he prays judgment, together with costs.

Defendant filed a general demurrer to the complaint, which, after argument, was sustained by the court, and, the plaintiff declining to amend, judgment was regularly entered thereon in favor of defendant, from which judgment plaintiff prosecutes this appeal.

[1] In support of the correctness of the court's ruling sustaining the demurrer, defendant claims that plaintiff's application to be furnished with electricity was insufficient to impose upon defendant the obligation to do so, in that plaintiff did not offer to pay the legal rate therefor and to abide by all reasonable regulations of the company; nor did he therein, or at all, specify how much electricity he would require. To sustain this position the following authorities may be cited: 20 Cyc. 1161; Hieronymus v. Bienville Water Supply Co., 131 Ala. 447, 31 South. 31; Robbins v. Bangor Ry. & Elec. Co., 100 Me. 496, 62 Atl. 136, 1 L. R. A. (N. S.) 963; Buffalo County Telephone Co. v. Turner, 82 Neb. 841, 118 N. W. 1064, 19 L. R. A. (N. S.) 693, 130 Am. St. Rep. 699; Williams v. Mutual Gas Co., 52 Mich. 499, 18 N. W. 236, 50 Am. Rep. 266; Smith v. Capital Gas Co., 132 Cal. 209, 64 Pac. 258, 54 L. R. A. 769; Ives and Mason on the Control of Public Utilities; Andrews v. N. R. E. L. & P. Co., 23 Misc. Rep. 512, 51 N. Y. Supp. 872; Shepard v. Milwaukee Gas Light Co., 15 Wis. 318, 82 Am. Dec. 679.

The company also contends that it was entitled to the amount demanded as compensation for installing an electric meter and for making the necessary service connections with the plaintiff's apartment, citing some of the cases just adverted to. The company, however, made no objection to the form of plaintiff's demand, but presented the plaintiff with an application which was in effect a contract, and told him that, unless he signed it, the company would refuse to comply with his request. The proposed document contained a great many conditions, one of which, at least, the company now concedes it was not entitled to require. It must therefore be held that the company waived any objection to the demand by the plaintiff, or to the matters and things to which, under the cases cited, the company may have been entitled. This conclusion is supported by authority, and seems to us to be sound and logical. In the case of Shepard v. Milwaukee Gas Light Co., supra, the syllabus correctly states the point decided as follows: "Gas company cannot require person to sign written application for gas, stating the number of burners, etc., which it might otherwise require him to sign, where the application is in an agreement, which contains a promise to abide by certain unreasonable and illegal rules and regulations adopted by the company, so that he could not sign the application without being bound by the promise; and the company, by presenting the application in that shape, waives its right to insist upon the application in any other."

Plaintiff's action appears to be founded on section 629 of the Civil Code, which provides: "Upon the application in writing of the owner or occupant of any building or premises distant not more than one hundred feet from any main, or direct or primary wire, of the corporation, and payment by the applicant of all money due from him, the corporation must supply gas or electricity as required for such building or premises, and cannot refuse on the ground of any indebtedness of any former owner or occupant thereof, unless the applicant has undertaken to pay the same. If, for the space of ten days after such application the corporation refuses or neglects to supply the gas or electricity required, it must pay to the applicant the sum of fifty dollars as liquidated damages and five dollars per day as liquidated damages for every day such refusal or neglect continues thereafter."

It will be observed that this section imposes a penalty for failure to comply with its terms on corporations furnishing gas and electricity, and leaves free from such penalty natural persons and copartnerships engaged in the same business who may be guilty of a like omission. Defendant contends that for this reason the statute is repugnant to section 11 of article 1 of the Constitution, which reads: "All laws of a general nature shall have a uniform operation."

The section of the Civil Code in question was enacted in the year 1872, and was based on the statute of 1863 (Stats. 1863, p. 647), at both of which times a discrimination of this nature was not prohibited by the Constitution. Much litigation grew out of this section, and it was regarded, of course, as a valid piece of legislation. But in the year 1905, in amending this section so as to make its provisions apply to the furnishing of electric current, as well as gas, it was repealed and immediately re-enacted, and the Legislature omitted, inadvertently no doubt, to preclude all question as to its constitutionality, under the provision of the new Constitution of 1879 relied on here, by making it apply, not only to corporations, but also to individuals and copartnerships, engaged in the same business. Under section 19 of article 11 of the Constitution, any natural person or corporation engaged in the business of furnishing artificial illumination to the public may, in order to do so, use, as therein prescribed, the public streets in any municipal corporation for the purpose of laying or erecting its gas conduits and electrical transmission lines. And it would seem, as argued by defendant, that there is no reason in law or in the nature of things why a natural person or a firm engaged in the business of supplying the public with illumination should not be subject to exactly the same penalties as corporations thus engaged. Johnson v. Goodyear Mining Co., 127 Cal. 4, 59 Pac. 304, 47 L. R. A. 338, 78 Am. St. Rep. 17; Gulf, Colo. et al. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666. Compare Western Union Tel Co. v. Hopkins, 116 Pac. 557, decided June 5, 1911. But the view we have reached on another phase of this case renders a decision of this point unnecessary.

[2] It will be conceded that if the defendant, a quasi public corporation, enjoying the privilege under the Constitution of using the public streets of the municipality for the location and maintenance of its conduits and transmission lines, wrongfully refused to furnish the plaintiff with electricity, the plaintiff had a good cause of action against the defendant, independent of section 629 of the Civil Code, for whatever damages he may have suffered as the result of such refusal (20 Cyc. 1163b and 1164); in other words, an action for the penalty provided by statute is not exclusive. 16 Ency. of Pl. & Pr. 244, 283; 20 Ency. of Pl. & Pr. 603; 3 Sutherland on Code Pl. & Pr. § 5027; Pearkes v. Freer, 9 Cal. 642. See, also, Ind. Nat. & Ill. Gas Co. v. Anthony, 26 Ind. App. 307, 312, 58 N. E. 868, where, in passing on a similar point, the court said that a city ordinance, providing a penalty for failure of a gas company to supply gas as therein prescribed, did not interfere with the right of a person to maintain an action on his own behalf for the recovery of such damages as he may have suffered.

[3] In the case at bar, the plaintiff by appropriate allegations has stated a case within the terms of section 629 of the Civil Code; but, if no cause of action is set forth thereunder because of the unconstitutionality of the section, still the demurrer should have been overruled, if the complaint contains facts sufficient to constitute a cause of action for what we may call civil or ordinary damages. This we think the complaint does. If section 629 is, as claimed in effect by defendant, to be regarded as thought nonexistent, still we find plaintiff alleging in a complaint —good, we think, as against a general demurrer—that he was damaged generally in the sum of $540 by reason of defendant's failure to give the service demanded. The demurrer therefore should have been overruled.

The judgment is reversed and the cause remanded, with directions to the trial court to overrule the demurrer to the complaint.

We concur: KERRIGAN, J.; HALL, J.

(18 Cal. App. 5)

SIMINOFF v. JAS. H. GOODMAN & CO. BANK. (Civ. 884.)

(District Court of Appeal, Third District, California. Jan. 8, 1912. Rehearing Denied by Supreme Court March 8, 1912.)

1. DAMAGES (§ 103*)—TORTS—STATUTORY PROVISIONS.

Civ. Code, § 3302, which provides that the detriment caused by breach of obligation to pay money only shall be the amount due with interest, deals only with contract relations, being intended to define damages recoverable for breach of a contract to pay a liquidated amount, and does not provide a measure of damages for torts or wrongs or breach of obligation arising by operation of law.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 260-264; Dec. Dig. § 103.*]

2. COMMON LAW (§ 12*)—APPLICABILITY—EXCLUSION BY STATE LAW.

While the Civil Code establishes the law respecting subjects to which it relates, it does not exclude the common law where the Code is silent.

[Ed. Note.—For other cases, see Common Law, Cent. Dig. § 10; Dec. Dig. § 12.*]

3. BANKS AND BANKING (§ 143*)—WRONGFUL DISHONORING OF CHECK—BANK'S LIABILITY.

At common law, substantial damages are recoverable against a banker for dishonoring a check of a depositor where there is sufficient money in his hands at the time to meet it.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 414; Dec. Dig. § 143.*]

4. ACTION (§ 16*)—RIGHT TO REMEDY.

Civ. Code, § 3523, which provides that for every wrong there is a remedy, means a remedy in some degree commensurate with the injury.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Action, Dec. Dig. § 16.*]

5. BANKS AND BANKING (§ 143*)—WRONGFUL DISHONORING OF CHECK—DAMAGES.

Civ. Code, § 3302, which provides that the detriment caused by breach of an obligation to pay money only shall be the amount due with interest, does not limit a banker's liability for wrongfully dishonoring a check against which the drawer had sufficient funds deposited, he being entitled to recover for the injury to his credit.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 414; Dec. Dig. § 143.*]

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by Aaron Siminoff against the Jas. H. Goodman & Co. Bank. From a judgment for defendant, and from an order refusing a new trial, plaintiff appeals. Reversed.

J. J. Dunne and Chas. E. Trower, for appellant. Frank L. Coombs and Nathan F. Coombs for respondent.

CHIPMAN, P. J. The question presented in this case is whether the complaint states a cause of action. The complaint was filed on September 27, 1909, and sets forth six causes of action. In the first cause of action, it alleges that the defendant was and is a banking corporation organized under the laws of this state, and conducting a general banking business and acting as a banking corporation, with its principal office and place of business located in the city of Napa in Napa county. It is next alleged that, at all the times involved, the plaintiff was a trader in good financial standing and credit, and engaged in the business of manufacturing, selling, and dealing in ladies' cloaks and suits in said city of Napa, and that he was a customer of and depositor with the defendant, and had and kept a banking account with defendant, subject to his (said plaintiff's) checks. It is then alleged that, from June 16 to June 19, 1909, plaintiff had in defendant bank a balance due and owing him exceeding the sum of $21.05, subject to plaintiff's checks; that, on June 16, 1909, plaintiff drew his check No. 627 on defendant bank, for $21.05, payable to the order of Meyer Cloak Company, in payment for an indebtedness then owing by plaintiff to said Meyer Cloak Company, and delivered said check to said Meyer Cloak Company in payment for said indebtedness; that said Meyer Cloak Company, immediately upon receipt of the check, caused it to be presented to defendant bank for payment, properly indorsed during business hours, and in the usual course of business; but that defendant bank, notwithstanding that it then had sufficient funds belonging to plaintiff on deposit with it wherewith to honor said check, refused to pay said check, and marked the same "No funds," and returned the check to Meyer Cloak Company dishonored. It is then alleged that, by reason of the foregoing acts and conduct of defendant bank, plaintiff has suffered and sustained damage in the sum of $75,000, in this, that is to say: By reason of the foregoing acts and conduct of defendant bank, plaintiff has suffered great injury in his name and credit with said Meyer Cloak Company and others, and his standing as a reputable merchant has been lost, and his credit destroyed. The remaining five causes of action are based on similar facts as to five other checks, drawn in favor of different firms, in sums varying from $3.75 to $287.45, all of which were returned to the payees dishonored. Four of these checks were drawn on June 12, 1909, and two of them on June 16, 1909, and all shared the same fate, although defendant, as is alleged, had funds in its hands to the credit of plaintiff sufficient to meet the same.

[1] The question of importance to be determined is whether section 3302 of the Civil Code prescribes the only measure of damages in cases of this character, or, in fact, was intended to apply to such cases at all. It reads: "The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest thereon." This section is found, among others, in chapter 2, art. 1, pt. 1, and is designated by its subhead, or what may be termed its syllabus, to pertain to cases for "breach of contract to pay liquidated sum." Section 3300 of the same Code, and part of the same article, provides: "For the breach of an obligation *arising* from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." Article 2 of the same part, in general, relates to "damages for wrongs." Section 3333 is as follows: "For the breach of an obligation *not* arising from contract, the measure of damages, except where otherwise provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." The same Code defines an obligation to be "a legal duty, by which a person is bound to do or not to do a certain thing" (Civ. Code, § 1427), and may arise "either from the contract of the parties, or by operation of law," in which latter case it "may be enforced in the manner provided by law, or by civil action or proceedings." (Id. § 1428). It will be observed that the Code furnishes a different measure of damages for breaches of obligations "to pay money only" and breaches of obligations *arising* from contracts generally, and from obligations not arising from contract; i. e., from wrongs.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The position taken by respondent is that "section 3302 controls the measure of damages to the exclusion of every other section of the Code, and to the exclusion of every other principle of law," and this results, as is claimed, from "the relation of debtor and creditor existing between the depositor and the bank." Furthermore, "that there is no other obligation, the breach of which is alleged, and no other is anticipated by the contract; that if there is an element of tort about the act of refusal to pay for which a different rule may apply as to the measure of damages, the nature and character of the circumstances must be alleged and shown, and special damages pleaded." Appellant contends, as does respondent, that the cause of action rests upon the duty of the bank towards its depositors; but it is claimed by appellant that this duty is not alone that of debtor and creditor, but "that upon the proper presentation of a proper check by a proper person, there being sufficient funds on deposit to the credit of the drawer of the check, it is the duty of the bank promptly to honor the check, subject, of course, as Mr. Morse points out (2 Banks and Banking, § 445), to the right of the bank to take a reasonable time to make inquiries in cases in which suspicious circumstances appear. * * * That the whole commercial community, and every interest dependent upon commerce, are affected by the honor of traders' checks," and that "the courts should hold banks to the proper performance of their duties to their trader depositors." It is further contended by appellant that whether the alleged cause of action be treated as upon contract or in tort is, in this state, immaterial upon the question of damages, because we have but a single form of action, in which nothing more is necessary than to state the facts and pray for the appropriate relief; "that in actions for damages for breach of contract, the parties need not to have consciously anticipated the precise damages which would flow from the breach, but, as our Supreme Court points out (Hunt Bros. Co. v. San Lorenzo Co., 150 Cal. 51, 56, 57 [87 Pac. 1093, 7 L. R. A. (N. S.) 913]), will be taken to have contemplated all damages which they ought, as reasonable persons exercising their faculties with reasonable prudence and discretion, to have contemplated, because no one can escape liability by the simple expedient of closing his eyes to what he would have seen if he had but looked, and because the consequences to a trader from the dishonor of his checks is so notorious that no bank can justly affect ignorance of what the whole commercial world is vividly alive to; * * * that the obligation to pay a trader's check involves something more than the mere discharge of a debt—involves something more in its aims and consequences than a mere 'obligation to pay money only'; and that section 3302 cannot furnish a just measure of the damages suffered by a trader through the dishonor of his checks."

[2] An examination of section 3302, when considered in its relation to other sections of the same title, and when construed, as we are told by section 1858 of the Code of Civil Procedure it must be construed (i. e., that "the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein"), will show that the section deals only and solely with contractual relations, and is intended to define the detriment caused by some breach of a contract to pay a liquidated amount. It does not attempt to provide a measure of damages in the large number of cases where the cause of action is "for the breach of an obligation *arising* from contract" (section 3300, Civ. Code), or "for the breach of an obligation *not* arising from contract" (section 3333), i. e., for torts or wrongs or breaches of obligations arising by operation of law, or implied obligations. And it is not to be forgotten that, although the Code establishes the law of this state respecting the subjects to which it relates, it "does not mean that there is no law with respect to such subjects except that embodied in the Code. * * * Where the Code is silent, the common law governs." Estate of Apple, 66 Cal. 432, 434, 6 Pac. 7; Peters v. Peters, 156 Cal. 32, 34, 103 Pac. 219, 23 L. R. A. (N. S.) 699; Pol. Code, § 4468.

In an illuminating article by Professor Pomeroy, published in volumes 3 and 4 of the West Coast Reporter, reprinted in an appendix to appellant's reply brief, that distinguished author says: "Except in the comparatively few instances where the language is so clear and unequivocal as to leave no doubt of an intention to depart from, alter, or abrogate the common-law rule concerning the subject-matter, the courts should avowedly adopt and follow without deviation the uniform principles of interpreting all the definitions, statements of doctrines, and rules contained in the Code in complete conformity with the common-law definitions, doctrines, and rules, and as to all subordinate effects resulting from such interpretation." This view is urged because of the "peculiar excellencies acknowledged by all able jurists to belong to" the common law, because "the Civil Code, as a matter of fact, was not designed to make any general alterations in the established doctrines and rules of the common law," and because "the Civil Code does not embody the whole law concerning private and civil relations, rights, and duties. It is incomplete, imperfect, and partial."

[3] It seems to be conceded by respondent, which is undoubtedly true, that at common law substantial damages may be recovered against a banker for dishonoring the check of a depositor; there being sufficient money in his hands at the time to meet it. The rule prevailing in this country, in states where the question has arisen, is given in

5 American and English Encyclopedia of Law (2d Ed.) 1059, 1060, as follows: "The relation between the bank and the depositor is that of debtor and creditor. The bank, in consideration of the deposit or loan, impliedly agrees with the depositor that, whenever a demand is made by the presentation of a genuine check in the hands of a person entitled to receive the amount, the check will be honored to the amount of funds on deposit. And whenever the bank fails to fulfill this agreement with the depositor, by a failure to honor the check when duly presented, a right of action at once accrues. The depositor, by proving such loss, is always entitled to recover substantial damages. But, if unable to show any such loss or injury, the better opinion seems to be that he would still be entitled to recover such moderate damages as the jury should judge to be a fair and reasonable compensation for the injury which he must have sustained; for it is almost impossible for a check to be dishonored without reflecting upon the character and credit of the drawer, the extent of the injury being within the peculiar province of the jury to determine." Mr. Morse says: "The duty of the bank to make such payments (i. e., payment of checks on presentation, the bank having sufficient funds of the drawer), and the reciprocal right of the depositor to have them made, arise from the contract to that effect, which, though probably never definitely expressed, will always be considered to be implied from the usual course of the banking business. This duty and this right are so far substantial that, if the bank refuses, without sufficient justification, to pay the check of the customer, the customer has his action for damages against the bank." 2 Morse on Banks and Banking (4th Ed.) § 458.

The Supreme Court of this state, in Janin v. London & S. F. Bank, 92 Cal. 14, 22-23, 27 Pac. 1100 (14 L. R. A. 320, 27 Am. St. Rep. 82), said: "It is well settled that a bank, in receiving ordinary deposits, becomes the debtor of the depositor, and its implied contract with him is to discharge this indebtedness by honoring such checks as he may draw upon it." This implied obligation or duty, out of which arises an action for nonperformance, is that payment will be made on presentation, and is an obligation different from and in addition to that existing ordinarily between debtor and creditor. "These dealings in bank checks stand upon peculiar grounds. The exigencies of trade do not admit of the delays attending the process of acceptance, or arising from the efflux of days of grace. If the drafts are delayed; if the bank, being in funds, be at liberty to refuse payment—the inevitable consequence to the parties disappointed can be none other than such as the want of scrupulous punctuality always inflicts. The drawer's credit suffers; and it is well known that for this injury a depositor is entitled to his action against the bank." Fogarties v. State Bank, 12 Rich. 518, 78 Am. Dec. 468. A single refusal to honor a check might work the ruin of a business man. That the returning of a check by a bank to the payee, indorsed "No funds," would necessarily tend to injure the credit and business standing of the drawer of the check, is a proposition so obvious as to need no argument to establish its truth. "It is almost impossible for a check to be dishonored without reflecting upon the character and credit of the drawer, the extent of the injury being within the peculiar province of the jury to determine." 5 Am. & Eng. Ency. of Law (2d Ed.) 1060; 2 Morse on Banks and Banking, § 458. And it is equally obvious that the rule contended for by respondent would furnish no adequate measure of the damage suffered in such a case. 1 Sutherland, Damages (3d Ed.) § 77. In a Pennsylvania case, where the ruling of the trial court was held to be correct, in refusing to charge the jury "that the mere loss of credit by the plaintiff is not a ground for damages, unless it be immediately connected with some tangible pecuniary loss of which it was the cause," the court said: "A bank is an institution of quasi public character. It is chartered by the government for the purpose, inter alia, of holding and safely keeping the moneys of individuals and corporations. It receives such moneys upon an implied contract to pay the depositor's checks upon demand. Individual and corporate business could hardly exist for a day without banking facilities. At the same time, the business of the community would be at the mercy of banks, if they could at their pleasure refuse to honor their depositor's checks, and then claim that such action was the mere breach of an ordinary contract, for which only nominal damages could be recovered, unless special damages were proven. There is something more than a breach of contract in such cases." Patterson v. Marine National Bank, 130 Pa. 419, 433, 18 Atl. 632, 633, 17 Am. St. Rep. 778.

In this state it is a felony for a person to willfully, with intent to defraud, make or draw or utter to another person a check on a bank, knowing at the time that he has not sufficient funds in such bank to meet such check. Pen. Code, § 476a. In Svendsen v. State Bank, 64 Minn. 46, 65 N. W. 1086, 31 L. R. A. 552, 58 Am. St. Rep. 522, the Supreme Court placed the rule "on the ground that the wrongful act of the banker in refusing to honor the check imputes insolvency, dishonesty, or bad faith to the drawer of the check, and has the effect of slandering him in his business," and it was there held that the position "that an action of tort cannot be maintained in such a case as this, and that plaintiff's only remedy is an action on contract, in which only nominal damages can be recovered, is not sustained by the authorities." When, in this state, a bank returns to the payee a check with the indorsement "No funds," the act at once suggests, not only what the Minnesota court says it imports, but it suggests a possible violation of a penal statute punishable as a felony. And yet, as respondent contends, the only redress is in an action in assumpsit for money had and received, with interest. The Massachusetts court said: "In the case of a trader, injury to his credit may be inferred from the fact he is a trader, and substantial damages may be found and given, on proof of that fact, without anything more." Wiley v. Bunker Hill Nat. Bank, 183 Mass. 495, 67 N. E. 655.

[4, 5] When our Civil Code says that "for every wrong there is a remedy" (section 3523), it means a remedy in some degree commensurate with the injury inflicted. The books abound in decisions holding that the dishonor of a trader's check is a grievous wrong. Lame and impotent, indeed, must be that system of remedies that furnishes no adequate relief in such cases. We cannot bring ourselves to believe that section 3302 of the Civil Code was intended to take away a right of action universally conceded to exist elsewhere. No reason can be suggested why banks in this state should enjoy such immunity. It is no sufficient answer to the cases cited, and numerous others to like effect, that in those jurisdictions no statutory rule of damages, as we have in section 3302, is enacted. That the rule is firmly established, though not by legislation, in the states alluded to, by judicial decisions coming down to us from the common law, cannot be questioned, and it has never been held to take away the right of action contended for by appellant. The rule, prescribed by our Code as a measure of damages, has been elsewhere held to apply solely to the limited class of cases referred to therein, namely, for breaches of obligations to pay money only; i. e., liquidated demands. Before we should feel authorized to hold that the rule laid down in section 3302 was intended to furnish the only measure of damage in such a case as we have here, it should be made to appear clearly from the terms of the statute that such was its intention, which we do not think does so appear. Mr. Pomeroy's article, supra.

Whether the facts alleged bring the case within section 3300, Civil Code, as a breach of an obligation arising from contract, or within section 3333, Civil Code, for a wrong —i. e., a breach of an obligation not arising from contract—is not very material. The measure of damage is substantially the same in both cases. In a sense here the injury arises from contract, and in a sense it is independent of contract and sounds in tort. But, viewed in either sense, section 3302 has no application to the facts alleged.

It has been sufficiently shown, contrary to respondent's contention, that the relation between a trader depositor and a bank is something more than that of debtor and creditor. The complaint alleges the breach of an obligation beyond that arising from the simple relation of debtor and creditor, an obligation implied by the peculiar circumstances surrounding the parties in that relation, and an obligation which, in the nature of these circumstances, must have been anticipated by the parties. So far as the element of tort is involved in the conduct of the defendant, we do not think, as is claimed by defendant, that "the nature and character of the circumstances must be alleged and shown and special damages pleaded," in order to maintain the action. Special damages are not claimed. Only such damages as might be shown to have been proximately caused by defendant's breach of duty are claimed. Civ. Code, §§ 1427, 1428, supra. The averments of the complaint are sufficient to show the violation of defendant's obligation, for which the law authorizes substantial damages. Actual compensation to the injured party, whether caused by tort or breach of contract, is the first object of the law. "Every invasion of a legal right is presumed in law to cause an injury, and, though none is shown, there may nevertheless be a recovery of nominal damages with costs of the action. Such recovery is a judicial recognition of the right and an admonition that it cannot be invaded with impunity. The relation between banker and depositor is one of contract. The right of the latter is that, to the extent of his credit balance subject thereto, his checks drawn and presented according to the customs and usages of the business, shall be promptly honored. For a breach of this right an action for damages will lie. If the depositor is a merchant or trader, it will be presumed, without further proof, that substantial damages have been sustained. This rule proceeds upon the fact, commonly recognized, that the credit of a person engaged in such a calling is essential to the prosperity of his business, and the dishonoring of his checks is plainly calculated to impair it, and to inflict a most serious injury. In common opinion, substantial damage is the natural and probable consequence of the act, and therefore a substantial recovery may be had, without pleading or proof of special injury." Third National Bank v. Ober, 178 Fed. 678, 102 C. C. A. 178. See authorities in note, 5 Cyc. 535.

In Heister v. Loomis, 47 Mich. 16, 10 N. W. 60, Mr. Justice Cooley points out a distinction sometimes drawn in awarding damages where breaches of contract are involved and in cases of tort. In the former, the damage allowed is because of something which could have been foreseen and reasonably expected; in the latter, "the plaintiff does not assist in making the case. It is made for him against his will." The learned jurist then says: "To deny the injured party the right to recover any actual damages in such cases, because they are of a nature which cannot be certainly measured, would be to enable parties to profit by and speculate upon their own wrongs, encourage violence, and invite depredation." He adds that, "where the damages are such as do not follow the injury as a necessary consequence, they should be specially alleged in the declaration." But all the authorities agree that more or less injury necessarily follows the dishonor of a trader's check. Besides, Judge Cooley is speaking of actions generally, and not particularly of the dishonor of a trader's check. In his work on Torts, the author says: "The refusal of a bank to pay the plaintiff's check to a third party, though having sufficient funds of the plaintiff to meet it, is in the nature of a slander upon the plaintiff's credit and business, and renders the bank liable for substantial damages, though no actual damages are proven, *when the plaintiff is engaged in trade or business.*" 1 Cooley on Torts (3d Ed.) p. 396. Among the cases cited in the note and in the text is Schaffner v. Ehrman, 139 Ill. 109, 28 N. E. 917, reported also in 32 Am. St. Rep. 192, and 15 L. R. A. 134, which last has a note on the question. The opinion in that case was on petition for rehearing, and is a careful review of the English and American cases. It was there held that the bank was liable for more than nominal damages, without any proof of actual loss or damage, although the refusal to pay the check was the result of a clerk's mistake. Craig, J., dissented, holding that, under the circumstances appearing at the trial, only nominal damages were recoverable. No dissenting voice is found to go beyond this, and even in that view the complaint here is sufficient. Judge Cooley quotes from the opinion, where it is said: "It is well understood that, in an action for slander by a person for the speaking of slanderous words of him in the way of his trade, the fact that he is a trader takes the place of special damages. To return a check marked 'Refused for no funds' to the holder, especially through a clearing house, certainly tends to bring the drawer of that check into disrepute as a person engaged in mercantile business, and it needs no argument to show that a single refusal might often, and frequently does, bring ruin upon a business man; and yet it is no more possible in either case to prove special or actual damages than it is for one charged with the commission of a crime to show specially in what manner he has been injured." It was said in Arzaga v. Villalba, 85 Cal. 191, 24 Pac. 656: "Every action is now, in effect, a special action on the case. * * * Does the complaint state in ordinary and concise language facts sufficient to constitute a cause of action? That is the question, and not whether it is sufficient to show trespass quare clausum, trespass vi et armis, or any other technical form of action, ex delicto or ex contractu. * * * Under our system, if the facts alleged and proved are such as would have entitled the plaintiff to relief under any of the recognized forms of action at common law, they are sufficient as the basis of relief, whatever it may be."

In harmony with this view, universally taken where the reformed procedure is adopted, the Supreme Court of Iowa said: "The pleader simply makes a plain statement of the facts, avoiding legal conclusions, and may recover as damages, on the facts stated, whatever the law will allow, either for breach of contract or for the tort pleaded." Mentzer v. W. U. Tel. Co., 93 Iowa, 752, 62 N. W. 1, 28 L. R. A. 72, 57 Am. St. Rep. 294. And so it was held, in Lorick v. Palmetto Bank & T. Co., 74 S. C. 185, 54 S. E. 206, 7 Ann. Cas. 818: "The liability of a bank to its depositor for substantial damages, temperate in amount, for refusing to pay his check, not exceeding his credit, is generally if not universally recognized. And it is not necessary to recovery that there should be proof of special damages; the law presuming that the result is injury to the credit of the depositor from the general experience of men in such transactions." The cases are extensively considered in the opinion.

In the case here it seems plain that the cause of action grew out of or arose from contract, in the sense that it never would have arisen but for the original contractual relation. Still there is in it an element of tort or wrong, a violation of duty, and we have seen that damages are allowable in whatever view the case may be regarded; hence we think the form of the action is immaterial. The case is analogous to the frequently occurring cases arising in breaches of contract for the transportation of passengers by railroad, where the damages are recoverable for the wrongful acts of the defendant committed in violation of its contract. The Supreme Court, in Capital Gas Co. v. Young, 109 Cal. 140, 41 Pac. 869, 29 L. R. A. 463, said: "The duty to furnish gas to the city devolved upon the respondent, not by virtue of any contract, but by operation of law, and hence the laws governing ordinary contracts resting in the volition of the parties thereto have no application." If it be said that that was the case of a public service corporation, and hence the reason underlying the rule there laid down does not apply here, it may be answered by the opinion in Meadowcroft v. People, 163 Ill. 56, 45 N. E. 991, 35 L. R. A. 176, 54 Am. St. Rep 447: "The fundamental error in the contention thus formulated is the assumption that the business of banking stands upon exactly the same footing that the ordinary industrial pursuits of farming, merchandising, manufacturing, and mining, and the many other common occupations of life, stand upon. The business of a banker is not juris privati only, but, like that of an innkeeper or common carrier, is affected with a public interest, and therefore subject to public regulation." Fogarties v. State Bank, supra. Said the Pennsylvania Court: "A bank is an institution of quasi public character." Patterson v. Marine National Bank, supra; Ex parte Pittman, 31 Nev. 43, 99 Pac. 700, 22 L. R. A. (N. S.) 266, 20 Ann. Cas. 1319; State v. Richcreek, 167 Ind. 217, 77 N. E. 1085, 5 L. R. A. (N. S.) 874, 119 Am. St. Rep. 491, 10 Ann. Cas. 899. It is upon the assumption that banking institutions are affected with a public interest that they are subject to regulation.

Without pursuing the argument further, our conclusion is that section 3302 of the Civil Code does not apply to a case of this character, that the complaint states a cause of action, and that the court erred in holding otherwise and in refusing to allow plaintiff to submit evidence in its support.

The judgment and order are reversed.

We concur: HART, J.; BURNETT, J.

17 Cal. App. 751

PEOPLE on Complaint of BEEDE v. TOWN OF ANTIOCH. (Civ. 1,063.)

(District Court of Appeal, First District, California. Dec. 29, 1911. Rehearing Denied by Supreme Court Feb. 26, 1912.)

1. Pleading (§ 214*)—Demurrer—Effect.

The facts alleged in the complaint are confessed by demurrer thereto.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525–534; Dec. Dig. § 214.*]

2. Municipal Corporations (§ 24*)—Boundaries of Town — Construction of Statutes.

Act effective March 30, 1872 (St. 1871–72, p. 725), is entitled "An act to properly define the boundaries of the town of Antioch, and extend the same," and section 1 provides that the boundaries and line of the town of Antioch, on the San Joaquin river, in front of said town, as surveyed and laid out by E. in 1866, is extended to extreme low-water mark in the river, and section 2 authorizes the town board of trustees to have the boundaries properly surveyed and located in conformity with the survey and map of E., as filed in the county recorder's office. *Held*, that the boundaries of the town were defined by the act as they were shown on the E. map, except that the boundary toward the San Joaquin river was extended to the line of low tide.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 24.*]

3. Statutes (§ 211*)—Construction—Title.

The title of an ambiguous act may be looked to in determining its meaning.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 288; Dec. Dig. § 211.*]

4. Statutes (§ 218*)—Construction—Contemporaneous Construction.

That the officers of a town and the public for about 38 years gave an ambiguous statute, defining its boundaries, a certain construction, justified the court in resolving any doubt as to its meaning in favor of such construction.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 294; Dec. Dig. § 218.*]

5. Municipal Corporations (§ 24*)—Boundaries—Establishment by Statute—Statutory Description.

The fact that act effective March 30, 1872 (St. 1871–72, p. 725) §§ 1, 2, defining the boundaries of the town of Antioch, erroneously referred to the map by which the boundaries were described as filed August 6, 1866, where it was filed in 1868, would not affect the validity of the statute as correctly defining the boundaries, where there was no map in fact filed in 1866, as such date will be rejected as a false description; other recitals in the statute identifying the map referred to.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 24.*]

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Quo warranto by the People, on the complaint of H. F. Beede, against the Town of Antioch. From a judgment for relator, defendant appeals. Affirmed.

B. D. Marx Greene (Hillyer, Stringham & O'Brien, of counsel), for appellant. Attorney General Webb, W. S. Tinning, Titus & Creed, and J. P. Abbott, for respondent.

HALL, J. This is a proceeding in quo warranto brought by the Attorney General, upon complaint of H. F. Beede, to obtain a judgment determining that the defendant is unlawfully asserting and exercising jurisdiction as a municipal corporation over territory lying wholly outside the corporate boundaries of said town of Antioch. The primary purpose of the proceeding is to procure a determination as to what constitute the boundaries of said town, and the solution of this question involves the construction and interpretation of the statute entitled "An act to properly define the boundaries of the town of Antioch, and extend the same," approved March 30, 1872 (St. 1871–72, p. 725). The act itself is set forth in the complaint, as well as various facts and proceedings thought to bear upon the question to be determined. Defendant filed a general demurrer to the complaint, which was by the court overruled, and, defendant declining to plead further, judgment was entered for plaintiff as prayed for. The effect of this judgment is to determine that the boundaries of the town of Antioch are as the same are shown and delineated upon a certain map of said town, made by one F. A. McMahon in 1884, and recorded in the office of the county recorder of Contra Costa county on the 7th day of April of said year. The appeal is from this judgment, and comes to this court upon the judgment roll and notice of appeal.

[1] The matters of fact hereinafter stated are from the allegations of the complaint, taken as confessed by the demurrer. The town of Antioch was first incorporated on the 6th day of February, 1872. The incorporation was accomplished after proceedings duly had for such purpose in pursuance of the act entitled "An act to provide for the

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

incorporation of towns," approved April 19, 1856 (St. 1856, p. 198), by an order duly made and passed on the 6th day of February, 1872, by the board of supervisors of Contra Costa county. In this order the boundaries of said town are set forth, and it is recited that they contain a territory of three square miles. The northern boundary of said town called for by this order is the line of ordinary high tide along the south bank of the San Joaquin river. The act under which the incorporation was effected authorized the incorporation of territory to the extent of three square miles only, and accordingly the order contains the provision that, "in case of later or more accurate surveys making said boundaries to contain more than 3 square miles, the excess to be taken off from the western side of said town."

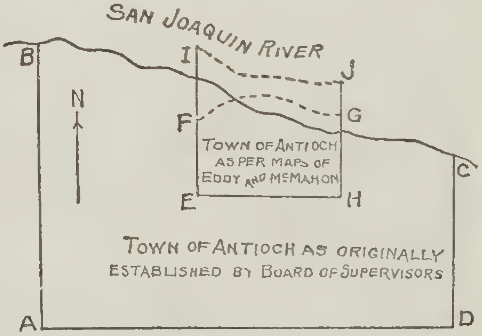
Shortly after the adoption of the said order incorporating said town, the Legislature passed the act entitled "An act to properly define the boundaries of the town of Antioch, and extend the same." This act was approved and went into effect March 30, 1872, and is as follows:

"Section 1. The boundary and line of the town of Antioch, on the San Joaquin river, in front of said town, as surveyed and laid out by R. Eddy in eighteen hundred and sixty-six, as per map on file in the office of the county recorder for Contra Costa county—provided that no land lying between high and low water mark shall be taken for public use except by consent of the owners thereof—is hereby extended to extreme low water mark and low tide in the San Joaquin river.

"Sec. 2. The board of trustees of said town of Antioch are hereby empowered and authorized to have the boundaries of said town properly surveyed and located in conformity with the survey and map of R. Eddy as filed in the office of the county recorder for Contra Costa county on the sixth day of August, eighteen hundred and sixty-six."

In the year 1866 one R. Eddy made a survey and map of the boundaries of the town of Antioch, which was filed in the office of the county recorder of Contra Costa county on the 10th day of January, 1868. No map or survey of said town by R. Eddy, or any other person, was filed in the office of said county recorder on the 6th day of August, 1866. A copy of the map made by said Eddy is annexed to and made a part of the complaint, and it is alleged in the complaint that it is the map referred to in the said act of the Legislature. In October, 1883, the board of trustees of said town of Antioch, in pursuance of the provisions of section 2 of said act of the Legislature, employed one T. A. McMahon, the county surveyor, to survey and locate the boundaries of said town, in conformity with the survey and map of said Eddy filed in the county recorder's office January 10, 1868, and to survey and locate the northern boundary line of said town in accordance with the provisions of section 1 of said act of the Legislature. Accordingly, said McMahon did survey and locate the boundaries of said town in conformity with the said survey and map of said Eddy, and did survey and locate the northern boundary of said town in accordance with section 1 of said act of the Legislature, and in the year 1884 did make and complete a map and plat thereof, which was on the 7th day of April, 1884, accepted by the board of trustees, who did declare the boundaries of said town to be as delineated and shown on said map made by said McMahon. This map was filed in the office of the county recorder August 12, 1893, and a copy thereof is attached to the complaint and made a part thereof.

It is proper at this point to say that the boundaries of the town of Antioch as originally incorporated by the board of supervisors in February, 1872, include much more territory than is included within the boundaries of said town as the same are laid down upon the Eddy and McMahon maps. We have been furnished by counsel with a diagram showing the boundaries as called for by the order of the board of February, 1872, and as shown on the Eddy and McMahon maps. From this we have prepared and attached to this opinion a diagram which shows the different boundaries contended for, with sufficient accuracy for the purposes of this opinion. On this diagram the lines AB, BC, CD, and DA indicate the boundaries according to the original order of the board incorporating the town. The lines EF, FG, GH, and HE indicate the boundaries according to the Eddy map, and the lines EFI, IJ, JGH, and HE indicate the boundaries according to the McMahon map.


SAN JOAQUIN RIVER
B
I
J
N
F
G
TOWN OF ANTIOCH AS PER MAPS OF EDDY AND McMAHON
C
E
H
TOWN OF ANTIOCH AS ORIGINALLY ESTABLISHED BY BOARD OF SUPERVISORS
A
D

The boundaries in the Eddy and McMahon maps are the same, except that the north boundary, according to the McMahon map, is placed further north than on the Eddy map, so as to coincide with the line of low-water mark, and the east and west boundary lines are extended so as to connect with the north boundary as thus changed.

Returning to the complaint, there are other allegations which show that at no time after the going into effect of the act of the Legislature of 1872, until the 1st day of

June, 1910, has the town of Antioch ever claimed or asserted any jurisdiction over territory outside the boundaries as laid down on the said McMahon map, and no person residing outside such boundaries has ever claimed any of the rights or privileges of an elector, resident, or taxpayer of said town. All elections held in or by said town have been participated in only by residents within said boundaries. That at an election held in 1890, whereby the town was reorganized as a municipal corporation of the sixth class, only residents within said boundaries took part. In July, 1910, the proper officers of the town of Antioch assessed property within the boundaries of the town as originally fixed by the board of supervisors in February, 1872, but outside the boundaries of said town as shown on the Eddy and McMahon maps, and shortly thereafter this suit was brought to procure an adjudication as to the proper boundaries of said town.

The contention of appellant is that no change was intended or made in the boundaries of said town by the act of the Legislature above set forth, other than to extend the limits of the town over its water front; that is, to the line of low water. The contention of the respondent, on the other hand, is that the intention of the Legislature in enacting such act was to adopt as the boundaries of said town the boundaries thereof as shown on the Eddy map extended northerly to the line of low water. This is the view of the effect of the statute taken by the trial court, and we think it is correct.

[2] It must be confessed that the language of the act is not so apt and clear as it might be. The purpose and scope of the act is indicated by its title, "An act to properly define the boundaries of the town of Antioch, and extend the same." By the first section, "The boundary and line of the town of Antioch, on the San Joaquin river, in front of said town, as surveyed and laid out by R. Eddy in eighteen hundred and sixty-six, as per map on file in the office of the county recorder for Contra Costa county, * * * is hereby extended to extreme low-water mark and low tide in the San Joaquin river." This only purports to extend the line in front of said town as shown on the Eddy map. The line along the river, according to the Eddy map, was and is probably not to exceed one-third as long as the line along said river as fixed by the original order of the board adopted in February, 1872. The language of this section will not admit of an interpretation that it extended the northern boundary except as shown on the Eddy map. In other words, the northern boundary as thus shown was treated as the correct boundary, and was by the act extended or shifted northerly to low tide line.

[3] By the second section the board of supervisors were authorized to have the boundaries surveyed and located in accordance with said Eddy map. Each of these sections must be construed and read in connection with the other; and, as the language of the act is not free from ambiguity, the title of the act may be looked to for such light as it may afford as to the meaning of the act. The title shows that the Legislature intended to *define the boundaries* of the town. There is certainly no reference in the act to the boundaries as fixed by the original order of incorporation adopted by the board of supervisors in February, 1872. Reading the entire act, including the title, we think it is reasonably clear that the Legislature intended to fix and define the boundaries of the town as they are laid down and shown on the Eddy map, except as to the northern boundary, which was shifted northerly so as to be coincident with the line of low tide of the San Joaquin river.

[4] From the facts pleaded and admitted by the demurrer, it is certain that this is the interpretation that was placed upon the act by the authorities of the town and all persons in any way interested in the question involved. This interpretation has been acquiesced in and acted upon as correct by the town and its officers and the public for upwards of 38 years. The correctness of this interpretation has never been questioned until shortly before this suit was brought. Such contemporaneous interpretation, so long acquiesced in by the town, its officers, and all other persons who could possibly have an interest in the matter now in dispute, is sufficient to justify the court in resolving any doubt it might have as to the meaning of the ambiguous language employed by the Legislature, in favor of sustaining such long unquestioned interpretation. 26 Am. & Eng. Ency. of Law, 633, 634; 36 Cyc. 1139; Belknap v. City of Louisville, 93 Ky. 444, 20 S. W. 309; Clark's Run, etc., Co. v. Commonwealth, 96 Ky. 525, 29 S. W. 360; People v. Farnham, 35 Ill. 562; Hamilton v. McNeil, 54 Va. 389, 402; Lewis' Sutherland, Statutory Construction, §§ 472, 473, 474.

[5] Some criticism is made because the act improperly recites that the Eddy map was filed August 6, 1866. This may be treated, as would a false call in a deed, where the description is otherwise sufficient for identification, and be disregarded. Endlich on the Interpretation of Statutes, § 319. See, also, California Loan, etc., Co. v. Weis, 118 Cal. 489, 50 Pac. 697; Palms v. Shawano County, 61 Wis. 211, 21 N. W. 77. At the time of the passage of the act in question, there was a map of the town of Antioch, which had been made in 1866, but not filed in the recorder's office until 1868. This was the only map of said town made by said Eddy. There was no map of said town filed on the date designated in the act. This part of the description was therefore false; but, as the other descriptive matters recited were

ample to identify the map referred to, the false recital should be disregarded.

The judgment of the court should be affirmed, and it is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

161 Cal. 719

DENT et al. v. CALIFORNIA FRUIT GROWERS' ASS'N OF LOS ANGELES et al. (L. A. 2,986.)

(Supreme Court of California. Dec. 4, 1911.)

APPEAL AND ERROR (§ 430*) — DISMISSAL — FAILURE TO GIVE NOTICE OF APPEAL.

Where notice of appeal is not given, as required by Code Civ. Proc. § 941b, the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2173, 2174; Dec. Dig. § 430.*]

In Bank. Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by Henry G. Dent and others against the California Fruit Growers' Association of Los Angeles and others. From the judgment, there was an appeal. Dismissed.

Richardson & Martin, for appellants. T. R. Archer, for respondents.

PER CURIAM. It is ordered that the appeal in the above-entitled cause be and the same is hereby dismissed, for failure to give the notice of appeal contemplated by section 941b, Code of Civil Procedure.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(162 Cal. 250)

In re TREAT'S ESTATE. (S. F. 5,433.)

(Supreme Court of California. Feb. 23, 1912.)

1. Executors and Administrators (§ 176*)—Family Allowance.

A family allowance, granted by an order not specifying its duration, terminates at the expiration of one year after the granting of letters, if the estate is insolvent; the provision of Code Civ. Proc. § 1466, that in case of an insolvent estate the allowance must not be for longer than one year, being considered a part of the order.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 661–666; Dec. Dig. § 176.*]

2. Executors and Administrators (§ 194*)—Collateral Attack—What Constitutes.

A determination, in a proceeding involving a family allowance, of the question whether the estate is insolvent is not a collateral attack on a prior order granting the allowance; the first order not involving any finding that the estate was solvent.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 713–723; Dec. Dig. § 194.*]

3. Executors and Administrators (§ 176*)—Family Allowance—Duration.

A court has no discretion as to the time during which a family allowance shall continue; Code Civ. Proc. § 1466, fixing the time as during the settlement of the estate, with a limitation of one year in case of insolvency.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 661–666; Dec. Dig. § 176.*]

4. Executors and Administrators (§ 194*)—Decisions Reviewable—Probate Proceedings.

Under Code Civ. Proc. § 963, subd. 3, allowing an appeal in probate proceedings from orders making an allowance for a widow or child, an order directing administrators to apply money in their hands on a family allowance, which they had stopped paying on the ground that the estate was insolvent, is appealable.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 713–723; Dec. Dig. § 194.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Petition by the widow of A. W. Treat, deceased, for an order requiring his administrators to pay arrearages in a family allowance previously granted to her. From the order, the administrators and certain creditors appeal. Reversed.

C. W. Cross, F. H. Gould, and Vincent Surr, for appellants. W. H. Orrick and W. H. Spaulding, for respondent.

ANGELLOTTI, J. This is an appeal by certain creditors of the estate of deceased and the administrators with the will annexed from an order of the superior court of the city and county of San Francisco directing said administrators to pay an alleged arrearage under a prior order of said court, made subsequent to the return and filing of the inventory in said estate, granting a family allowance to the widow of deceased.

There is no controversy as to the material facts, which are as follows: Deceased died testate, and his will was admitted to probate on December 8, 1906. The inventory and appraisement of the estate was returned and filed on March 22, 1907. On May 15, 1907, Lucy B. Treat, the widow of deceased, filed her petition for a family allowance of $175 per month. On the following day, the court made its ex parte order granting such application to the extent of $125 per month, "to be paid by administrators herein, and same to date from date of order admitting will to probate"; no expressed specification being contained therein as to the time during which such allowance should continue, or as to the condition of the estate in respect to solvency. No appeal was ever taken from this order. The administrators paid to the widow the amount so allowed for a period of 13 months, to and including the month ending January 19, 1908, and refused to make any further payments. In January, 1909, the widow presented her petition for an order requiring such administrators to pay to her $1,000, then in their hands and not necessary for the payment of costs and expenses of administration, on account of such allowance alleged to be due under such order, which would pay all sums due thereunder to and including the month ending September 19, 1908. The administrators and appealing creditors opposed the granting of such application on the ground set up in their answer that the estate is insolvent; the creditors alleging in their answer that such estate was insolvent at all times since the death of decedent, and both answers substantially alleging that the refusal of the administrators to pay any allowance after the payment of the same for 13 months was because of such insolvency. Upon the hearing in the lower court, it was sought by the appellants to show such insolvency on the part of the estate; but the court, upon the objection of the petitioner, refused to hear any evidence on that question. If a showing that the estate was in fact insolvent would have been a sufficient answer to the application of the widow for the payment of any additional family allowance under the order of May 16, 1907, it is obvious that the lower court erred to the prejudice of appellants in excluding such evidence.

Section 1466, Code of Civil Procedure, provides: "If the property set apart is insufficient for the support of the widow and children, or either, the court or a judge thereof must make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances, during the progress of the settlement of the estate, *which, in case of an* *insolvent estate, must not be longer than one year after granting letters testamentary or of administration.*" The question in this case is as to the effect of the portion of this section which we have italicized. The theory of the appellants is that it constitutes a limitation which must be read into any order for family allowance, however general such order may be on its face; and that the allowance comes to an end upon the lapse of one year, if the estate is in fact insolvent.

[1] There can be no doubt that the statutory provision in question was intended to prevent the payment of any family allowance under section 1466, Code of Civil Procedure, for a longer period than one year after the granting of letters testamentary or of administration, where the estate is insolvent. This intention is clearly enough expressed, and has always been recognized in the decisions of this court. In Estate of Montgomery, 60 Cal. 648, where creditors sought an order discontinuing a family allowance on the ground of the insolvency of the estate, the allowance having already been paid for a period exceeding one year, the court said, in affirming an order of discontinuance: "But, in case of an insolvent estate, the time must not be longer than one year after the granting of letters. Here is an absolute prohibition in case of insolvency. The court had power, upon ascertaining the estate to be insolvent—nay, it was its duty—to discontinue the allowance." In Estate of Walkerly, 77 Cal. 642, 20 Pac. 150, it was said that the court may make such allowance as may be necessary, "subject, of course, to the proviso that if the estate is insolvent it shall not extend beyond one year." See, also, Estate of Adams, 128 Cal. 380, 383, 57 Pac. 569, 60 Pac. 965; In re Lux, 100 Cal. 593, 599, 35 Pac. 341. We have in this provision of our statute a clear and explicit declaration by the Legislature that the family allowance given under section 1466, Code of Civil Procedure, must not, in the case of an insolvent estate, be for longer than one year after the granting of letters testamentary or of administration. We can see no good reason why it should not be held, at least as to an order of the form of the one before us, one simply granting an allowance of a certain sum per month, without any specification of the time during which it shall continue, that the order is made upon the terms fixed by the statute, viz., that it is to continue during the progress of the settlement of the estate, unless the estate is insolvent, in which event it is to continue for only one year after the granting of letters, even though the settlement of the estate has not then been concluded. It certainly should not be presumed in construing the order that the court intended to violate the provision of the law forbidding the payment of such an allowance for more than one year in the case of an insolvent estate. In the case of an order in this form, at least, one where the court has done no more than to designate the amount of allowance per month, the fair and reasonable construction is that the provisions of the statute as to the time during which it shall continue constitute a part of the order. If we are to imply a provision that the allowance is to continue "during the progress of the settlement of the estate," it would necessarily seem that we must also imply the additional provision contingent upon insolvency. So construed, the order would cease to be effectual in case of an insolvent estate, so far as future payments of allowance are concerned, upon the expiration of one year from the date of the granting of letters testamentary or of administration; and no order of court would be essential to that result.

[2] A question of fact might exist as to whether or not the estate was insolvent, and that question would have to be determined in some such proceeding as the one we have before us. Such a proceeding, however, would involve no collateral attack upon the original order, but simply an inquiry as to whether the order had, by its terms, ceased to be operative.

The respondent's theory practically is that section 1466, Code of Civil Procedure, contemplates and relates to conditions as they exist at the time the order of allowance was made; that, so far as the question of insolvency is concerned, the court must at the time of making the order determine whether the estate is then solvent or insolvent, and make its order in view of such determination; that the making of an order without any limitation as to the time during which it shall continue to be operative implies a finding of solvency which is conclusive as to the status of the estate in that regard, in the absence of a revocation or modification of the order, except in a subsequent proceeding to obtain such revocation or modification; and that the allowance ordered must be paid during the entire progress of the settlement of the estate, in the absence of such modification or revocation; for to hold otherwise would involve a holding that the validity and regularity of an order may be assailed in a collateral proceeding to enforce such order.

While, as a prerequisite to an order for family allowance under section 1466, Code of Civil Procedure, certain facts must be determined by the trial court, we see nothing in our statute requiring the question of solvency or insolvency to be so determined. It must be determined, for instance, that such property as has been set apart for the support of the widow and children, under section 1465, Code of Civil Procedure, if any, is insufficient for their support; for the statute allows the order for family allowance to be made only where such other property is insufficient, and the granting of a family allowance necessarily implies a finding of such insufficiency. Estate of Welch, 106 Cal. 427, 430, 39 Pac. 805. And the same thing is true as to the relationship of the claimants to the deceased. The allowance is authorized only for the maintenance of the *family* of the deceased; and an order granting such an allowance to a person as the widow of a deceased necessarily concludes the question as to the status of such person as widow (Estate of Nolan, 145 Cal. 559, 79 Pac. 428), at least so far as the matter of family allowance is concerned, unless it be set aside in some manner authorized by law. And so, again, as to the reasonableness of the amount allowed. The finding is necessarily implied that such amount is a reasonable amount to be allowed for the maintenance of the family according to their circumstances, and the order is a conclusive adjudication on that subject as long as it remains in force. But it is nowhere in effect provided that solvency of the estate is a prerequisite to the making of any such order, where the order is made within a year after the granting of letters. The other conditions existing, the allowance must be made, whether the estate is solvent or insolvent (see 1 Woerner on Administrations, § 83; Griesemer v. Boyer, 13 Wash. 171, 43 Pac. 19); the only limitation in case of insolvency being that it must not continue "longer than one year after granting letters," etc. Even if the estate be insolvent, the family is entitled to such "reasonable allowance out of the estate as shall be necessary for" their maintenance, "according to their circumstances" during the whole of the year prescribed, if the estate is properly in progress of settlement so long; and we see nothing in the law authorizing the conclusion that, because an estate is insolvent, the court may restrict such "reasonable allowance" to a specified part of such year.

[3] The determination as to the *time* during which a "reasonable allowance" shall be paid does not rest in the sound discretion of the court. That time is fixed by the statute, which compels the granting of such an allowance as the court may consider reasonable for such time as may be properly consumed in the settlement of the estate, with the limitation of one year in case of insolvency. See In re Dougherty's Estate, 34 Mont. 336, 343, 86 Pac. 38. There is nothing in the statute to indicate that the limitation as to insolvent estates is applicable to only those estates as to which it is possible to show insolvency at the time of the making of the order. So that, as we have said, a determination of the question of solvency or insolvency is in no way necessarily involved in the making of the order within a year after the granting of letters, and consequently a finding and adjudication on that point is not to be implied, at least in the case of an order which does not in express terms prescribe the period during which the allowance shall continue. It is true, as has been said, that the court in making the order may take into consideration the fact of insolvency, if shown, in connection with all the other circumstances, in determining what may be a "reasonable allowance"; but this in no way affects the views we have stated. Estate of Bell, 131 Cal. 1, 63 Pac. 81, 668, is not in conflict with what has been said. On the settlement of an executor's account, objections were made to items consisting of sums of money paid by the executor to the widow under orders of the court for family allowance made years after the granting of letters, and after the widow had been paid a large allowance for years under a prior order. The ground of objection was that the estate was insolvent when such subsequent orders were made. It seems to be implied in the opinion that, if such could be shown to be the case, the court must be held to be without jurisdiction to make the order, doubtless because the allowance granted thereby was for a period during which no allowance could be made, in view of the limitation contained in section 1466, Code of Civil Procedure. But it was very properly held that under such circumstances, solvency of the estate being a prerequisite to the making of any order at all, the making of the order was necessarily a finding and adjudication that the estate was then solvent, which, of course, could not be attacked collaterally. The distinction between that case and this is obvious.

What we have said in reply to respondent's theory stated above is said with reference solely to the question of the proper construction of the order of family allowance involved in this case, and in support of our conclusion that, so far as the time during which the allowance was to continue is concerned, it simply ordered the payment for such period as was authorized by section 1466, Code of Civil Procedure, and in no degree adjudicated the question of solvency or insolvency. If this be the proper construction of the order, we have here, as already substantially said, no question of any collateral attack on the order, but simply an inquiry whether, under the terms of the order itself, it has not ceased to be operative. The question in this regard is somewhat analogous to a case where the widow who is granted a family allowance marries again during the progress of the settlement of the estate. It is held that in such a case the order of allowance ipso facto terminates at the time of the second marriage; the theory being that such an order clearly implies that it is to be paid the widow only while she remains a member of the family of the deceased, and that by her marriage she removes herself from the operation of the order. The order is satisfied, so far as she is concerned. Estate of Hamilton, 66 Cal. 576, 6 Pac. 493. See, also, In re Dougherty's Estate, 34 Mont. 336, 86 Pac. 38, where it was held that an order for allowance to continue during the progress of the settlement of the estate must be presumed to have been satisfied when the time shall have arrived at which the estate may be settled.

In view of what we have said, we are satisfied that the administrators and creditors were entitled to show, if they could, in response to the widow's application for the order appealed from, that the estate of deceased was insolvent. The court's ruling, excluding the testimony offered in this behalf, was therefore prejudicially erroneous.

[4] It is claimed in the brief of respondent that the order involved in this appeal is not an appealable order, and that the appeal should be dismissed for that reason. A motion to dismiss the appeal on that ground was heretofore made by respondent and denied on its merits by this court. We see no reason to doubt the correctness of that ruling. The statute allows an appeal in probate proceedings from an order "against or in favor of * * * making an allowance for a widow or child." Code Civ. Proc. § 963, subd. 3. In view of what we have said as to the proper construction of the original order for family allowance, it is clear that the order here appealed from was in substance and effect one "making an allowance for a widow."

The order appealed from is reversed.

We concur: BEATTY, C. J.; SHAW, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

(162 Cal. 248)

PEOPLE v. DRAKE. (Cr. 1,707.)

(Supreme Court of California. Feb. 23, 1912.)

1. Abduction (§ 1*)—Compulsion—Statutory Provisions—"Custody."

To constitute a violation of Pen. Code, § 266d, making it a felony for any person to receive money or any valuable thing for placing in "custody" any female for the purpose of causing her to cohabit with a male to whom she is not married, the female in question must be under some sort of restraint, so that she is not free to come and go, or otherwise act as she pleases.

[Ed. Note.—For other cases, see Abduction, Cent. Dig. §§ 1-10; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 2, pp. 1800, 1801; vol. 8, p. 7625.]

2. Statutes (§ 231*)—Construction—Revision.

The meaning and effect of a statute is not changed by incorporating it in the Penal Code.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 312; Dec. Dig. § 231.*]

3. Prostitution (§ 1*)—Elements of Offense.

Prior to the passage of the act of February 8, 1911 (St. 1911, p. 9), making "pandering" a felony, it was not a felony to persuade a female to become a voluntary inmate of a house of ill fame as a prostitute, and to receive the proceeds of her occupation.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. §§ 1, 2; Dec. Dig. § 1;* Disorderly House, Cent. Dig. § 7.]

In Bank. Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Ernest J. Drake was convicted of crime, and he appeals. Reversed.

Jas. K. Ross, for appellant. U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., C. M. Fickert, Dist. Atty., and F. L. Berry, Asst. Dist. Atty., for the People.

SHAW, J. The defendant was convicted of the felony defined in section 266d of the Penal Code. The section is as follows: "Every person who receives any money or other valuable thing for or on account of his placing in custody any female for the purpose of causing her to cohabit with any male to whom she is not married, is guilty of a felony."

[1, 2] By this definition, in order to constitute the offense, it is made imperative that the female in question shall have been "placed in custody" by the person charged. The use of the words "in custody" necessarily implies that she must be placed where she is detained or kept in the charge or control of another, in some sort of restraint so that she is not free to come and go or otherwise act as she pleases. Spring v. Dahlman, 34 Neb. 692, 52 N. W. 567; Wilkes v. Slaughter, 10 N. C. 216; Century Dic. That this is the correct interpretation of the section is further demonstrated by its legislative origin and history. It was first enacted as section 4 of the act of March 23, 1893, entitled "An act to prevent compulsory prostitution of women, and the importation of Chinese or Japanese women for immoral purposes, and to provide penalties therefor." Stats. 1893, p. 217. There are six sections of the act. This particular offense was thereby made a misdemeanor only. The title shows the general purpose to be to prevent forcible detention of women for prostitution, and the provisions of the several sections are directed against the kidnapping of women and the holding of them in restraint for that purpose or for illicit sexual intercourse. In the revision of the Penal Code in 1901, these sections were incorporated therein, and all the offenses defined were declared to be felonies. Stats. 1901, p. 448. This revision was held unconstitutional in Lewis v. Dunne, 134 Cal. 291, 66 Pac. 478, 55 L. R. A. 833, 86 Am. St. Rep. 257. In 1905, they were again inserted in their present form in the Penal Code as sections 266a to 266f, inclusive. Stats. 1905, p. 655. Placing them in the Code, did not change their meaning or effect.

[3] There is no evidence of such custody.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The most that can be said of the conduct of the defendant is that he persuaded the girl in question, who was then, and had been for a considerable time before, a prostitute, but who was not his wife, to go to a bawdyhouse, and there follow the same practice during the greater part of every night, and that he received from her a large part or all of the money she obtained thereby. It does not appear that either the defendant, the keeper of the bawdyhouse, or any other person exercised any restraint or control over her actions, or prevented or attempted to prevent her from leaving the place at any time she chose. The conduct of defendant was exceedingly immoral, reprehensible, and degrading. But he did not place the girl in custody; he merely persuaded her to become a voluntary inmate of a house of ill fame as a prostitute, and received the proceeds of her occupation. This the statute at that time did not denounce as a felony. The acts charged were done prior to the passage of the act of February 8, 1911, making such conduct, designated therein as "pandering," a felony. Stats. 1911, p. 9. The evidence does not show a violation of the section above quoted, under which the defendant was prosecuted. The verdict was contrary to the law and the evidence.

The judgment is reversed.

We concur: ANGELLOTTI, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

(18 Cal. App. 41)

FURMAN v. CRAINE et al. (Civ. 1,048.)

(District Court of Appeal, Second District, California. Jan. 15, 1912.)

1. Specific Performance (§ 86*)—Contracts Enforceable.

Where parents of a child four years old surrendered the custody thereof to a third person in consideration of her agreeing to adopt the child and give her all the rights of a child in her estate, and the third person on the execution of the agreement took charge of the child and exercised control over her as an adopted child until the child's marriage 16 years later, and the child, for over 24 years, discharged her duties as a child until the third person's death, intestate, equity would compel the specific performance of the contract to give the child the property, though there had been no adoption in fact; the contract being supported by a valid consideration.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 223, 224; Dec. Dig. § 86.*]

2. Executors and Administrators (§ 224*)—Claims—Statutes.

Code Civ. Proc. §§ 1493, 1495, 1500, providing for the presentation of claims against decedents' estates before suit, do not apply to an asserted ownership of a decedent's property based on the existence of a trust created by decedent in her lifetime for the benefit of plaintiff, based on a contract, supported by valuable consideration, binding decedent to adopt plaintiff and give all her property to plaintiff.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 768–788; Dec. Dig. § 224.*]

3. Executors and Administrators (§ 439*)—Parties—Proper Parties.

Where, for a valuable consideration, a person agreed to adopt a child and make it an heir, the child, on the death of such person in suing for specific performance, properly made the administrator a party to restrain him from delivering the property to the next of kin, though, in the absence of any affirmative relief against the administrator, he was not a proper party.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1765, 1766, 1770, 1771, 1774; Dec. Dig. § 439;* Parties, Cent. Dig. §§ 17, 25, 37, 38, 50, 64.]

4. Limitation of Actions (§ 46*)—Time to Sue—Limitations.

Where a cause of action was based on plaintiff's right to inherit the property of a decedent pursuant to a contract creating a trust for plaintiff's benefit at testator's death, no cause of action accrued until decedent's death, and a suit for specific performance of the contract, brought less than two years after decedent's death, was not barred by limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 240–253; Dec. Dig. § 46;* Insurance, Cent. Dig. § 1540.]

5. Equity (§ 87*)—Laches.

Mere delay for a period less than that prescribed by limitations does not amount to laches.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 242–244; Dec. Dig. § 87.*]

6. Evidence (§ 178*)—Secondary Evidence—Admissibility.

Where an agreement was executed in duplicate, and a party thereto took both copies, and at her death a mutilated copy, containing little of the substance of the agreement, but disclosing the signatures of the parties and the witnesses, was found, and a diligent search was made for the other copy or the remainder of that found, but without avail, secondary evidence of the contents of the agreement was admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 580–594; Dec. Dig. § 178;* Records, Cent. Dig. § 33.]

7. Witnesses (§ 139*)—Competency—Testimony of Administrator.

Where, in a suit against the next of kin of a decedent to compel specific performance of a contract binding decedent to adopt plaintiff and make her a legal heir, the administrator, not a proper party, was competent to testify to the contents of the instrument evidencing the contract.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 582–597; Dec. Dig. § 139.*]

8. Specific Performance (§ 120*) — Contracts Enforceable.

Where parents surrendered the custody of a child to a third person in consideration of her agreeing to adopt the child and make it her legal heir, and the child, on the third person's death, sought specific performance of the contract, evidence, that the child performed the duties devolving on her as a child of the third person in reliance of the status which she believed to exist in view of the representations that the child was an adopted child, was admissible.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 384–386; Dec. Dig. § 120.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

9. Appeal and Error (§ 1042*)—Harmless Error—Erroneous Rulings on Pleadings.

The striking out of an allegation in an answer not presenting affirmative matter, but presenting only an issue tendered by other allegations of the answer, is not prejudicial because the right of defendant to introduce evidence is not thereby abridged.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4110–4114; Dec. Dig. § 1042.*]

10. Witnesses (§ 133*) — Competency — Transactions with Deceased Persons.

Where parents surrendered the custody of a child to a third person in consideration of her agreeing to adopt the child and make it her legal heir, and the child, on the third person's death, brought suit for specific performance of the contract, the parents were competent to testify to the execution of the agreement, notwithstanding Code Civ. Proc. § 1880, subd. 3, prohibiting parties to an action against a decedent's estate from testifying.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 566–569; Dec. Dig. § 133.*]

11. Evidence (§ 461*)—Contracts Enforceable.

In a suit to compel specific performance of a contract by a person since deceased to adopt plaintiff and make her a legal heir, evidence of conversations and conduct of decedent to show that she construed the contract as creating the relation between her and plaintiff as mother and child by adoption was admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2129–2133; Dec. Dig. § 461.*]

Appeal from Superior Court, Los Angeles County; M. P. Conrey, Judge.

Action by Mary E. S. Furman against George F. Craine and others. From a judgment for plaintiff, certain of the defendants appeal. Affirmed.

Murphey & Poplin, Shankland & Chandler, and C. White Mortimer, for appellants. John H. O'Connor, Hunsaker & Britt, James P. Hogan, and M. M. Meyers, for respondents.

SHAW, J. It appears from the findings: That on June 2, 1884, when plaintiff was four years of age, Margaret E. Synnot, who at the time of her death was known as Margaret E. Cleveland, a childless, widowed sister of defendant James O. Craine, made an agreement in writing with the latter and his then wife, Emma Craine, who were the father and mother of plaintiff, whereby they forever surrendered to Synnot the control, custody, and society of plaintiff and relinquished to her all claims and rights which they had to and over plaintiff by reason of being her parents, in consideration of which Synnot agreed to take, adopt, rear, and educate plaintiff as her own child, and give her all the rights of a child in and to her estate and to make plaintiff her heir at law so she would inherit the property of Synnot upon the latter's death. Plaintiff's parents fully performed all of the conditions on their part agreed to be performed, and Synnot upon the execution of the agreement took charge of plaintiff and thenceforward, until plaintiff's marriage in November, 1900, had and exercised exclusive control, custody, and care of plaintiff in all respects as her adopted daughter, and during all of said time plaintiff lived with Margaret E. Synnot as a member of her family and performed all the duties and obligations of a daughter to her up to the time of her said marriage, after which, though occupying a residence of her own, she continued to discharge her duties as a daughter of Margaret E. Synnot, until the latter died, intestate, on April 23, 1908, leaving neither issue, husband, father, nor mother surviving her. That while said Margaret E. Synnot did not legally adopt plaintiff, she frequently stated to plaintiff, and to others in her presence, that she had adopted plaintiff and that plaintiff was her heir at law and upon her death would inherit her estate, by reason whereof plaintiff was led to believe, and did believe, that she was the legally adopted daughter and heir at law of said Synnot, and in reliance thereupon after she came to years of discretion she remained with said Margaret E. Synnot as a member of her family and gave her the affection and obedience of and in all respects conducted herself as the daughter of said Margaret E. Synnot. That plaintiff's parents and Margaret E. Synnot believed and understood that the agreement so entered into between them had the legal effect of establishing between plaintiff and said Margaret E. Synnot the relation of child and parent, and conferred upon plaintiff the statute and rights of an adopted child. At the time of the commencement of the suit, all of the claims against the estate and all costs and expenses of administration had been paid, and the estate was ready for distribution. The defendants appealing are nephews and nieces of two deceased brothers and a deceased sister of Margaret E. Synnot. James O. Craine was the administrator of the estate of said Margaret E. Synnot, deceased, and as such was made a party defendant in the action upon an allegation therein to the effect that he would, unless restrained by the process of court, pay over and deliver to said defendants the estate so remaining in his hands for final distribution. The court by its judgment declared plantiff to be the equitable owner of all the estate remaining in the hands of the administrator for distribution, and adjudged and decreed that the defendants, other than James O. Craine as administrator of said estate, held the legal title to all said property in trust for the benefit of plaintiff, and that they, or, in default of so doing, that the clerk of the court, execute to plaintiff a conveyance sufficient in law to transfer said property to her, and enjoining James O. Craine from the payment or delivery of any of said property to any of said defendants in pursuance of any decree of distribution which may be made in the matter of said estate. The appeal is from the judgment and from an order of court denying defendants' motion for a new trial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] 1. The right of plaintiff to have specific enforcement of the alleged contract upon the facts found is supported by overwhelming authority. Van Tine v. Van Tine (N. J.) 15 Atl. 249, 1 L. R. A. 155; Healey v. Simpson, 113 Mo. 340, 20 S. W. 881; Sharkey v. McDermott, 91 Mo. 647, 4 S. W. 107, 60 Am. Rep. 270; Burns v. Smith, 21 Mont. 251, 53 Pac. 742, 69 Am. St. Rep. 653; Johnson v. Hubbell, 10 N. J. Eq. 332, 66 Am. Dec. 773. While in the case of Owens v. McNally, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369, specific performance was denied as against the widow of deceased, the ground therefor clearly distinguishing the case from this, it was there said, with reference to a like agreement, that "a court of equity will enforce such an agreement specifically by treating the heirs as trustees and compelling them to convey the property in accordance with the terms of the contract." That there was an adequate consideration for the promise fully appears; it being shown that when plaintiff was four years of age the relation existing by nature between plaintiff and her parents was severed, and in lieu thereof an artificial relation for the purpose of satisfying the maternal cravings of this childless aunt. Plaintiff entered her household as her child, and she, her parents, and her aunt, upon sufficient grounds, thought and believed that she had been adopted as the child of Margaret E. Synnot, and thenceforward for nearly 24 years she was so recognized by Synnot. The surrender of their child on the part of the parents, the presumed detriment to plaintiff due to the severing of the paternal ties, and the love, obedience, and companionship given the aunt, followed by the establishment of the artificial relation, cannot be measured in gold. "There are things which money cannot buy; a thousand nameless and delicate services and attentions, incapable of being the subject of explicit contract, which money, with all its peculiar potency, is powerless to purchase. The law furnishes no standard whereby the value of such services can be estimated, and equity can only make an approximation in that direction by decreeing the specific execution of the contract." Sutton v. Hayden, 62 Mo. 101; Healey v. Simpson, supra.

[2] 2. Defendants appealing demurred to the complaint upon the ground that, inasmuch as it did not appear therefrom that plaintiff, prior to filing the same, had presented to the administrator any demand or claim for the property, as provided in sections 1493 and 1500, Code of Civil Procedure, it did not state facts sufficient to constitute a cause of action. The action of the court in overruling the demurrer is assigned as error. These sections of the Code have no reference to actions of the character here presented. Plaintiff did not claim that the estate was indebted to her, and she held no claim payable out of the estate in course of administration. Her contention is that she is the sole beneficiary of a trust impressed upon the property remaining after the payment of costs of administration and all claims against it, and as such equitable owner entitled to a conveyance thereof from those holding the legal title.

[3] In an action the purpose of which is merely to enforce such trust by way of specific performance, and in the absence of any affirmative relief being asked against the administrator, he is not a necessary, or even proper, party defendant. In the case at bar he is properly made a party defendant because of allegations showing a necessity for the order asked restraining him from paying or delivering the property to the defendants. That the asserted ownership of the property, based upon the existence of a trust created by the owner thereof in her lifetime for the benefit of plaintiff, is not a claim within the meaning of sections 1493, 1495, and 1500, Code of Civil Procedure, is sustained by numerous authorities. See Fallon v. Butler, 21 Cal. 24, 81 Am. Dec. 140; Est. of Swain, 67 Cal. 637, 8 Pac. 497; McCabe v. Healy, 138 Cal. 81, 70 Pac. 1008; Est. of Dutard, 147 Cal. 253, 81 Pac. 519. An examination of the authorities cited by appellants to the contrary discloses that they were all cases involving claims properly so called, against an estate for money, and wherein it was sought to establish the right thereto by action instituted against the administrator or executor of decedent.

3. For like reasons, the court did not err in sustaining the demurrer to the second separate defense contained in the answer, since it was based upon the failure of plaintiff to present the claim for allowance in accordance with the provisions of said sections 1493 and 1500, Code of Civil Procedure.

[4] 4. It is claimed that the court erred in sustaining plaintiff's demurrer to the fifth separate defense set up in the answer, wherein defendants pleaded laches of plaintiff in bringing the suit. The cause of action here involved is based upon plaintiff's right to inherit the property of Margaret E. Synnot at her death. Hence no cause of action accrued until her demise on April 23, 1908. The suit was brought within less than two years from that date, and therefore was not barred by the provisions of the statute limiting the time within which such actions may be brought.

[5] As said by respondent: "Mere delay for a period of time less than that prescrib-

ed by the statute of limitations does not constitute laches." Lux v. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; Ex-Mission L. & W. Co. v. Flash, 97 Cal. 610, 32 Pac. 600. Moreover, the adoption was merely the means whereby to accomplish an end, viz., the transfer to plaintiff of the property owned by Synnot at the time of her death. While, in the absence of other disposition by will, the intended purpose would have been accomplished by adoption, as a result of which plaintiff would have inherited as a natural child, nevertheless, had there been an adoption, and Synnot had by will devised the property to another, plaintiff would, by virtue of the agreement, have been entitled to maintain an action for the property as against such devise. The matter thus set up constituted no defense, and hence the court did not err in sustaining the demurrer.

[6] 5. The agreement between Margaret E. Synnot and plaintiff's parents was executed in duplicate, and Margaret E. Synnot took charge of both copies thereof. At the time of her death a mutilated copy, containing little of the substance of the agreement, but disclosing the signatures of the parties thereto, together with those of the witnesses to the execution of the same, was found among her papers. A diligent search was made for the other copy, or the remainder of that found, but without avail. The evidence was sufficient to establish the loss and destruction of the instrument, and to admit of parol testimony in proof of its contents. There was no error in the line of evidence admitted for the purpose of establishing the loss, nor in proof of the contents of the instrument by parol.

[7] 6. The testimony of the administrator, since he was not a proper party defendant, nor the action prosecuted upon a claim against the estate of Margaret E. Synnot, was competent evidence of the contents of the instrument. Poulson v. Stanley, 122 Cal. 658, 55 Pac. 605, 68 Am. St. Rep. 73.

[8] 7. Proof alone of the execution of the written instrument would not in itself have entitled plaintiff to recover. Since she had not been legally adopted as promised, nor otherwise given the immediate right of inheritance upon the death of her aunt, it was necessary and proper, when invoking the equitable intervention of the court, to show that she performed the obligations and duties devolving upon her as the daughter of deceased, not as a mere stranger, but in reliance upon a status which she believed to exist, and which belief was justified by the conduct and representations made by the aunt. We perceive no error in admitting the plaintiff's testimony for such purpose.

[9] 8. In their answer defendants alleged that plaintiff and her father had conspired together in fabricating testimony to prove the existence of the alleged contract, knowing that no such contract had been made. This was properly stricken out by the court. The allegation contained no affirmative matter, and hence presented no issue other than that tendered by the answer in specifically denying the execution of the agreement alleged in the complaint, and upon which the cause of action was based. The right of defendants to introduce evidence was in no wise abridged by the action of the court.

[10] 9. The claim that the evidence fails to support the findings as to the execution of the agreement and its contents is based upon the contention that under subdivision 3, § 1880, Code of Civil Procedure, neither the father nor mother of plaintiff was a competent witness to testify touching the subject. As we have seen, the action was not prosecuted upon a claim against an estate, and hence the admission of the testimony did not contravene the provisions of this section.

A number of alleged errors are predicated upon the rulings of the court in admitting and rejecting evidence. It is unnecessary to enter upon an extended discussion of these rulings; suffice it to say, we have considered all of them and, in the light of what has heretofore been said, find no merit in the points based thereon.

[11] It was not improper to prove conversations, conduct, and actions on the part of the aunt which tended to show that she construed the agreement as creating the relation between her and plaintiff of mother and child by adoption. Van Tine v. Van Tine, supra. We perceive no error in the ruling of the court in admitting in evidence the deposition of Thomas Eileman and Mrs. Anna Duey. The stipulation of attorneys, considered with the evidence of the clerk and the record, sufficiently identifies it as a deposition taken to be used in the trial of the case under a commission duly issued authorizing the taking of the same.

We find no prejudicial error in the record, and the judgment and order are therefore affirmed.

We concur: ALLEN, P. J.; JAMES, J.

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18 Cal. App. 52

Ex parte NORTHERN. (Cr. 236.)

(District Court of Appeal, Second District, California. Jan. 19, 1912.)

1. Contempt (§ 6*)—"Contempt in Immediate View of Court"—Failure to Pay Pursuant to Order.

A contempt for refusal to pay pursuant to an order is not committed in the immediate view of the court within Code Civ. Proc. § 1211, authorizing summary punishment for such contempt.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 6, 10, 13; Dec. Dig. § 6.*]

2. Contempt (§ 54*)—Proceedings for Punishment—Affidavit.

Under Code Civ. Proc. § 1211, providing that, when a contempt is not committed in the immediate view of the court, an affidavit of the facts must be presented to the court, the court is without jurisdiction to punish for contempt for refusal to pay pursuant to an order, unless the proper affidavit is presented.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 143–149; Dec. Dig. § 54.*]

3. CONTEMPT (§ 44*) — JURISDICTION — RECORD.

The jurisdiction of the superior court in contempt proceedings is limited, and the jurisdictional facts must appear in the judgment and order of commitment.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 128–130; Dec. Dig. § 44.*]

Application for writ of habeas corpus by Milton Northern for his discharge from custody under a sentence for contempt of court. Granted, and petitioner discharged.

Lewis Cruickshank, for petitioner. D. E. Bowman, for respondent.

PER CURIAM. Petitioner is shown by the return to be held under a commitment specifying that a certain action came on regularly for hearing on an order to show cause in re contempt, and testimony having been heard on the part of both the plaintiff and the defendant and it appearing to the satisfaction of the court that the defendant Northern had been guilty of contempt by reason of his refusal to obey the order of the court to pay temporary alimony and attorney's fees, which said order was made on October 16, 1911, and, it further appearing to the court that said defendant Northern had ability to pay the same, it was therefore ordered, adjudged, and decreed that he be committed to the county jail until he should pay to the plaintiff Mildred Northern the sum of $40.

[1] The contempt for a refusal to pay pursuant to an order is one not committed in the immediate view and presence of the court, and under section 1211 of the Code of Civil Procedure an affidavit presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees, arbitrators, or other judicial officers, is essential as giving the court jurisdiction to hear and determine the proceedings in contempt.

[2] Assuming that the case of Northern v. Northern was one in which a judgment for alimony could be rendered, which fact does not affirmatively appear, and that the court made an order requiring him to pay the sum of $40, which fact also does not affirmatively appear, and that said Northern had ability to pay the same, nevertheless the court was without jurisdiction to punish for contempt, in the absence of an affidavit as provided by the section of the Code above cited.

[3] In proceedings in contempt the jurisdiction of the superior court is limited, and jurisdictional facts must be made to appear in the judgment and the order of commitment.

Considering the record, then, as presented in this case, the order made by the court was without jurisdiction, and the petitioner is entitled to his discharge, and it is so ordered.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

MEMORANDUM DECISIONS

162 Cal. 760

HAUN v. ROBINSON. (S. F. 5,793.) (Supreme Court of California. Jan. 18, 1912.) Department 1. Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge. Action by Joseph P. Haun against F. E. Robinson. From an order granting a change of place of trial, defendant appeals. Affirmed. Frank H. Gould, for appellant. Hickcox & Crenshaw and Reuben G. Hunt, for respondent.

PER CURIAM. Appeal from an order granting a change of place of trial from the superior court of the city and county of San Francisco to the superior court of Los Angeles county on the ground that the convenience of witnesses and the ends of justice would be promoted by the change. Code Civ. Proc. § 397, subd. 3. The order was affirmed from the bench, for the reason that it satisfactorily appeared to the court that there was a sufficient showing made by the affidavit in support of the motion to sustain the conclusion of the lower court that "the convenience of witnesses and the ends of justice" would be promoted by such a change.

17 Cal. App. 674

SAVINGS BANK OF ST. HELENA v. NAPA COUNTY. (Civ. 876.) (District Court of Appeal, Third District, California. Dec. 16, 1911. Rehearing denied by Supreme Court Feb. 14, 1912.) Appeal from Superior Court, Napa County; Henry C. Gesford, Judge. Action by the Savings Bank of St. Helena against the County of Napa. Judgment for plaintiff, and defendant appeals. Affirmed. Frank M. Silva and Theodore A. Bell, for appellant. Wallace Rutherford, for respondent.

CHIPMAN, P. J. This is an action to recover the sum of $2,056.47, alleged to have been paid by plaintiff to defendant under protest as taxes illegally assessed on plaintiff's property. The property so assessed consisted of the bonds of certain railroad companies and certain bonds of the California Gas & Electric Company of San Francisco, and it is alleged that all of said railroad companies are railroad corporations organized under and by virtue of the laws of the state of California and that the said gas and electric company is a public service corporation organized under and by virtue of the laws of said state, all of said bonds amounting to the sum of $116,845, on which said assessment was levied and collected. It is further alleged "that all of said bonds are and were on the first Monday in March, 1909, at 12 o'clock meridian, secured by mortgage or deed of trust made and executed by said corporations upon property owned by said corporations in the state of California * * * and now assessed to said corporations." The facts set out in the complaint as constituting the cause of the action are similar in all essential particulars as appeared in Napa Savings Bank v. County of Napa, No. 877, decided by this court on November 23, 1911, reported in 120 Pac. 449. A general demurrer to the complaint was sustained, and plaintiff had judgment, from which defendant appealed. The questions presented in the present case are the same as were decided in the case cited, and, on its authority, the judgment herein is affirmed.

We concur: BURNETT, J.; HART, J.

CALIFORNIA REPORTER

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18 Cal. App. 70

PEOPLE v. MARIO (two cases). (Cr. Nos. 171, 172.)

(District Court of Appeal, Third District, California. Jan. 22, 1912.)

1. Criminal Law (§ 1130*)—Appeal—Brief—Necessity.

Where accused fails to file a brief or comply with Supreme Court rule 2 (119 Pac. x), requiring appellant to file his points and authorities, and thereby subjects his appeal to dismissal under rule 5 (119 Pac. x), the reviewing court need not make an independent investigation into the legality of his conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2965–2970; Dec. Dig. § 1130.*]

2. Robbery (§ 24*)—Evidence—Sufficiency.

Evidence *held* sufficient to support conviction of robbery.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. §§ 32–36; Dec. Dig. § 24.*]

Appeals from Superior Court, Plumas County; J. O. Moncur, Judge.

Celestino Mario and Guiseppe Mario were

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

convicted of robbery, and they separately appeal. Appeals dismissed.

W. W. Kellogg and J. D. McLaughlin, for appellants. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

HART, J. The defendants above named were jointly charged, by information filed by the district attorney of Plumas county, with the crime of robbery. They were given separate trials, and each was convicted of the crime charged in the information.

Each of the defendants appeals from the judgment under the method prescribed by section 1247 of the Penal Code, and, as one of the grounds of the appeal in each cause is the alleged insufficiency of the evidence to justify the verdict, the court below ordered, upon the application of the defendants, all the testimony in each case to be transcribed by the phonographic reporter, and said testimony, therefore, constitutes a part of the record on appeal in each case.

[1] But counsel for the appellants have not filed a brief or points and authorities in either case. The transcript in each case was filed in this court on October 28, 1911. Rule 2 (119 Pac. x) of the Supreme Court provides that, "in criminal cases, the appellant shall file his points and authorities (with proof of service of a copy thereof on the Attorney General) within ten days after the filing of the transcript," and rule 5 (119 Pac. x) authorizes a dismissal of the appeal where the points and authorities are not so filed. The reason of the last-mentioned rule is that, since an appeal presupposes at least some debatable ground of complaint against the judgment and the manner of its procurement, it is the duty of the complaining party (the appellant) to point out the specific points upon which he seeks to support his appeal, and that it is not intended or contemplated that the reviewing court, unaided by appellant himself, shall make an independent investigation, for the purpose of ascertaining whether he has been legally or illegally convicted of the offense charged against him. As is said in People v. Perry, 117 Pac. 1036, where the appellant likewise failed to file points and authorities, "this court is not required, in the absence of special assignments, in some form, of alleged error, to search the record for the purpose of determining whether the trial in the court below was in all respects conducted without prejudice to the substantial rights of the accused."

[2] We have, however, notwithstanding the omission to file briefs in these cases, carefully read the testimony and examined the instructions in each case. The principal testimony upon which the verdicts are founded came from the prosecuting witness. It involves a direct statement that the defendants went to the room of the prosecuting witness, shortly after the latter had retired for the night, and, while one held a pistol over him, the other abstracted the sum of $90 in gold from a pocket in the shirt in which he retired, and which was on his body at the time of the robbery. This testimony is sufficient to support the verdict returned in each of the cases. The instructions given in both cases fully, fairly, clearly, and correctly covered every phase of each case as disclosed by the charge and the evidence.

For the reasons stated in the foregoing, the appeal in both cases will have to be dismissed. It is therefore ordered that the appeal in the case of People v. Mario (No. 171) be dismissed, and that the appeal in the case of People v. Mario (No. 172) be dismissed.

We concur: CHIPMAN, P. J.; BURNETT, J.

18 Cal. App. 35

MACHADO v. CANTY. (Civ. 872.)

(District Court of Appeal, Third District, California. Jan. 13, 1912.)

1. JUDGMENT (§ 256*)—ACTION—FINDINGS TO SUPPORT JUDGMENT.

Findings, in an action to quiet title, that the plaintiff was, and for more than three years prior to the beginning of his action had been, the owner in fee and entitled to the possession, that defendant claimed title under a tax deed from the state, that the tax sale was based upon an assessment levied when the property was not subject to taxation by the state, and that the plaintiff afterwards received a patent from the United States, conveying to him the absolute title, support a judgment for the plaintiff.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 446–454; Dec. Dig. § 256;* Injunction, Cent. Dig. § 432.]

2. JUDGMENT (§ 256*) — CONSTRUCTION OF FINDINGS — FINDING OF FACT OR CONCLUSION OF LAW.

In an action to quiet title, a finding that the plaintiff "is the owner in fee" of the property is not a conclusion, but a finding of an ultimate fact, sufficient to support a judgment for plaintiff.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 446–454; Dec. Dig. § 256;* Injunction, Cent. Dig. § 432.]

3. TAXATION (§ 811*) — FINDINGS — CONSISTENCY.

Where it is found, in an action to quiet title, that plaintiff had no right to the premises until about June, 1897, when he made application to enter upon the land as a homestead entryman, a further finding that during a period from and including the year 1895 to March, 1905, title to the property was in the United States, "subject only to the rights of plaintiff as a homestead entryman thereon, as aforesaid," is not inconsistent therewith.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1609, 1610; Dec. Dig. § 811.*]

4. JUDGMENT (§ 256*)—FINDINGS—CONSTRUCTION—SEPARATE JUDGMENT.

Any uncertainty in findings is to be construed so as to support the judgment, rather than defeat it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 446–454; Dec. Dig. § 256.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. Appeal and Error (§ 1031*) — Harmless Error—Findings as to All Issues.

Where the findings do not cover all material issues, and any further findings must have been adverse to the appellant, there is a presumption that the failure to find on all issues was without prejudice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4038–4046; Dec. Dig. § 1031.*]

6. Taxation (§ 814*) — Tax Title—Payment of Taxes—Right to Refund.

In an action to quiet title against the claimant under a tax deed, void because based upon an illegal assessment, defendant, on judgment for plaintiff, was not entitled to a refund of the amount that he had paid for the property at the tax sale.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1612, 1613; Dec. Dig. § 814.*]

7. New Trial (§ 124*) — Newly Discovered Evidence—Sufficiency.

A petition for a new trial on the ground of evidence discovered after the appeal was taken, supported by an affidavit setting out such newly discovered evidence, which shows petitioner's reliance upon statements and admissions made by the adverse party in a conversation with a person who is only identified as a man by the name of M., but without affidavit of such person, is too meager and uncertain to entitle petitioner to a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 250–253; Dec. Dig. § 124.*]

8. New Trial (§ 103*) — Newly Discovered Evidence—Materiality.

Land the title to which is in the United States, being not subject to assessment for taxes, under Pol. Code, § 3607, defendant, in an action to quiet title against a tax deed based on assessment of the land before plaintiff made his homestead entry thereon, on which a patent was later issued, will not be granted a new trial for newly discovered evidence that another person had previously made a homestead entry on the same land and had been in possession from before the assessment until after the sale for taxes; such evidence being immaterial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 215–217; Dec. Dig. § 103.*]

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by Frank A. Machado against D. J. Canty. Judgment for plaintiff, and defendant appeals. Affirmed.

Royle A. Carter, for appellant. Sutherland & Barbour, for respondent.

BURNETT, J. The action, brought in the usual form to quiet title, resulted in a judgment for plaintiff, from which the appeal is taken on the judgment roll.

[1, 2] The decisive question is whether the findings support the judgment. The court found: "That the plaintiff is now, and for more than three years prior to the commencement of this action has been, the owner in fee and entitled to the possession of that certain real property," describing it. "That the defendant, D. J. Canty, claims some right, title, or interest in said real property adverse to said plaintiff. That the said claim of defendant is based upon a certain assessment of said property for state and county taxes of the year 1895, for which taxes said property was purported to have been sold to the state of California by the tax collector of the county of Fresno, state aforesaid, on July 3, 1896; said tax collector's certificate of such purported sale being thereupon issued to said state, also upon said tax collector's deed dated on or about July 8, 1901, purporting to convey the title to said premises to the state of California. and also upon said tax collector's deed to defendant, dated May 31, 1905, purporting to convey to defendant all of the interest of the state of California in and to said real property. That at the time said assessment was levied upon said real property, and during the entire year 1895, said land was a part of the public domain of the United States of America, and not subject to taxation by the state of California. That on or about the 1st day of June, 1897, plaintiff made application to enter upon said land as a homestead entryman, said application being numbered 9,596, and thereafter, on or about the 22d day of August, 1904, final certificate No. 4,641 was issued by the General Land Office of the United States of America to plaintiff, and on March 8, 1905, letters patent of said land were issued by the United States of America to plaintiff, conveying to plaintiff the absolute title thereto." Then follow the conclusions of law that said assessment and tax deed were void, that defendant has no interest in the property, and that plaintiff is the owner in fee simple and entitled to the possession thereof, and directing a decree in accordance with the prayer of the complaint. That the judgment in favor of plaintiff follows logically and necessarily from the facts found seems beyond candid controversy. The only pretense of an argument that could be made to the contrary is based upon the assumption that the purported findings of fact are in reality but a statement of legal conclusions. This is, however, opposed to the correct view of the situation. The finding that plaintiff "is the owner in fee" of the property is of an ultimate fact and is sufficient to support the judgment. Smith v. Acker, 52 Cal. 217; Frazier v. Crowell, 52 Cal. 399; Murphy v. Bennett, 68 Cal. 531, 9 Pac. 738.

[3, 4] Nor is there any conflict in the findings. Appellant contends that "finding 5 expressly declares that, from and including the year 1895 (the year of the assessment), the property was subject to the rights of plaintiff though the title was in the United States." As pointed out by respondent, this is not a fair inference from said finding. The language is: "That during said period from and including the year 1895 to March 8, 1905, title to said lands was in the United States of America, subject only to the rights of said plaintiff as a homestead entryman thereon, as aforesaid." The rights of plain-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tiff "as aforesaid" are determined by the preceding finding. Therein it is disclosed that he had no right in the premises till about the 1st day of June, 1897, when he "made application to enter upon said land as a homestead entryman." Of course, any uncertainty in the findings is to be construed so as to support the judgment, rather than defeat it. Warren v. Hopkins, 110 Cal. 506, 42 Pac. 986.

[5] There is no merit in the contention that the findings do not cover all the material issues. If such were the fact, in the condition of the record, the presumption would be that it was without prejudice. Krasky v. Wollpert, 134 Cal. 338, 66 Pac. 309. We deem it sufficient to say that, not only do the findings support the judgment, but they cover all the essential allegations of the pleadings.

[6] It was not error for the trial court to render judgment for plaintiff, without requiring him to pay defendant the amount that defendant paid for said property at the tax sale. The cases cited by appellant are not in point here, as the land in controversy before us was not subject to taxation by the state at the time of the assessment. In the case of Brooks v. County of Tulare, 117 Cal. 468, 49 Pac. 470, it is said: "It will be observed that there is a plain distinction between the Hayes Case [99 Cal. 74, 33 Pac. 766] and this. Here the plaintiff knew, or might have known, when he made his bid and paid his money, whether the land was vacant public land or not. It may be that some one had a possessory claim on the land which was subject to assessment. At any rate, his bid was voluntary, and he cannot now maintain an action to recover back the money paid." As pointed out by respondent, the Brooks Case involved an action to recover from the county the amount paid by the purchaser of a tax title, based upon an assessment of land which was at the time of said assessment a part of the public domain of the United States. Other authorities cited by respondent are Preston v. Hirsch, 5 Cal. App. 485, 90 Pac. 965; Norris v. Russell, 5 Cal. 249; Harper v. Rowe, 53 Cal. 233; Loomis v. Los Angeles County, 59 Cal. 456; Pennock v. Douglas County, 39 Neb. 293, 58 N. W. 117, 27 L. R. A. 121, 42 Am. St. Rep. 579; Mitchell v. Minnequa Town Co., 41 Colo. 367, 92 Pac. 678. The situation seems to be substantially covered by the following statement made by respondent: "This land was assessed for taxes in the year 1895, when the title to the same was in the United States, and the state had no right to assess the land. Defendant holds a tax deed based upon this illegal assessment. His tax deed is void, and he has no rights whatever in this land or against this plaintiff. He is not entitled to the land because the state had no title to convey to him. He is not entitled to a refund of the money paid by him for the tax title, for the reason that such payment was a voluntary payment on the part of the defendant. He is not entitled to a refund of the taxes for the years 1898 to 1904, for the reason that a void sale for the taxes of the year 1895 could not convey title for the years 1898 to 1904, and any lien that the state may have against this land has not been acquired by defendant."

[7] When the case was called here for oral argument, appellant filed a petition praying that the cause be remanded to the superior court of the county of Fresno, in which the action was tried, for a new trial and for the purpose of taking new and additional testimony, or that this court reopen the case and allow petitioner to make the additional showing here and present the evidence in proper form as the court may direct. The petition was based upon the ground of evidence discovered after the appeal was taken herein, and was supported by an affidavit setting out said newly discovered evidence. Our attention has not been called to any case where such proceeding has been taken before in this state. Appellant has cited two or three decisions from North Carolina where the practice seems to have been countenanced. In one of these, Sikes v. Parker, 95 N. C. 232, it is stated that "it has been frequently held that this court will always entertain such a motion with caution and scrutiny, and will not grant a new trial, except in a clear case coming within the settled rules of practice in such respect." We need not, however, consider the question whether in this court under any circumstances such a motion could be granted, for we are satisfied that for two reasons stated by respondent the application must be denied: In the first place, appellant relies upon statements and admissions made by respondent in a conversation with a man by the name of McCord. But there is no affidavit from McCord, and all the material facts and circumstances recited in appellant's affidavit are based upon information and belief growing out of statements made to him by McCord, who is only identified "as a man by the name of McCord." Such showing is manifestly too meager and uncertain to justify a court in setting aside a solemn judgment.

[8] Again, the newly discovered evidence would be immaterial if a new trial were granted. The information upon which appellant relies is that one "M. F. Johnson entered and located the land involved in this action under the homestead entry laws of the United States; that said M. F. Johnson occupied said land, and held possession thereof under said entry, with intent to obtain a patent to said land, from some time previous to the date of the levy of said assessment, until after said levy of said assessment was made, and after said property was sold for taxes to the state of California, under the

sale under which your petitioner claims title; and that said M. F. Johnson was in possession of said property under said entry, and entitled to possession of the same, at the time said assessment was levied, and said property was sold for taxes on said property, and on the improvements thereon, and on the personal property of said M. F. Johnson." We agree with respondent that the law in force at the time of the assessment of the taxes in question was that property belonging to the United States was not subject to taxation. Section 3607, Pol. Code. If not subject to taxation, it could not be sold to satisfy any illegal assessment. And the law in force at the time the assessment was levied is the law governing the case. But by the affidavit in question it is made to appear that at the time said levy was made the title was in the United States. "It is therefore apparent," as respondent states, "that the evidence of which appellant now seeks to have the court take cognizance can have no possible bearing on the case at bar, for the reason that, if material at all, it could only be material under the statutes enacted subsequent to the assessment in question."

We think the judgment of the court below is right, and should be affirmed, and the motion to reopen the case should be denied. It is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

LAPIQUE v. SUPERIOR COURT OF ORANGE COUNTY et al. (Civ. 1,126.)

(District Court of Appeal, Second District, California. Jan. 19, 1912. Rehearing Denied by Supreme Court March 18, 1912.)

1. Appeal and Error (§ 553*)—Bill of Exceptions — Substitutes — Authentication.

All that a judge is required to authenticate in lieu of a bill of exceptions is the stenographic notes of the trial containing the proceedings and evidence which would otherwise form no part of the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2461–2471; Dec. Dig. § 553.*]

2. Appeal and Error (§ 659*)—Writ of Review—Where Lies.

Since a writ of review lies only where the court acts without jurisdiction and there is no other speedy and adequate remedy, it will not lie because the trial judge in authenticating the transcript omits matters therefrom.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2834–2843; Dec. Dig. § 659.*]

Petition by John Lapique against the Superior Court of Orange County and Z. B. West, Judge thereof, for writ of review. Writ denied.

John Lapique, in pro. per.

PER CURIAM. An affidavit filed by petitioner discloses facts tending to show that he is the appellant in a certain action pending in this court on appeal from the superior court of Orange county; that the appeal was regularly taken; and that within the prescribed time he filed with the clerk a notice of the papers which he desired certified; that the clerk in preparing the transcript of such papers omitted therefrom papers specified in the notice, none of which papers appear to have had reference to or connection with any transcript required to be signed by a judge. He alleges that the clerk's transcript was presented to the judge, and that the judge made certain amendments thereto on his own motion, and that the clerk certified the transcript as amended. He asks this court to review the action of the superior court and to compel that court to certify the omitted papers.

[1] The only thing a judge is "required to correct, approve, and certify under the new practice in lieu of a bill of exceptions is the stenographic notes of the trial containing the proceedings and evidence which would form no part of the record unless authenticated as the statute provides." Christenson Lumber Co. v. Seawell, 157 Cal. 406, 108 Pac. 276. But, were the facts otherwise and the papers such as should be incorporated in a transcript to be authenticated by the judge, nevertheless, in determining the correctness of a transcript, the court has jurisdiction and authority to sign such transcript as in his opinion is correct.

[2] The writ of review only lies where the court acts without jurisdiction and there is no other speedy and adequate remedy. The court in signing a transcript, which by the statutes is to be authenticated by it, does not exceed its jurisdiction if it omits matters therefrom, and the writ of review would not lie on account of such omission.

Writ denied.

HINTON v. BAHRS et al., Civil Service Com'rs. (Civ. 886.)

(District Court of Appeal, First District, California. Jan. 22, 1912. Rehearing Denied by Supreme Court March 23, 1912.)

Municipal Corporations (§ 217*)—Civil Service—Classification.

A classification of clerks for civil service examination and appointment, made by the civil service commissioners of San Francisco, being based merely on salary to be paid, without regard to departments, instead of on duties to be performed, as contemplated by the charter, providing that the examinations shall be practical, and relate to the duties to be performed, and that the promotions shall be from the lower rank established for each department, is properly abandoned.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 717; Dec. Dig. § 217.*]

Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Petition by Guy Hinton for writ of mandate to George H. Bahrs and others, civil service commissioners of the city and county of San Francisco. From an adverse judgment, petitioner appeals. Affirmed.

Rehearing denied by Supreme Court (122 Pac. 82).

Guy Hinton, in pro. per. Percy V. Long, City Atty., and John F. English, Asst. City Atty., for respondents.

KERRIGAN, J. This is an appeal from a judgment in favor of respondents entered upon an order sustaining a general demurrer to the second amended petition for a writ of mandate.

The petition alleges: "That on June 9, 1908, the said commission created 'Class XXII. Clerks (Class b)' within 'Division A. —Clerical service,' of the classification of the civil service of said city and county. That subsequently, on March 30, 1909, said commission changed the designation of said class to 'Class IV—Clerks (Class b).' On said March 30th said commission for the first time defined said class as follows: 'Resolved, that all permanent positions as timekeepers, storekeepers, tabulators, filing clerks, and other positions having similar duties, and all permanent clerkships carrying salaries of $1440 per annum, or less, be and are hereby classified under the designation "Clerks (Class B)," and, further, that applicants who qualify in this examination be eligible only for appointment to permanent positions carrying salaries of $1440 or less.' That prior to said March 30, 1909, there had been created by said civil service commission certain classes of experienced clerks in the classified civil service of said city and county of San Francisco, to wit, experienced clerks, auditor's office, experienced clerks, board of public works, experienced clerks, board of health, and experienced clerks, tax collector's office. That on said March 30, 1909, the said civil service commission did strike from said classified civil service list said classes of experienced clerks, auditor's office, experienced clerks, board of public works, and experienced clerks, board of health, and, further, said civil service commission did, on said March 30th pass a resolution to the effect that an examination for applicants for positions as clerks, class B, would be held on April 24, 1909. That said commission made rules to carry out the purposes of article 13 of the charter of said city and county and in particular for examinations to be held thereunder. That thereafter, on the 24th day of April, 1909, it gave an examination for 'Clerks, Class B' under the above-mentioned classification, * * *" resulting in the making up of a list of eligibles for this class, which included the name of the petitioner with many others, all of whom successfully passed the examination.

Subsequently on March 7, 1910, this classification "Clerks (Class B)" was abolished by the commission, the resolution in that regard reading: "Whereas, the classification 'Clerks (Class B)' and 'Clerks (Class C)' have been made to depend upon considerations of salary, and whereas, the charter requires that classifications shall be based upon examination, such examinations to be practical; therefore be it resolved, that the following classifications of 'Division A—Clerical Service' of the classification of the classified civil service of San Francisco be and hereby are abolished: Class IV. Clerks (Class B). * * *" And on the same day the commissioners restored the above-described classes of experienced clerks, and added a new class, to wit, "Experienced Clerks, Department of Electricity," and the class designated experienced clerks, tax collector's office, which had never been disturbed, was retained. Since shortly after the adoption of the charter there has been in the classified civil service of San Francisco a general class designated as division A—clerical service, from which class appointments have been made by the different officers, under the civil service regulations of the charter, whenever employés of the character included in said class were required. Appointments to permanent positions have always been made from classes known as experienced clerks, and temporary places have been filled from the class known as ordinary clerks.

The respondents were warranted in their action of March 7, 1910, when they rescinded the resolution of March 30, 1909, abolishing the classification according to salaries and restoring the former classification based on duties to be performed. No doubt the efficiency of the different departments of the city and county government of San Francisco will be best promoted when applicants for employment are examined not with regard to their qualifications generally, but with regard to their aptitude to fill particular positions. The duties to be performed in the different departments are quite dissimilar. In the department of the board of health, for example, a clerk should be informed on health ordinances and regulations, with regard to such matters as the abatement of nuisances, restrictions as to contagious diseases and regulations as to sanitation. In the office of the board of public works, on the other hand, he might be required to know the numerous charter and ordinance provisions relative to sewers and street work, building regulations and the like, while in the tax collector's office, or any other department of the municipal government, the duties involved might require knowledge and experience of an entirely different character. It was for this reason, it is safe to say, that the charter provides that the civil service examinations "shall be practical in their character, and shall relate to the duties of the position" (Charter of the City and County of San Francisco, art. 13, §§ 2 and 4).

Section 10 of the same article also clearly contemplates that clerks shall be classified by departments, for in providing that the civil service commission shall fill vacancies by promotion it reads that an examination therefor "shall be competitive among such members of the next lower rank established by the commission for each department."

The brief filed by amicus curiæ, like those filed by the appellant, is interesting and instructive; but we do not feel that we would be warranted in passing upon the principal points discussed in the former, they not being involved in this case.

From what has been said it appears plain that the classification of March 30, 1909, as to salaries was not in accordance with the provisions of the charter, and that therefore the commission properly abandoned it, and cannot be compelled by writ of mandate to restore the list of eligibles based upon an examination held under said classification of March 30, 1909.

The judgment appealed from is affirmed.

We concur: LENNON, P. J.; HALL, J.

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18 Cal. App. 53

HINTON v. BAHRS et al. (S. F. 6,167.)

(Supreme Court of California. March 25, 1912.)

In Bank. Action by Guy Hinton against George H. Bahrs and others. Judgment for defendants was affirmed by the District Court of Appeal (122 Pac. 80). Application for rehearing denied.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing of this cause. The question presented for decision is not which system of classification of eligibles for employment in the clerical service of San Francisco is the better, but is whether the resolution of June 9, 1908, establishing "Class B" was a valid exercise of the discretion of the commissioners. If it was, the petitioner, upon being enrolled in that class after successfully passing the prescribed examination, acquired a vested right, of which he could not be deprived short of two years, to be recommended in his turn for employment in any clerical position under the municipal government the annual salary of which was not in excess of $1,440. I can see no reason for denying the power of the commissioners to establish the class, and, while it was undoubtedly the right of their successors or of themselves to rearrange the classification, they could not in that way deprive the petitioner and other eligibles of their right during the two-year term. As to them the change could not take effect until that time had elapsed. Charter, art. 13, § 10. It is, however, the misfortune of petitioner that this view, even if it had prevailed, would have afforded no relief, since his two-year term had expired before a decision here could have been reached, and the new and equally valid regulation has now displaced the resolution of 1908.

18 Cal. App. 117

MITCHELL v. BROWN. (Civ. 906.)

(District Court of Appeal, Third District, California. Jan. 27, 1912.)

1. Adoption (§ 20*) — Status of Adopted Person.

Under Civ. Code, §§ 227–229, declaring that a child when adopted is the child of the adopting parent, and that the natural parents are relieved of parental duties, an adopting parent is legally liable for the support and education of the adopted child, and he may contract with the natural parents to support and educate the child for a compensation.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 29–32; Dec. Dig. § 20.*]

2. Trial (§ 165*)—Motion for Nonsuit—Question of Law.

A motion for nonsuit presents a question of law only, and the court assuming as true the evidence sustaining plaintiff's case must determine whether facts essential to a recovery are established.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

3. Trial (§ 165*)—Motion for Nonsuit—Presumptions.

The court, on motion for nonsuit submitted at the close of plaintiff's case, must consider the evidence in the light most favorable to plaintiff, and where the evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to plaintiff, and contradictory evidence, if any, must be disregarded.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

4. Executors and Administrators (§ 451*) — Contracts for Support of Adopted Child—Evidence.

In an action to establish a claim against a decedent's estate in favor of a husband for the support of a child of his wife by a former husband after decedent had adopted the child, evidence *held* to sufficiently show a contract, express or implied, between decedent and plaintiff for the support of the child to prevent a nonsuit at the close of plaintiff's case.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1877–1882; Dec. Dig. § 451.*]

5. Appeal and Error (§ 876*)—Questions Reviewable—Nonsuit—Rulings on Evidence.

Errors in rulings on evidence may not be considered on appeal from an order denying a new trial after granting a nonsuit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3549–3559; Dec. Dig. § 876.*]

6. Payment (§ 70*)—Evidence—Admissibility.

In an action to establish a claim against a decedent's estate for the support by a husband of a child of his former wife after the adoption of the child by decedent, evidence that during the time the support was furnished decedent gave to the wife a large sum of money was admissible to show that a payment had been made on the husband's claim.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 203–218; Dec. Dig. § 70.*]

Appeal from Superior Court, Marin County; Thos. J. Lennon, Judge.

Action by Carl A. Mitchell against Walter Elmer Brown, as executor of Elizabeth M. Haffner, deceased. From a judgment of nonsuit and from an order denying a new trial, plaintiff appeals. Judgment reversed and order denying new trial affirmed.

F. J. Castelhun, for appellant. Clinton G. Dodge (J. M. Inman, of counsel), for respondent.

HART, J. On the 16th day of December, 1909, the plaintiff presented to the defendant, as the executor of the estate of Elizabeth M. Haffner, deceased, a claim for the sum of $1,200 for the support, maintenance, and education of one Alphia W. Mitchell, the minor adopted daughter of the deceased, for the period of four years from the 20th day of September, 1905, at the monthly rate of $25. On the 23d day of December, 1909, the defendant rejected said claim, and thereupon the plaintiff instituted this action to recover upon the same. This appeal is from the judgment entered upon an order granting a nonsuit on the motion of the defendant and from the order denying plaintiff a new trial.

The facts are, briefly these: Daisy Mitchell was the granddaughter of the deceased and the mother of Alphia W. Mitchell by her first husband, Walter Mitchell. Daisy Mitchel was divorced from Walter Mitchell, and thereafter the former went to the home of the deceased and there lived a considerable portion of the time until the date of her marriage to plaintiff (also Mitchell by name), on the 9th day of September, 1905. On the 28th day of March, 1905, and subsequently to the entry of the decree granting Daisy Mitchell a divorce from her first husband, the deceased, by legal proceedings, instituted in the Marin county superior court for that purpose, adopted Alphia W. Mitchell, who, at that time, was not quite five years of age, as her own child. The latter remained and lived with deceased until the intermarriage of her natural mother, Daisy Mitchell, with the plaintiff, on the 9th day of September, 1905, at which time she left the home of her adopted mother and took up her residence with her natural mother and the latter's husband. The circumstances under which the last-mentioned event occurred are detailed by Daisy Mitchell as follows: "At the time of my marriage (to plaintiff), Mrs. Haffner was living in Sausalito. Alphia was there from the time of her adoption up to the time of my marriage. I was there off and on. On the evening when I expected to be married, I was packing up my things to ship them to Mill Valley. Mrs. Haffner said she didn't know what she was going to do. She said she felt that she was not in a position to take care of the girl; that she was getting old and was sick and was worried; she wanted me to take her with me. We were married the same evening and came back to the house. Mrs. Haffner, Mr. Mitchell, Alphia, and myself were sitting at the supper table. I went in to take my hat. When I came out, Mrs. Haffner wanted to know if I was not going to take Alphia with me. She said: 'I cannot take care of her any more. I am getting old, sick, and worried. It is too much trouble for me. You take her. I will make it all right with you.' Q. What did she say to Mr. Mitchell, if anything? A. She said for him to take her and be good to her. Q. That is the language? A. That is the language. She said, 'Take her and be good to her.' She said, 'I will fix it all right with you.' The same night we took the child with us to our home, and she has been there ever since. I clothed her, sewed for her, did everything that was to be done for a child of her age, sent her to school, bought her books, and everything like that." The testimony of Daisy Mitchell constituted all the evidence that was offered and received on behalf of plaintiff. It was at the conclusion of her testimony that the court granted defendant's motion for a nonsuit. We think that the order granting the nonsuit was erroneous and that the judgment must therefore be reversed. The legality of the proceedings culminating in the adoption of Alphia Mitchell by the deceased is not questioned here.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] The legal effect of the proceedings by which Alphia became the adopted child of the deceased was to disrobe the natural parents of all parental or any authority over the minor. The child, by virtue of those proceedings and the order of the court therein, became, in all respects, legally the child of the deceased (section 227, Civ. Code), and from the time of the adoption thenceforward the deceased and the child sustained towards each other the legal relation of parent and child, and had all the rights and were subject to all the duties of that relation. Civ. Code, § 228. Furthermore, the natural parents of the child, from the time of her adoption, were relieved of all parental duties towards, and all responsibility for, the child, and as before stated, can legally exercise no right over her. Civ. Code, § 229. It follows, from the foregoing rules of the law of this state, that, after the adoption of a minor child by another, the parental obligations of the natural parents to such child cease to exist, and that the former, after such adoption, are no more legally liable for the maintenance, support, and education of the child than a perfect stranger would be. And it furthermore follows that an adopted parent may contract with the natural parents to take care of, support, and educate the adopted child for compensation as freely and legally as such a contract could be made by the adopted parent with a stranger to the blood of such child. With the law as thus stated in view, we shall proceed to consider whether, under the evidence, the court was justified in making the order granting the nonsuit.

[2] That a motion for a nonsuit presents for the decision of the court to which it is addressed a question of law, pure and simple, is a proposition so well settled in this state that it might well be regarded as a work of supererogation to cite authorities in its support. The proposition is, however, affirmed by many cases, of which the following may be mentioned: Felton v. Millard, 81 Cal. 540, 21 Pac. 533, 22 Pac. 750; Higgins v. Ragsdale, 83 Cal. 219, 23 Pac. 316; Warren v. McGill, 103 Cal. 153, 37 Pac. 144; Zilmer v. Gerichten, 111 Cal. 73, 43 Pac. 408; Goldstone v. Merchants' Ice & Cold St. Co., 123 Cal. 625, 56 Pac. 776; Hanley v. Cal., etc., Co., 127 Cal. 232, 59 Pac. 577, 47 L. R. A. 597; Estate of Arnold, 147 Cal. 583, 82 Pac. 252; Estate of Welch, 6 Cal. App. 45, 91 Pac. 336; Archibald's Estate v. Matteson, 5 Cal. App. 441, 90 Pac. 723; Non-Refillable Bottle Co. v. Robertson, 8 Cal. App. 103, 96 Pac. 324; Bush v. Wood, 8 Cal. App. 650, 97 Pac. 709; In re Daly's Estate, 15 Cal. App. 329, 114 Pac. 787. In Goldstone v. Ice & Cold Storage Co., supra, it is said: "A nonsuit should be denied where the evidence and the presumptions reasonably arising therefrom are legally sufficient to prove the material allegations of the complaint." "A nonsuit should be denied," says the court in Zilmer v. Gerichten supra, "when there is any evidence to sustain plaintiff's case, without passing upon the question as to the sufficiency of such evidence." In Hanley v. Cal., etc., Co., supra, the court said: "This rule must be applied to all the evidence submitted by the plaintiff." In Bush v. Wood, supra, the rule is thus stated: "It is clear that it makes no difference, where the motion for a nonsuit is made on the close of plaintiff's case, whether the court itself believes the testimony or not, for, as is obvious, the material facts which the evidence tends to prove must be assumed to be true for the purpose of the motion, just the same as the material facts alleged in a pleading must be so treated in the consideration of a demurrer to such pleading."

Following the contention of counsel for defendant that, if the evidence showed that the services of which the claim for compensation is predicated were actually performed by the plaintiff, such services were disclosed by said evidence to be purely gratuitous, the court granted the motion for nonsuit upon the ground that the testimony failed to establish either an express or implied contract between the deceased and the plaintiff for the care and support of the child.

[3] But does the evidence, considered, as it must be on such a motion, in a light most favorable to the plaintiff, fail to disclose an agreement? In answering this question, we shall confine ourselves to a consideration of the testimony bearing upon the actual occurrences attending the transaction by which plaintiff took the custody and charge of the child, and will not consider the effect, ordi-

narily, in legal contemplation, of a request by one to another that the latter perform some service for him without any reference to the matter of compensation for such service.

[4] Mrs. Daisy Mitchell testified and repeatedly declared that Mrs. Haffner said, not only to her but to her husband, the plaintiff herein, "Take her and be good to her," referring to the child; "I will fix it all right with you," or, "I will make it all right with you." She testified that on the very day on which Mrs. Haffner thus addressed them they took the child, and for four years from that time they "clothed her, sewed for her, did everything that was to be done for a child of her age, sent her to school, bought her books, and everything like that." There is nothing so vague in the language of the deceased, "I will make (or fix) it all right with you," as to make it doubtful as to its meaning. It seems to us that but one meaning can rationally be ascribed to that language, and that is that, if the plaintiff and his wife would take charge of and provide for the child, she (deceased) would reasonably compensate them for the services so rendered. The language is at least capable of that interpretation, and on a motion of this character it is the duty of the court to which such motion is submitted to view the testimony most favorably to the plaintiff, and therefore to so construe said language. As is said in the Estate of Arnold, supra: "Where evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to the contestants"—or, as here, the plaintiff.

But counsel insist that the language of the deceased above quoted was addressed to Mrs. Mitchell and not to the plaintiff. We do not so read the record. On page 18 of the transcript, it appears, as shown, that Mrs. Mitchell was asked the following questions and made the following answers: "Q. What did she (meaning deceased) say to Mr. Mitchell, if anything? A. She said for him to take her and be good to her. Q. That is the language? A. That is the language. She said, 'Take her and be good to her.' She said, 'I will fix it all right with you.'" The answers thus returned were to questions specifically directed to the ascertainment of what deceased said to the plaintiff when she requested him to take the child. That witness was thus referring to the language addressed by the deceased to plaintiff on the subject, we think, can admit of no room for doubt.

Emphasis is also laid upon the fact, developed on the cross-examination of Mrs. Mitchell, that the deceased gave her the sum of $1,100 after her intermarriage with plaintiff and within the period during which she had the custody of Alphia. But we cannot see that that fact can in any manner or degree support the order granting the nonsuit. Assuming that that circumstance, on the trial on the merits, might properly be regarded as contradictory to the claim declared upon by plaintiff, still, as so viewed, it cannot be considered on a motion for a nonsuit presented on the close of plaintiff's case. "All the evidence in favor of the contestants (plaintiff) must be taken as true, and *if contradictory evidence has been given, it must be disregarded.*" Estate of Arnold, supra.

Moreover, assuming that the fact was brought out for the purpose of disclosing that the plaintiff and his wife had thus been partly or fully compensated for their services in caring for the little girl, then the natural inference therefrom, which it would be the duty of the court to draw and consider in favor of plaintiff on the motion, is that the deceased recognized the existence of an agreement on her part—whether express or implied is immaterial—to reimburse or compensate either the plaintiff or his wife or both for the expenses and services incident to the maintenance, support, and education of the child. In this view of the testimony with regard to the $1,100, the case of plaintiff would, obviously, be materially strengthened and would render more apparent the error of the order.

Mrs. Mitchell, however, explained the gift to her of the sum of money named as follows: That, her own mother (daughter of deceased) being dead at the time of the death of Mrs. Haffner's husband, she, after the latter's death, relinquished to deceased all the right to and interest in the estate of her grandfather to which her mother, as heir of the last named, would have been entitled had she been living at the time of the death of her father, and that in consideration of such relinquishment Mrs. Haffner gave to Mrs. Mitchell the said sum of $1,100. It was, of course, the duty of the court, on the motion, to view the testimony of Mrs. Mitchell on this point most favorably to the plaintiff, and therefore to that end to accept as verity, or at least to assume as true, her explanation of the reason or purpose for which that money was given her by the deceased.

Counsel further lay much stress upon the fact, admitted by Mrs. Mitchell, that neither she nor plaintiff ever made any demand on the deceased during her lifetime for compensation for taking care of the child. Undoubtedly that fact, not satisfactorily explained, would be entitled to much consideration and perhaps considerable weight in the determination of the issue upon its merits; but upon a motion for a nonsuit it is entitled to no consideration whatever against the right of the plaintiff to have the cause determined upon its merits.

Nor will it do to argue, in reply to our views of the record as it is presented here, that, it being a natural or moral duty resting on plaintiff's wife to care for the child, the court was therefore justified in inferring from that proposition that the services of plaintiff in that respect were gratuitous.

There can, of course, be no doubt that the care and maintenance of a minor by its natural parents under any circumstances would be a most humane and proper thing to do, and, where necessary, any parent made of the right sort of material would do so, even if the law did not place that duty upon him. But we are here dealing with legal obligations and duties. The natural mother of the child, as we have seen, lost all legal authority over and was relieved from all legal obligations to maintain and support the child immediately upon the latter's adoption by the deceased. The relation of parent and child between Mrs. Mitchell and Alphia legally ceased to exist upon the adoption, as completely as if that relation between them had never existed. As to the plaintiff himself, the adoption having taken place prior to his intermarriage with the natural mother of the child, the latter never, at any time, either subsequently to or (much less) before the adoption, bore any relation of whatsoever nature to him. On a trial on the merits of the controversy, in a case of this character, where the main facts adduced are irreconcilably contradictory, the fact of the natural as contradistinguished from the legal duty of a party in the premises might be entitled to considerable weight, and, indeed, might throw the scales against the claimant or plaintiff. But on a motion for a nonsuit, submitted on the close of plaintiff's case, it is the duty of the court to draw all inferences that are deducible from the testimony in view of the legal obligations, duties, and responsibilities of the parties, and not in view of what one of the parties ought to and would perhaps naturally do under certain circumstances.

If the case had been submitted on the merits of the issue upon the testimony presented by the plaintiff, we doubt not, judging from the ruling on the motion, that the court would have rendered judgment for the defendant, in which case it is very probable that the action of the court would stand immune from disturbance on appeal, so far as the evidence was concerned. And we may with propriety suggest here that, if counsel for the defendant had rested their case on the testimony of plaintiff prior to the presentation of their motion for a nonsuit, a much different proposition might perhaps be submitted here for review. Estate of Morey, 147 Cal. 507, 82 Pac. 57. It is said in that case: "But with regard to the granting of a motion for nonsuit made at the close of the evidence for plaintiff and defendant, the rule seems to be well established that the trial court has discretion, and that it is not error to grant the motion where, *upon all the evidence*, it is clear that if the jury should bring in a verdict against the defendant it would be the duty of the court to set it aside and order a new trial"—citing a number of cases. Of course, the rule as thus stated does not mean that the motion, if made after both parties rest their case, should be granted in every case where the trial court might grant a new trial for insufficiency of evidence for plaintiff, but only that the court may do so in very clear cases.

But, on a motion for a nonsuit on the close of plaintiff's case, the court is compelled to assume the truth of all the testimony produced by plaintiff. The question of the credibility of witnesses or the weight of evidence cannot under such circumstances arise. In fine, as we have in effect already pointed out, the line of distinction between the power of the court when considering the evidence on a motion for a nonsuit on the close of plaintiff's case, and the power vested in it when considering the evidence upon the merits, is that, in the former case, a pure question of law is submitted for the court's decision, and there is therefore no discretion in the court to pass upon the credibility of the witnesses for plaintiff or the probative value of the testimony produced by plaintiff; while, in the latter case, a question of fact is submitted to the court, it then being called upon to determine whether the issue has been established by the proofs, and the court, like a jury where the issues of fact are so tried, may then weigh the testimony and to that end pass upon the credibility of the witnesses, and, finally, conclusively determine the truth as to the ultimate fact.

The defendant in this action did not rest his case on the close of plaintiff's case, but, upon the conclusion of the adduction of evidence by the plaintiff, made a motion for a nonsuit. Upon this motion, under such circumstances, it was therefore, as we have shown, imperatively incumbent on the court to view plaintiff's testimony in the light of a truthful narration of the facts, considering, indeed, as facts proved, "every favorable inference deducible, and every favorable presumption arising, from the evidence so produced," and to disregard all contradictory evidence or facts inconsistent with plaintiff's evidence or with the theory of his case.

Under the evidence upon which the motion was submitted and granted, viewed by the light of the rules governing the consideration and disposition of motions for nonsuit on the close of the case for plaintiff, we can see no possible escape from the conclusion that the court erred in its ruling on the motion in this case.

[5] As we have seen, the plaintiff has also appealed from an order denying his motion for a new trial. The basis of the motion was an alleged error of the court in the admission of certain testimony. It is thoroughly settled that errors in the rulings of the court admitting or rejecting evidence may not be considered or reviewed on a motion for a nonsuit. But, as the case is to be retried and the order appealed from should

be disposed of, we will express our views as to the propriety of the testimony thus complained of.

[6] The order appealed from is objected to on the ground that the court committed prejudicial error in allowing, over objection by counsel for plaintiff, Mrs. Mitchell to be asked and answer the question, on her cross-examination, whether, after she took charge of the child, Mrs. Haffner had given her any money. The answer brought the reply that the deceased had given her the sum of $1,100, to which reference has hitherto been made. The argument is that, since the action is by the husband of Mrs. Mitchell for services alleged to have been performed by him, it was immaterial whether the witness had been given or paid any money by Mrs. Haffner. The specific purpose for the disclosure by the defendant of the gift or payment of the sum of $1,100 by Mrs. Haffner seems to have been to show that a payment had been made "on this claim," and for that purpose the question and the testimony elicited thereby were perfectly proper. It would manifestly be immaterial, so far as the question of the propriety of such testimony is affected, whether the money was paid to Mrs. Mitchell or her husband, if, in point of fact, the purpose for which the money was so paid or given was to compensate the plaintiff and his wife for their services in taking care of the child. And it is equally manifest that the defendant had the right to inquire into that transaction for the purpose suggested, although the answer might, as it did, indicate that it was given for a different purpose or a purpose altogether foreign to the arrangement for the care of the child.

For the reasons herein given, the judgment entered upon the order granting the nonsuit is reversed, and the order denying plaintiff's motion for a new trial is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(18 Cal. App. 114)

JAQUES v. OWENS. (Civ. 913.)

(District Court of Appeal, Third District, California. Jan. 27, 1912.)

1. VENUE (§ 67*)—CHANGE — AFFIDAVIT OF MERITS—AMENDMENT.

Where an affidavit of merits under Code Civ. Proc. § 396, providing for a change of venue, stated that affiant was a resident of another county, but failed to state that he resided there at the time of the commencement of the action, the court had discretion to permit the affidavit to be amended at the beginning of the hearing.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 114–120; Dec. Dig. § 67.*]

2. VENUE (§ 67*)—CHANGE — AMENDED AFFIDAVIT—EFFECT.

An amended affidavit of merits, filed to secure a change of venue to the county in which the defendant resided, related back to the time of the filing of the original affidavit, so as to supply evidence to warrant the granting of the motion for a change of venue.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 114–120; Dec. Dig. § 67.*]

3. VENUE (§ 63*)—CHANGE—NOTICE.

No formal notice, beyond the demand and the affidavit of merits provided for by Code Civ. Proc. § 397, is required of the filing of a motion to secure a change of venue to the county in which a defendant lives.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 104–108; Dec. Dig. § 63.*]

Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Action by David E. Jaques against O. N. Owens. From an order changing the place of trial, plaintiff appeals. Affirmed.

C. W. Eastin, for appellant. John F. Davis, for respondent.

BURNETT, J. [1] This is an appeal from an order changing the place of trial. At the time of serving and filing his demurrer to the complaint, the defendant served upon plaintiff and filed a notice of motion for a change of venue, on the ground of his residence, together with an affidavit of merits and a demand in writing that the trial be had in the proper county. At the time and place specified in the notice, the plaintiff appeared and opposed the demand and motion. The original affidavit of the defendant contained the clause: "I am the defendant in said action, and I reside in the city and county of San Francisco." At the beginning of the hearing, the court, over the objection of plaintiff, permitted the defendant to serve upon plaintiff and file an amended affidavit containing, in place of the last-quoted clause, the following: "I am the defendant in said action, and at the commencement of this action resided, ever since have resided, and I now reside in the city and county of San Francisco, state of California." It is apparent that the first affidavit was defective in its failure to aver that defendant resided in San Francisco *at the time of the commencement of the action.* By the amendment, this omission was supplied, and the sole question is whether the court rightly exercised its authority in permitting said amended affidavit to be filed.

Section 396 of the Code of Civil Procedure provides that, "if the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein unless the defendant, at the time he answers or demurs, files an affidavit of merits and demands in writing that the trial be had in the proper county." As pointed out by respondent, two jurisdictional pleadings are therefore required to secure a change of the place of trial, to wit, a *demand in writing* and an *affidavit of merits.* The demand was in proper form;

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and no objection was made to it. That the court has the discretion to allow the affidavit of merits to be amended has been directly determined in Palmer & Rey v. Barclay, 92 Cal. 199, 28 Pac. 226, and Pittman v. Carstenbrook, 11 Cal. App. 224, 104 Pac. 699. In the former, it is said that, "under section 473 of the Code of Civil Procedure, which is to be liberally construed, with a view to promote justice, the trial court has power, in the exercise of its discretion, to allow an insufficient affidavit of merits, which has been filed in due time upon a motion to change the place of trial of an action, to be amended after the time for filing the original affidavit has expired; and the filing of the amended affidavit relates back to the time of the filing of the original affidavit." There can be no contention here that the court abused its discretion in any way in allowing the amendent. The amendment simply supplied what was manifestly omitted from the original affidavit by inadvertence; and no injury was done to appellant. There was no counter affidavit, and no attempt made by plaintiff to show that the residence of defendant was otherwise than as claimed by him.

[2, 3] As far as the notice of the motion is concerned, the amended affidavit, as held in the Barclay Case, supra, related back to the time of filing the original affidavit, and thus furnished information of the ground of the motion and supplied sufficient evidence to warrant the order granting it. Since the parties were in court, it would, of course, have been idle to require an amended or additional notice to be given of the motion. Indeed, the statute requires no formal notice beyond the demand and the affidavit of merits. The only purpose to be subserved by any other notice would be to give information of the time when the application would be heard. This would be regulated or determined according to the rules of the court. When the said demand and affidavit with the demurrer were served and filed, the plaintiff had due notice of the application, and the court acquired jurisdiction to hear, in the regular course of procedure, the demand of defendant to have the place of trial changed. It is true that section 397 of the Code of Civil Procedure contemplates that the order of the court shall be made "on motion"; but the basis for the motion, as we have seen, is the demand and affidavit of merits. The "motion" is obviously the formal application in court for the order.

We find nothing in any of the cases cited by appellant opposed to the foregoing view of the situation. There seems to be no consideration of substantial justice that requires a reversal of the order; and it is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(18 Cal. App. 131)

PEOPLE v. PALUMA. (Cr. 170.)

(District Court of Appeal, Third District, California. Feb. 1, 1912.)

1. Criminal Law (§ 44*)—"Attempt."

An "attempt" is an endeavor to accomplish a crime, carried beyond mere preparation, but falling short of execution of the ultimate design in any part of it. It is an intent to do any particular thing combined with an act which falls short of the thing intended; an act immediately and directly tending to the commission of the principal crime, and committed by the prisoner under such circumstances that he has the power of carrying his intention into execution, including solicitations of another. Mere intention to commit a specific crime does not amount to an attempt; but there must, in addition to the mens rea, be some act done toward the accomplishment of the proposed crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 51; Dec. Dig. § 44.*

For other definitions, see Words and Phrases, vol. 1, pp. 621–627; vol. 8, p. 7586.]

2. Larceny (§ 24*)—Attempt—Evidence.

Evidence *held* to warrant a conviction of an attempt to commit grand larceny by means of the confidence game.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 53; Dec. Dig. § 24.*]

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Harry Paluma was convicted of an attempt to commit larceny, and he appeals. Affirmed.

Carlton C. Case, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

BURNETT, J. Appellant, jointly charged with one Louis Forrester with an attempt to commit grand larceny, was convicted on a separate trial and sentenced to the penitentiary for four years, and he appeals from the judgment and the order denying his motion for a new trial.

[1] The only point concerning which there can be any controversy—in fact, the only contention seriously urged by appellant—is that the evidence is insufficient to warrant the verdict. In this respect, it is not claimed that there was a failure to show the purpose or preparation on the part of defendant to commit the crime of grand larceny; but it is argued that there was no overt act sufficient to constitute an *attempt*, within the contemplation of law. The statute does not prescribe what steps shall be construed as an attempt to commit a crime; yet it makes provision for its punishment. There is no difficulty, however, in determining the meaning of the expression, although its application to the particular facts of each case may not be so easy. As stated by Bouvier, in criminal law, an "attempt" is "an endeavor to accomplish a crime, carried beyond mere preparation, but falling short of execution of the ultimate design in any part of it." "An intent to do a particular criminal thing combined with an act which falls short of the

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

thing intended." "An act immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances that he has the power of carrying his intention into execution, including solicitations of another."

In People v. Moran, 123 N. Y. 257, 25 N. E. 412, 10 L. R. A. 109, 20 Am. St. Rep. 732, it is said: "Whenever the animo furandi exists, followed by acts apparently affording a prospect of success and tending to render the commission of the crime effectual, the accused brings himself within the letter and intent of the statute. To constitute the crime charged, there must be a person from whom the property may be taken, an intent to take it against the will of the owner, and some act performed tending to accomplish it; and when these things concur the crime has, we think, been committed, whether property could, in fact, have been taken or not."

The question of what constitutes an attempt is elaborately considered in People v. Stites, 75 Cal. 570, 17 Pac. 693. Therein it is said that "mere intention to commit a specific crime does not itself amount to an 'attempt,' as that word is employed in the criminal law. There must, in addition to the wicked intent—the mens rea—be some act done toward the ultimate accomplishment of the proposed crime." In ascertaining whether such act has been accomplished, it is further declared that "the proximity or remoteness of the person or thing intended to be injured is generally an important element, as the adjudicated cases will show," and quotation is made from Blackburn, J., in Regina v. Cheeseman, Leigh & C., 140, that, "if the actual transaction has commenced which would have ended in the crime, if not interrupted, there is clearly an attempt to commit the crime."

[2] We are entirely satisfied that, within the purview and spirit of the foregoing, the defendant was justly convicted as charged in the information. A brief statement of the evidence will make this apparent.

Appellant and his codefendant came to Stockton on the same train and stopped at the same hotel. Two or three days later appellant took a pair of shoes to one De Martini, who was engaged in the shoe business on California street in said city, and left them to be half-soled. He engaged Mr. De Martini in conversation, speaking in the Italian language. He asked about the business, and suggested that De Martini ought to have a larger stock and take a partner to put in more money, that the business might be enlarged. The proprietor replied that he didn't care about a partner; that he was doing very well as it was. Paluma then took a paper out of his pocket, and, reading about a man that played the valise game and secured some money, he said, "I don't know what the valise game is," and he asked De Martini what it was. The latter replied that he didn't know; but he proceeded to explain the game as he understood it. Appellant then left the store, and did not return until the next day. He remained then only a short time. He was asked if he wanted the shoes, but he said "No;" that he would get them the next day. He came back the next morning, and had been there a few minutes when the codefendant, Forrester, arrived and tried to get in at the wrong door, and appellant let him in at the proper entrance. Forrester inquired if they spoke Italian, and, being answered in the affirmative, he asked to be directed to the "Imperial Hotel," stating that he had just come in on the train and had missed his way. De Martini gave him the information. Forrester then told Paluma an interesting story, whose details we need not recite, and he then produced a $20 gold piece, and said to De Martini, "I will give you $20 to show me where the hotel is;" but appellant responded that he would show him as a favor. They then went out; but they did not go to the hotel. In about 15 minutes, Paluma returned, and, after waiting for the departure of a Mr. Orsi, who was in the store, he said to De Martini: "I had good luck this morning. I made $20 to go from here over to the Imperial Hotel"—and he unfolded a plan of Forrester to distribute $10,000 among the poor of Stockton, and to employ two men for the purpose, and appellant said that he was to be one, and, furthermore, "if you want to, you can make the other party. He will give us $20 a day for every day we spend in that pursuit, and, besides, he will double all the money you got. He wants to know the men are responsible, and in order to show responsibility you got to show him some money. If you can show $500, why, besides giving you $20 a day for the time you lose, he will double your money; he will make you a present of $500." De Martini said he had no money that morning, but would try to get some from his friends, if they would wait till the next day; but he was urged by appellant to get it that afternoon, as some one else might get in. De Martini said he would try. Appellant said they would be back that afternoon. He then went out, and shortly after 12 o'clock both returned, and Forrester submitted the same proposition, and then, or on a previous occasion, he pulled out a package from his pocket, wrapped in manila wrapping paper, about the size of a greenback and two inches thick, and showed a greenback or two, and said that the package was full of that kind. Paluma asked De Martini if he had any money in the bank, and the latter said, "Yes." About this time, a police officer came in and asked what appellant and his confederate were doing. No reply was made, and he then asked Paluma if he intended to get his shoes, and the reply was, "I guess not." The two were then placed under arrest. Forrester thereafter undid this package, while it was in his pocket, and took the paper out and threw it in the waste basket. Two handkerchiefs were found in his pocket. One of them he took out and unfolded; but the other was found folded about the size of a greenback. Each of the defendants was found to have in his possession a big, long, blue, cloth-lined envelope and an empty black bag, just alike.

It seems very clear that the defendants were acting according to a prearranged plan, and, as said in People v. Mann, 113 Cal. 79, 45 Pac. 183, they were "playing a confidence game, and 'bunco' is its name." That Mr. De Martini was not "buncoed" out of his money was not due to any penitence or abandonment of their plan by defendants, or either of them. They did everything they could towards the accomplishment of their felonious purpose. The visit to the store of the prosecuting witness under the circumstances detailed, the false and alluring representations that were submitted to him, and the efforts made to induce him to exhibit his money and to fall into the snare so deliberately and cunningly devised for him, constitute an "attempt," within any reasonable view of that term. Appellant says the whole thing was a "joke"; but such jokes are rather too frequent to be encouraged by adopting the exceedingly technical construction of the law which has been urged upon us. The manifest rascality of appellant certainly does not invite overnice distinctions in his favor.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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18 Cal. App. 107

HOPKINS v. LEWIS. (Civ. 886.)

(District Court of Appeal, Third District, California. Jan. 27, 1912.)

1. Vendor and Purchaser (§ 51*)—Contracts—Construction—Furnishing of Abstract.

Where a contract with the owner's agent to purchase land allowed 10 days for a search of the title after delivery of a complete abstract, but did not provide who should furnish the abstract, or make any reference to a contract between the agent and the owner, wherein the owner agreed to furnish an abstract, it did not bind the owner to furnish the same.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 82; Dec. Dig. § 51.*]

2. Limitation of Actions (§ 46*)—Accrual of Right—Contract to Purchase Land.

Where a contract to purchase land gave the purchaser 10 days for search of title after delivery of a complete abstract, and provided that if the title was found not perfect 30 days would be allowed to make it so, and if it were not made perfect in that time the deposit should be immediately returned, the statute of limitations, in so far as related to an enforcement of the contract by the purchaser, began to run after a reasonable time was allowed for the delivery of the abstract, even though it was the owner's duty to furnish it.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 240-253; Dec. Dig. § 46.*]

3. Specific Performance (§ 105*) — Defenses—Laches.

Where one who entered into a contract to purchase land remained silent for six years, asserted no title whatever, made no demand for an abstract, expressed no willingness to complete the purchase, and did no act in furtherance thereof, her right to enforce the contract was barred by laches.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 325-341; Dec. Dig. § 105.*]

4. Pleading (§ 205*)—Laches—Demurrer.

A demurrer to a complaint for want of sufficient facts is sufficient to raise the question of the plaintiff's laches, without any specific allegation thereof.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 491-510; Dec. Dig. § 205.*]

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by L. W. Hopkins against Mary E. Lewis. From a judgment for defendant, plaintiff appeals. Affirmed.

Lippitt & Lippitt, for appellant. William B. Haskell, for respondent.

CHIPMAN, P. J. Action to enforce the specific performance of a contract for the sale and purchase of land. A demurrer to the second amended complaint for want of sufficient facts, and that the action is barred by sections 337 and 343 of the Code of Civil Procedure, was sustained, and, plaintiff declining further to amend her complaint, defendant had judgment, from which plaintiff appeals.

It appears from the amended complaint that on April 8, 1904, defendant executed and duly acknowledged an instrument in writing whereby she authorized and empowered Horn-Sinclair Company, a corporation, as her agent to sell certain described lots, situated in Petaluma, "for the period or until sold from the date hereof, and thereafter until said agency is withdrawn in writing, for the sum of $300 net ($300) dollars." The contract further provides that defendant will pay said company, "upon finding a bona fide purchaser for said property, ——— per cent. of the selling price." There is a further provision relating to the compensation of said company, not now important, which closes as follows: "Undersigned agrees to furnish abstract of and give perfect title to said property. Should title to said property be defective, undersigned shall, with all reasonable diligence, perfect the same." Duly recorded April 18, 1904. It is then averred that, acting for and on behalf of defendant as her agent, as aforesaid, the said company, by an instrument in writing sold said land to plaintiff on April 8, 1904, and plaintiff agreed to buy the same, as follows: "Received from L. W. Hopkins the sum of one hundred dollars in gold coin, on account of and as a deposit, to secure the sale to her at the price of $600—dollars in gold coin the following described property, viz." (the land in question), on the "following terms to which both parties are mutually bound: $100—cash deposit paid to-day and the balance of $500—to be paid in cash upon receipt of a deed and perfect title. 10 days are to be allowed for legal search of title after the delivery of complete abstract. If title is not found perfect, thirty days are then to be allowed to make it perfect; and if it is not made perfect in that time the deposit for which this is a receipt is to be immediately returned. Time is of the essence of this contract. If the title is found perfect and the sale is not closed in accordance with above terms the deposit is to be forfeited as fixed and settled damages and not as a penalty." This memorandum is signed by J. W. Horn, and there is an averment that he was the president of said corporation and executed the contract for the corporation, and as part of said instrument the following appears:

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"Petaluma, Cal., April 8, 1904.

"I hereby bind myself to buy the within-described property at the price and on the terms named herein; hereby agreeing to pay the balance of the purchase-money as specified above, but only if the title is found perfect. If the title is not found perfect, the seller then is to be allowed thirty days to make the title perfect and if it is not made perfect within that time I am released from this contract, and my deposit is to be at once returned. L. W. Hopkins." It is then averred that "defendant has never at any time since the 8th day of April, 1904, furnished an abstract of title to the property described in the agreement, set forth in paragraph II (the first of the foregoing documents), and, on the 16th day of December, 1909, the plaintiff made a written demand upon the defendant, requiring the defendant to procure and furnish to the plaintiff, for her use, an abstract of title of the lands and premises described, and the defendant has failed, refused, and neglected to furnish the abstract of title, as agreed upon by her by the terms of said written agreement" (the agreement first above referred to). It is then averred that, on March 15, 1910, the said corporation, on behalf of plaintiff, served a written notice on defendant (which is set out in the complaint), informing defendant of the sale, and its terms, made to Hopkins on April 8, 1904, and further informing her that said Hopkins "has this day [March 15, 1909] paid to us the balance of $500, and has waived the furnishing of the abstract of title which she heretofore and on the 16th day of December, 1909, demanded of you." Then follow averments of tender of $600 and a deed, conveying the property to Hopkins, and a demand that defendant execute and deliver said deed to said Hopkins. Plaintiff, Hopkins, in writing, as part of the foregoing paper, joins in the tender of the $600 and demand for a deed. It is further averred that, on April 2, 1910, plaintiff tendered to defendant $600 and a deed, duly prepared, and demanded its execution by defendant, and that defendant refused to execute the same. Ability and willingness to pay the purchase price is averred, and that a deposit of said amount has been made in a bank at Petaluma, for the purpose of paying said purchase price. It is also averred that the price agreed to be paid for said lands was just and reasonable and the value of said lands; that the said contract, first above referred to, was entered into by defendant without any misrepresentation or unfair practice of any person; and that ever since said April 8, 1904, defendant has been and now is the owner of said land, and has been and is able to make and deliver plaintiff a deed thereto.

It seems to be conceded by both parties that the demurrer was sustained because the action was barred, either by laches, or by the provisions of the Code sections referred to, or both. No other ground for the decision is discussed in the briefs.

Plaintiff's position is that there was an obligation on defendant to furnish an abstract of title as a condition precedent to any act of plaintiff by way of tender or demand of deed, and until such abstract was furnished the statute of limitations was not set in motion; that plaintiff might have waived the condition precedent, as she did in March, 1910, thus setting the statute in motion, but that until such waiver, or until defendant had complied with the condition of the contract and furnished the abstract, the time within which an action for specific performance should be commenced did not run. The principle relied upon is thus stated in 25 Cyc. 1067: "Generally speaking, where a party's right depends upon the happening of a certain event in the future, the cause of action accrues and the statute begins to run only from the time."

[1] The corporation was the agent of defendant, and as such made the contract with plaintiff; but the contract of defendant with her agent is distinct from that made with plaintiff. In the contract of agency, there was a provision that defendant would furnish an abstract; but no such promise was made by the agent in its contract with plaintiff, and it is not alleged in the complaint that its agreement with plaintiff was intended to include such promise. The language is, "10 days are allowed for legal search of title after the delivery of complete abstract," but by whom this abstract was to be made, and at whose cost, or when, does not appear by the contract, nor by any averments of the complaint. The plaintiff, in her complaint, refers to the agency contract; but it formed no part of her contract, or of the terms on which she agreed to make the purchase. The agent could have agreed to furnish an abstract, for it was so authorized; but it did not do so. It nowhere appears in the contract with plaintiff or in the complaint

that she knew anything about the terms of the agency contract, or acted with reference thereto. So far as we can see, plaintiff's rights must be determined upon her contract with defendant's agent. It does not appear that either the agent or plaintiff took any steps toward consummating the sale, after the contract was entered into, for nearly six years. It does not appear that defendant knew, until in 1910, that the agent had made a sale to plaintiff; nor does it appear that either the agent or plaintiff made any demand on defendant for an abstract, or that plaintiff made any such demand on the agent, until after this long lapse of time. It may be true, as alleged in the complaint, that the price agreed upon "was an adequate consideration for the land" at the time the agreement was entered into, and that the land was not then of value "greater than the amount set forth in said agreement"; but that does not throw much light on its value six years later. This fact, however, might not be material, if defendant had failed to perform her part of the agreement, and plaintiff had fully performed her part. But we have here the contention of plaintiff that under the agreement she could remain inactive for an indefinite period, and could come forward 20 years after the contract was entered into and demand a deed, if defendant had failed to furnish an abstract. We cannot believe she had any such right. Under her contract, she was given "ten days for legal search of title after the delivery of complete abstract." This probably means that after an abstract had been made by some one 10 days were given to have it passed upon by some competent lawyer. If the title was not found perfect, 30 days were "allowed to make it perfect; and if it is not made perfect in that time, the deposit for which this is a receipt is to be immediately returned," or, as plaintiff expressed it in her indorsement, "I am released from this contract, and my deposit is to be at once returned." It does not appear in the complaint what became of this deposit. If plaintiff insisted on her rights, and if the agent did its duty, this deposit was long ago returned to plaintiff, and the transaction ended.

[2, 3] It seems to us a fair inference from all the facts, so far as disclosed, that plaintiff made up her mind not to purchase the property, or she would not have waited six years for an abstract which she now says it was plaintiff's duty to have furnished at least within a reasonable time; there having been no stated time named for its delivery. The equities of the case may be seen if we reverse the parties and suppose the defendant (having knowledge of the contract, which she did not), after six years of inaction, had, without any explanation or cause for her delay, come forward with an abstract showing perfect title. No court would have enforced the contract against plaintiff. But if it may be said that there was an implied obligation on defendant's part to furnish the abstract, there being no time stated in which to perform this duty, the law would have given defendant but a reasonable time, and at its expiration plaintiff would have had the right to withdraw from the contract. The statute would also, at that time, have begun to run against the enforcement of the contract. In that view, we think the action would be barred. Plaintiff could not keep silent for six years, asserting no right whatever, making no demand for an abstract, expressing no willingness to complete the purchase, doing no act in furtherance of her original purpose, without giving rise to the presumption that she had acquiesced in defendant's default, and justifying defendant in so treating her contract. In Marsh v. Lott, 156 Cal. 643, 648, 105 Pac. 968, the court states the rule to be, as given in 26 American and English Encyclopedia of Law, p. 80, that where, after defendant's violation or an express repudiation of his contract, the plaintiff delays to proceed for such length of time as to constitute acquiescence in defendant's breach, or a presumption of abandonment of his right to specific performance, relief in equity will be denied. We think the facts here bring the case within this rule.

[4] The question of plaintiff's laches could be raised by the general demurrer, without specifically alleging laches. It was said, in Kleinclaus v. Dutard, 147 Cal. 245, 250, 81 Pac. 516, 517: "It is settled in this state by the two California cases last cited that the defense of laches may be raised by demurrer; the defense being, in substance, as said in one of the cases, that the bill does not show equity, or, in the language of our statute, that the complaint does not state facts sufficient to constitute a cause of action." It would seem to be logical that, if laches shows want of sufficient facts, an averment of want of facts could be supported by showing laches. See, also, Marsh v. Lott, supra. We are unable to discover any ground on which the complaint may be held sufficient.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

18 Cal. App. 72

PEOPLE v. BURKE. (Cr. 158.)

(District Court of Appeal, Third District, California. Jan. 26, 1912. Rehearing Denied by Supreme Court March 26, 1912.)

1. Courts (§ 106*)—Opinions—Scope.

While the author of an opinion should keep in mind the constitutional provision requiring an appellate court to give reasons for its conclusion, he must follow his own judgment as to the degree of elaboration accorded to the treatment of any proposition, and as to questions which are worthy of notice.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 359; Dec. Dig. § 106.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. Criminal Law (§ 1159*) — Appeal—Review — Verdicts — Sufficiency of Evidence.

On appeal from a conviction, where the sufficiency of the evidence is challenged, the appellate court can determine only whether there was sufficient evidence to support the ultimate finding; the jury being the sole judges of all questions of fact and of the credibility of witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074–3083; Dec. Dig. § 1159.*]

3. Explosives (§ 5*) — Criminal Prosecutions—Indictment—Sufficiency.

In a prosecution under Pen. Code, § 601, making it a felony for any person to maliciously explode at, in, or near any building where human beings usually inhabit any dynamite, nitroglycerine, or other explosive, the indictment alleged that accused on or about the 5th day of February, 1910, in the county of S., did deposit and explode near a tent dwelling house where human beings did then reside dynamite and other explosives with the intention to injure a human being named. Pen. Code, §§ 950–952, 955, respectively provide that an indictment shall contain the title of the action, the name of the court and the parties, and a statement of the acts constituting the offense; that it may be in the following form: "The people against A. in the superior court in the county of ——— by this indictment charge," etc., that it must be direct and certain as regards the party and offense charged, and that the precise time at which the offense was committed need not be stated, but it may be alleged to have been committed at any time before the filing thereof except where time is material. *Held*, that the indictment was sufficient, being in accordance with the provisions of the statute denouncing the offense, and satisfying the demands of the statutes above mentioned.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 2; Dec. Dig. § 5.*]

4. Criminal Law (§ 170*) — Sufficiency — Bar to Double Jeopardy.

An indictment charging that accused, in the county of S., did deposit and explode near a tent dwelling house inhabited by human beings dynamite and other explosives with the intent to injure a human being, is sufficient to protect accused from a second prosecution for the same offense and act as a bar to double jeopardy.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 312–321; Dec. Dig. § 170.*]

5. Explosives (§ 5*)—Criminal Prosecution —Evidence—Sufficiency.

In a prosecution for exploding dynamite near a dwelling house with intent to injure a human being, evidence *held* sufficient to support a conviction.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 2; Dec. Dig. § 5.*]

6. Criminal Law (§ 380*)—Examination of Witnesses—Cross-Examination of Character Witnesses.

Where witnesses testify as to accused's good character for peace and quiet and also for chastity, questions concerning specific reports about the traits of character involved are proper cross-examination.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 843, 845; Dec. Dig. § 380.*]

7. Criminal Law (§ 1170½*)—Appeal—Reversible Error.

In a prosecution for maliciously exploding dynamite near a dwelling with intent to injure the occupant thereof, the error in asking accused's character witnesses if they had not heard that he had been indicted was not reversible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129–3135; Dec. Dig. § 1170½.*]

8. Criminal Law (§ 1144*)—District and Prosecuting Attorneys — Good Faith—Presumptions.

Where nothing appears to show his bad faith, a question by the district attorney as to whether accused's character witnesses had ever heard of his indictment for crime must be presumed to have been propounded in good faith.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736–2764, 2766–2771, 2774–2781, 2901, 3016–3037; Dec. Dig. § 1144.*]

9. Criminal Law (§ 1170½*) — Appeal — Harmless Error.

Where accused's character witnesses were improperly asked questions reflecting on his reputation, the errors were harmless, where the answers were unfavorable to the state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129–3135; Dec. Dig. § 1170½.*]

10. Criminal Law (§ 676*)—Trial—Reception of Evidence—Discretion of Trial Court.

It was not an abuse of the trial court's discretion for it to limit the number of accused's character witnesses to 13, where none of them were impeached or contradicted, and it did not appear that additional witnesses would have added to the evidence of those testifying.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1608; Dec. Dig. § 676.*]

11. Witnesses (§ 396*)—Examination—Redirect Examination—Scope.

Where, on cross-examination, the defense sought to elicit statements tending to impeach the prosecuting witness, it was proper redirect examination for her to be asked an explanation of the impeaching statement.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1261–1264; Dec. Dig. § 396.*]

12. Criminal Law (§ 413*)—Evidence—Declarations—Self-Serving Declarations.

While evidence of the declarations of accused may be given in evidence, where they tend to explain the character and quality of his action, yet, in a prosecution for exploding dynamite near a dwelling house with the intention of injuring the occupant, the declarations of accused made several days before his trip to the place where he procured the dynamite as to his purpose in going were inadmissible, being merely self-serving declarations.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 928–935; Dec. Dig. § 413.*]

13. Criminal Law (§ 427*)—Evidence—Acts of Conspirators.

In a prosecution for exploding dynamite near a dwelling house with intent to injure the occupant, where it appeared that a friend of accused came to his sanitarium as soon as he was charged with the crime, and had many private conferences with the prosecuting witness, evidence that this friend gave the prosecuting witness money to leave the state was, in view of the friend's lack of funds, admissible as the act of a coconspirator; the jury being admonished that they could not consider such evidence, unless satisfied that accused caused or authorized the persuasion of the prosecuting witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1012–1017; Dec. Dig. § 427.*]

14. Witnesses (§ 352*)—Examination—Impeachment of Absent Witness.

In a criminal prosecution, where evidence had been introduced showing that a friend of accused had given the prosecuting witness money to leave the jurisdiction, and the friend did not testify, it was not error for one testifying to the movements and financial condition of the friend to testify as to her immoralities, where those facts were connected with his knowledge of her financial condition, for those facts were relevant as to the credibility of the witness; the life and associations of a witness, whether impeccable or not, being relevant.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1152; Dec. Dig. § 352.*]

15. Witnesses (§ 344*)—Impeachment—Specific Immoralities.

In a prosecution for maliciously exploding dynamite near a dwelling house with intent to destroy the prosecuting witness, with whom accused had sustained illicit relations, and who alleged she had borne him a child, evidence of other immoralities of the witness, save such as might affect the question of the paternity of the child, were inadmissible, as a witness cannot be impeached by evidence of particular wrongful acts.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1120, 1125; Dec. Dig. § 344.*]

16. Witnesses (§ 340*)—Evidence—Evidence Admissible Because of the Admission of Other Evidence.

The answer of the prosecuting witness, on direct examination, as to whether she had had relations with any one save accused during certain months, covering the time of conception, stating that she had not then, or at any other time, did not present the question of her moral character, so as to entitle the defense to go into that question, being merely asked to negative the possibility that any one but accused might be the father of her child, which was one of the issues.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1116, 1117, 1119, 1121; Dec. Dig. § 340.*]

17. Criminal Law (§ 1169*)—Appeal—Harmless Error.

In a prosecution for exploding dynamite with intent to destroy the prosecuting witness with whom accused had carried on illicit relations, the act of the court in allowing the defense to ask whether she had maintained illicit relations with any other man was harmless, though erroneous; the ruling being in favor of accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137–3143; Dec. Dig. § 1169.*]

18. Criminal Law (§ 424*)—Evidence—Acts of Coconspirators.

In a prosecution for exploding dynamite near a dwelling house with intent to injure its occupant, where it was shown that accused had possession of dynamite before the explosion, evidence that a coconspirator had made an attempt to substitute other dynamite for that which accused was supposed to have exploded, was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1002–1010; Dec. Dig. § 424.*]

19. Criminal Law (§ 1170½*) — Appeal — Harmless Error.

In a prosecution for maliciously exploding dynamite with intent to injure a human being, the allowance of a question whether the witness had not stated that one G. told that he had destroyed the only evidence that would save accused from the penitentiary was harmless, if erroneous, where the answer was in the negative, and no impeaching evidence was offered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129–3135; Dec. Dig. § 1170½.*]

20. Criminal Law (§ 693*) — Appeal — Objections—Time for Objections.

Where objections to questions were not made until they were answered, the propriety of such questions cannot be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1630; Dec. Dig. § 693.*]

21. Criminal Law (§ 404*)—Evidence—Resemblance.

In a criminal prosecution, where the paternity of a child is in question, it is properly exhibited to the jury to observe the resemblance, if any, to its putative father.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 873, 891–893, 1457; Dec. Dig. § 404.*]

22. Criminal Law (§ 377*)—Impeachment—Support of Witness.

In a criminal prosecution, it is not error to reject testimony of accused's generous disposition offered in support of his reputation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 836, 837, 840; Dec. Dig. § 377.*]

23. Criminal Law (§ 1170*) — Appeal — Harmless Error.

In a criminal prosecution, the exclusion of a question, where the objection was sustained with leave to offer the testimony later on and that was never done, was harmless, though erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145–3153; Dec. Dig. § 1170.*]

24. Explosives (§ 5*)—Evidence—Motive.

In a prosecution for maliciously exploding dynamite near a dwelling house with intent to destroy the prosecuting witness, evidence that the prosecuting witness had borne accused an illegitimate child was admissible to show motive.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 2; Dec. Dig. § 5.*]

25. Criminal Law (§ 351*)—Evidence—Consciousness of Guilt.

Efforts by accused to manufacture testimony, to do away with adverse witnesses or induce them to leave the jurisdiction, are admissible as showing a consciousness of guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 776, 778–785, 930–932; Dec. Dig. § 351.*]

26. Criminal Law (§ 371*)—Evidence—Evidence of Other Crimes.

Whenever there is a clear connection between two offenses from which it may be inferred that, if guilty of the first, the accused is guilty of the latter, evidence of the second offense is admissible, so that, in a prosecution for exploding dynamite near a dwelling house with intent to injure the occupant, evidence that, after the explosion, accused attempted to poison the occupant, was admissible, tending to identify him as the one causing the explosion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830–832; Dec. Dig. § 371.*]

27. Witnesses (§ 271*) — Evidence—Inspection of Statements.

In a criminal prosecution, it was not error for the court to refuse to direct the district attorney to deliver to accused a written statement by the prosecuting witness, so that it might be used in the cross-examination of the sheriff; the sheriff not having been interrogated concerning it, and having only indirectly referred to it in testifying to a conversation with the prosecuting witness.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 958–962; Dec. Dig. § 271.*]

28. Criminal Law (§ 1144*)—Appeal—Harmless Error—Burden of Showing Prejudice.

The refusal of the trial court to direct the district attorney to deliver accused a written statement made by the prosecuting witness cannot be held prejudicial error, where the record does not show the contents of the statement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736–2764, 2766–2771, 2774–2781, 2901, 3016–3037; Dec. Dig. § 1144.*]

29. Witnesses (§ 388*)—Impeachment—Foundation.

The exclusion of a letter offered during the cross-examination of a witness which was admissible only to impeach him is proper, where no foundation for the impeachment was laid.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1233–1242, 1246; Dec. Dig. § 388.*]

30. Criminal Law (§ 364*)—Evidence—Res Gestæ.

In a prosecution for maliciously exploding dynamite with intent to injure the occupant of a dwelling, declarations by accused on the night of the explosion, as to where he had been, and not directly concerned with the explosion, were not part of the res gestæ, and were inadmissible as hearsay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 805, 808–810, 813, 816–818; Dec. Dig. § 364.*]

31. Criminal Law (§ 469*)—Expert Testimony—Subjects of Expert Testimony.

Where a mining engineer testified as to the appearance of rocks, it was not error to exclude a question asking for his conclusion as an expert as to the most feasible method of removing the rocks; the matter not being one for expert testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1059; Dec. Dig. § 469.*]

32. Criminal Law (§ 450*)—Evidence—Conclusions.

In a prosecution for exploding dynamite near a dwelling house with intent to injure the occupant, where it appeared that accused had procured dynamite from a mine, a question whether there had been any secrecy about accused's statements or means in getting the explosive was properly excluded as calling for a conclusion of the witness, and thus invading the province of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1036; Dec. Dig. § 450.*]

33. Criminal Law (§ 1170*)—Appeal—Harmless Error.

In a prosecution for exploding dynamite near a dwelling with intent to injure the occupant, where the uncontradicted evidence showed that accused had procured dynamite from his mine, and that his actions had not been secret, the exclusion of a question whether his actions were secret was harmless if erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145–3153; Dec. Dig. § 1170.*]

34. Criminal Law (§ 723*)—Trial—Arguments of Counsel.

Argument by the district attorney in which he told the jury to "let us have a law that is equal for rich and poor, and that, if so administered, it will enjoy the confidence, deserve the reverence and support of the people, and that to-night the people of the state look here to you, not to find out whether accused is guilty, but to see whether a court of justice is going to declare him so," was not improper, as containing a threat that the people had already found accused guilty, and that the jury would not dare to do otherwise.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1663, 1674, 1676; Dec. Dig. § 723.*]

35. Criminal Law (§ 730*)—Trial—Arguments of Counsel.

Where after the district attorney had told the jury that the people of the state were looking to them, not to find out whether accused was guilty, but whether a court of justice was going to declare him so, the court's admonition that the jury should disregard any statement as to what the public or other people think must be presumed to have cured the error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

36. Criminal Law (§ 719*)—Trial—Argument.

In a prosecution for exploding dynamite with intent to injure the occupant of a dwelling house, where accused introduced dynamite which was in his possession, it became the subject of legitimate argument.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1669; Dec. Dig. § 719.*]

37. Criminal Law (§ 814*)—Trial—Instructions—Applicability to Evidence.

In a prosecution for exploding dynamite near a dwelling house with intent to injure the occupant, where from the evidence it would be a fair inference either that accused personally exploded the dynamite, or had it done by some one acting under his orders, an instruction that there was no evidence tending to show that defendant procured any other persons to explode the dynamite and that therefore if he did not do it he should be acquitted was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979–1985, 1987; Dec. Dig. § 814.*]

38. Criminal Law (§ 80*)—Trial—Election—Prosecution as Principal or Accessory.

As one accused may be indicted as a principal and convicted as an accessory, the state need not make an election to prosecute as principal or accessory, but may ask for a conviction if the jury be satisfied either that accused was a principal or an accessory, and hence, in a prosecution for exploding dynamite near a dwelling house with intent to injure the occupant, the state may ask for a conviction, though the evidence showed that accused only procured another to fire the explosion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 103–111, 1384; Dec. Dig. § 80.*]

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

W. P. Burke was convicted of maliciously using explosives to destroy a building inhabited by human beings, and he appeals. Affirmed.

J. R. Leppo, W. F. Cowan, and J. A. Cooper, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones and Clarence F. Lea, for the People.

BURNETT, J. This case has many peculiar features, and it has excited wide public interest on account of the nature of the charge and the prominence of appellant. He is a physician of high standing in his profession, a man of affluence and of many friends, and, prior to the unfortunate occurrence which gave rise to his prosecution, he bore an enviable reputation in the community, not only for the qualities involved in the accusation, but, so it is claimed, for prominence in the manifestation of those traits of character generally that distinguish the benevolent and upright citizen. The case was prosecuted and defended with great pertinacity and rare ability. The trial lasted for seven weeks and a mass of testimony was taken, which, in 6 volumes of over 500 pages each, has been submitted to this court. The printed arguments filed herein comprise something like a thousand pages in which every possible phase, seemingly, of the propositions of law involved in the record has been forcibly and persuasively presented by distinguished counsel who have certainly spared no effort to assist the court in the arduous task of reaching a just and legal determination of this appeal.

[1] It would be impossible, within reasonable limits, to discuss fully the various points made by appellant. Indeed, it seems hardly practicable or requisite to notice specifically all of the grounds of attack upon the judgment to which our attention has been invited. The author of an opinion should, of course, keep in mind the constitutional provision requiring an appellate court to give the reasons for its conclusion and should have a due regard for the gravity of the offense and the possible bearing of the opinion as a precedent in the future. He should also be not unmindful of the valuable assistance of counsel, but manifestly he must follow his own judgment as to the degree of elaboration to be accorded to the treatment of any proposition and as to the questions which are worthy of notice at all.

[2] In view of much of the argument of appellant, it seems appropriate, at the outset, to declare that in our attention to the question of the guilt of defendant or of the sufficiency of the evidence to establish any fact in issue we have been guided by the familiar and oft-repeated principle so forcibly stated in People v. Ruef, 14 Cal. App. 583, 114 Pac. 57, by Judge Cooper, who was then the Presiding Justice of the First District Court of Appeal, as follows: "In the discussion of this question, it must be borne in mind that we have the power only as a matter of law to say as to whether or not there is sufficient evidence, conceding every syllable of it to be true, to support the ultimate finding of the jury. The jury is the sole judge of all questions of fact, and its finding, based upon evidence, upon any controverted question, is conclusive on this court. It has the right to believe or to disbelieve any witness, and draw all reasonable inferences from the facts proven." And, also, in People v. Durrant, 116 Cal. 200, 48 Pac. 79, where the Supreme Court, through Mr. Justice Henshaw, goes so far as to say that, where a witness has absolutely discredited his own testimony "by swearing to opposite statements so that one or the other must be false, under our laws his testimony is not of necessity to be rejected," and the jury, while they are bound to look upon it with suspicion, may accept as true one or other of the contradictory asseverations. "Thus," as it is said, "upon a review of the evidence by this tribunal, we may not examine with minuteness claims that witnesses are discredited or that their testimony is unworthy of belief, or look to see whether some other conclusion might not have been warranted by the evidence." This exclusive function of the jury as to the determination of the facts is well known, of course, to all the profession, but it is surprising that in so many instances it seems necessary to remind even leaders of the bar of the existence of the rule and of its vital importance in the determination of cases on appeal.

[3] Much space is devoted in appellant's brief to the maintenance of his contention that the indictment is fatally defective, and that therefore his demurrer thereto should have been sustained. He even states that he has not the patience to discuss the proposition, and that it seems clear to him that "this court cannot, without setting aside all rules and precedents, and ignoring all learning and reverence for the law of our ancestors, hold this indictment sufficient, when it fails to state or describe in any manner the place where the explosion occurred." The offense is defined in section 601 of the Penal Code. Therein is penalized the use of explosives for certain enumerated purposes. The charging part of the indictment here, following substantially the language of said section describing the alleged offense, is as follows: "The said W. P. Burke, on or about the fifth day of February, A. D. 1910, at and in the county of Sonoma, state of California, did willfully, unlawfully, feloniously and maliciously deposit and explode at, in and near a dwelling house, being a tent house and place where human beings did then and there and theretofore usually inhabit, assemble and frequent, pass and repass, dynamite, Hercules powder and other chemical compounds and explosives with the intent then and there to feloniously injure Lu Smith, a human being, and that by means of said deposit and exploding of said explosive said Lu Smith was thereby injured and endangered." It cannot be disputed that the indictment charges an offense defined in said section of the Penal Code, and that said offense is shown to be within the jurisdiction of the court. Neither can there be any doubt, as we view it, that the indictment meets the requirement of sections 950, 951, and 952 of the Penal Code. The act is identified by these circumstances, as pointed out by respondent: (1) The date satisfies the demand

of section 955 of the Penal Code. (2) The offense was committed in Sonoma county. (3) The explosion occurred near a dwelling house, being a tent house. (4) Said tent house was occupied by human beings and it was a place where they assembled and passed and repassed. (5) Dynamite was the explosive used. (6) The act was maliciously done. (7) The intent of the defendant was then and there to feloniously injure one Lu Smith. (8) By means of said explosive said Lu Smith was then and there injured. The location of the tent house might have been more definitely indicated, but it is clear that appellant has suffered no injury by the want of greater particularity in the averment. In this respect there would seem to be no difference in principle from other cases of personal injury or of felonious assault. In a charge of assault with a deadly weapon or with intent to commit murder, for instance, it is admitted that it is sufficient, as far as the locality is concerned, to aver that the offense was committed in the county. This, in connection with the name of the person sought to be injured and the substantive averments of the crime, makes the identification complete, and answers every purpose of a good pleading. "The facts necessary to be set forth are provided in the statute, and whenever it is substantially followed, so as to put the prisoner upon fair notice of the offense charged and the time, place, and circumstances necessary to constitute the crime, it will be sufficient." People v. Thompson, 4 Cal. 240. Looking at the matter in its practical aspect, it is manifest that no substantial right of the defendant was invaded or imperiled. He knew whether the offense charged was committed by him in any part of Sonoma county. This knowledge would enable him to prepare and present his defense.

[4] And, as far as any future prosecution is concerned, the indictment would protect him in his answer to any charge of the same offense committed at the time set forth at any place within the jurisdiction of said superior court. If there should be any doubt as to this, his plea "of once in jeopardy" could be supported by extraneous evidence to identify the particular offense for which he has been tried, and thus he would be amply protected. In the light of the trial itself, it may be added, it is made perfectly clear that appellant was not embarrassed by the asserted infirmity in the indictment, and that he need have no fear of another conviction under a different pleading for the same offense. The following authorities, cited by respondent, bear more or less upon the sufficiency of the indictment, and they lend support to the ruling of the trial court upon the demurrer. People v. Avila, 43 Cal. 199; Ex parte Helbing, 66 Cal. 215, 5 Pac. 103; People v. Platt, 67 Cal. 23, 7 Pac. 1; People v. Sheldon, 68 Cal. 435, 9 Pac. 457; People v. Anderson, 80 Cal. 205, 22 Pac. 139; People v. Frigerio, 107 Cal. 152, 40 Pac. 107; People v. Faust, 113 Cal. 172, 45 Pac. 261; People v. Prather, 120 Cal. 660, 53 Pac. 259; People v. Barnnovich, 117 Pac. 572; State v. Sneed, 16 Lea (Tenn.) 450, 1 S. W. 282; State v. Shaw, 35 Iowa, 575; Spencer v. State, 13 Ohio, 407; 2 Bishop's New Criminal Procedure, § 135.

The cases cited to the point by appellant are easily distinguished from the one at bar, and we deem it unnecessary to notice all of them specifically. They mostly relate to injuries to property and some fact essential for identification was omitted. The two following citations, however, relate to personal injuries: In People v. Perales, 141 Cal. 581, 75 Pac. 170, the charge was of an assault by means likely to produce great bodily injury. The Supreme Court, through Mr. Justice Lorigan, held that a more particular statement of facts was necessary to charge the offense definitely and certainly, since, under the statute, the terms used had no precise or technical meaning, and that it was not a case where the statute designates and specifies particular acts or means whereby the offense is committed. In People v. Mahony, 145 Cal. 104, 78 Pac. 354, the indictment was for the presentation of a false and fraudulent claim, and it was held, in accordance with the well-established rule in relation to fraud, that the particular acts and facts which make the claim fraudulent should be averred. Here, as we have seen, the facts constituting the offense were alleged substantially in the language of the statute. Those facts need no definition nor explanation, and the time and place were sufficiently designated.

[5] Appellant has displayed no lack of ingenuity or of courage in his discussion of the question of the sufficiency of the evidence to support the finding of the jury. The method, however, adopted, according to which the evidence is considered piecemeal without regard to the cumulative and convincing effect of the inculpatory circumstances in the aggregate, is probably the only course that could be pursued with any plausibility or hope of success in a case like this. We do not propose to argue the probative value of the various circumstances upon which the people relied for a conviction. We think the mere statement of some of the important facts, which we must accept as established to the satisfaction of the jury, carries with it the conclusion that the verdict represents a rational inference from the evidence.

For many years appellant had been at the head of an institution known as Burke's Sanitarium, located about five miles from Santa Rosa, in Sonoma county. At the time of the offense he was of the age of 60 or thereabout, and one Lu Smith of the age of 40. In 1901, being ill, she came to the sanitarium, and she was given osteopathic treatment by appellant. Subsequently she accepted employment from him, and so continued, with some intermission, till the spring of

1906. She then went away for a short time, but returned in June, and remained till the 1st of September. After that she resided at different places, and frequently visited appellant at his office in Oakland or San Francisco. In the summer of 1906 appellant addressed to her a long communication on the subject of the proper relation of the sexes, with a request that she read and return to him. This communication was read to the jury on the request of the defense. His opinions therein advanced seem rather startling in view of appellant's reputation in the community. He declared that the "voluntary family" was to take the place of the old fashioned family; that, while a "natural marriage may not be legal, but legal is not as high an authority as the natural"; that the "noble woman" is the one who has the courage to live "nature's ways," no matter what the result, and regardless of the popular standard of morals; that sex is not enjoyed to the full "until you have sublimized it to the fineness of the rapture of affinity"; that "such a ceremony is lawless, wordless, and thoughtless," and that nature says: "Be utterly passionate where there is affinity, and then it will be pure." Miss Smith seems to have been duly impressed with the beauty and verity of these sentiments, as she and the doctor assumed illicit relations in June, 1906, and their meretricious conduct continued at intervals for a long time thereafter, the doctor supporting her in the meantime, and in June, 1908, while appellant was visiting her at the home of a Mrs. Macy in San Francisco, conception took place. After Miss Smith knew she was to become a mother, she told the defendant, and after consultation, it was decided that she should go to the Burke Sanitarium. When she arrived there, she was introduced as Mrs. Smith by appellant, and, according to his directions previously given, she so signed her name on the register. She had no money, and appellant paid for her maintenance at the sanitarium for some time. On the 12th of March, 1909, a child was born to her, appellant being the attending physician. About the 1st of August, 1909, she moved into the tent house where the explosion occurred, the tent being located near some cottages on a road running through the sanitarium grounds. The first disturbance between appellant and Lu Smith occurred some time in June, 1909, when she said to him, in the presence of others: "You have time to see everybody else except your own child." This was the first time she had publicly accused him of being the father of the child, and it became noised about. She called him a coward, and said he was afraid to face the consequences of his own act. On another occasion she had with him a heated controversy over his neglect of the child, and, in great anger, he seized her by the throat. In November she concluded to leave the sanitarium, but appellant dissuaded her from doing so. On the 17th day of December she telephoned to an attorney in San Francisco in reference to her troubles, and this was reported to appellant, who, the following day, left for his mine in Butte county, and there obtained four sticks of dynamite. The mine is located about 24 miles from Oroville. Appellant left Oroville on the morning of the 19th of December and drove to the mine and returned that evening. At the mine he asked for dynamite "to take down to blow a rock out of the ditch or grounds around the sanitarium." He stated he had not seen any dynamite used and a small charge was prepared and exploded in his presence. He claimed that he had "an old miner down there around the sanitarium that knew how to use it, and he would be in no danger with it." No evidence was introduced at the trial that there was any such miner at the sanitarium. There was only one piece of fuse taken by appellant, about three feet long, although there were several rocks that the defendant claimed he wanted to remove. The defendant was shown at the mine how to light the fuse, and it may be said that the fuse found at the place of the explosion corresponded in appearance with that which appellant obtained. He took the dynamite away from the mine and arrived at Fulton, a few miles from Santa Rosa, on the evening of December 20th, where he was met by Dr. Hitt of the sanitarium. Appellant carried a satchel on his knees in the buggy, and Dr. Hitt advised him to set it down between their feet, but he continued to hold it. Appellant did not tell Dr. Hitt or any one else that he had any dynamite. No other person knew anything about it being on the premises. Appellant had it in his possession at the sanitarium for 46 days preceding the explosion, yet no attempt was made to blow the rocks from the ditch, and they were still there at the time of the trial. After Lu Smith, in the presence of others, had reminded appellant that he was the father of her child, appellant began to charge her with insanity, and falsely stated to different persons that she had threatened "to blow herself up, and he feared that she was going to do it." Being asked how he thought she would accomplish it, he said: "It may be dynamite, or something of that nature." He also declared that it would be better if she and the child were both dead. Thursday before the explosion he promised to give the woman money in a few days. The next day he told her he had a check, and he would have it cashed when he would give her the money. He asked her whether the baby's crib was "by the side of the bed or at the foot" in the tent. Some time before that he went to the front of the tent, stepped onto the porch, looked in at the open door where he had a view of the location of the bed and the baby's crib, and, feeling of the canvas, he remarked to the girl who was caring for the baby: "This is a nice tent." On Saturday, the day of the explosion, he again excused himself for not furnishing her the money, and she threatened to go away and bring suit against him. That night, February 5, 1910, about 7 o'clock, an attorney connected with the office of the attorney to whom she had previously telephoned, arrived at the sanitarium, and appellant was informed of his arrival. On the evening of the explosion, about a quarter to 8, a Mr. Dillard, clerk of the sanitarium, left the sanitarium building and started towards his own cottage, which was westerly from the Lu Smith cottage. At this time Mrs. Smith was away from her tent and the light was out. Temporarily stopping in the road—not far from said tent—he saw Dr. Burke approaching him from the sanitarium, walking rapidly. The night was dark, and, when appellant reached a point within 10 or 15 feet of the witness, the former turned and practically retraced his steps. No word was spoken between them. The dynamite that caused the explosion was attached to the wall of the tent above the wooden wall that came up near the top of the bed occupied by Mrs. Smith, the bed being immediately against the wall. She went to bed about 8 o'clock. She had put the baby in its crib, and put out the light previous to that time, and had gone to the bathroom some distance away to take a bath, leaving the baby alone asleep. It was the theory of the prosecution that this was the time when Dillard saw appellant and that the latter had taken advantage of the absence of Mrs. Smith, to attach the dynamite to the outside wall of the tent. The explosion occurred about 9:30 o'clock and was that of dynamite. The woman was burned considerably, and her flesh was torn in several places, especially on one of her arms. Under similar conditions as those existing at the tent, the prosecution made an experiment with the explosion of the same amount of dynamite as that secured by appellant as aforesaid, and obtained similar results as to the force of the explosion and the marks on the tent. Shortly after the explosion appellant, standing near the tent, said, "I guess that girl has blown herself up," and the next morning he stated that it was too bad the explosion had not killed her, as the baby would be better off without her. He was advised that the explosion should be investigated by the authorities, and he declared that "the matter would right itself," and that he "did not think an investigation was necessary." After witness Dillard had reported the explosion to the authorities, appellant declared to him that he was too officious, and that he had directed his brother, Alfred Burke, to telephone to the officers not to come, and had sent to them a letter to that effect. The explosion was reported by Mr. Dillard to the sheriff about noon on the 6th of February, and Alfred Burke delivered the letter about 4 o'clock in the afternoon. In this letter to the sheriff appellant stated that the explosion occurred "in the tent of a patient who is unbalanced in mind," and that she "will probably die as the result of the explosion," and "we do not know that she did it but think she did as she has repeatedly threatened 'to blow herself up.' We are quite able to cope with the situation, without troubling you." When the sheriff talked to him on that afternoon, appellant stated that he had not known of any explosives being on the place. One week later two other peace officers interviewed him at the sanitarium, and he was asked if there had been any dynamite or explosive on the premises, and he replied that he "knew of no reason why any should have been used on the place, unless at the time of building a water flume there several years ago," and, on being further questioned, he stated positively that he knew of "no blasting powder or dynamite ever being on the place." Immediately after the explosion one Dr. Dessau, who was employed by appellant at the sanitarium, treated Miss Smith. He did not believe she was going to die, but appellant predicted her death. For some unexplained reason, Dr. Dessau was withdrawn from the case within a day or two, and appellant took charge. He applied to the wound on the arm of Miss Smith a preparation contained in a box upon which was written, in appellant's handwriting, "Boracic acid." It contained, however, quite a percentage of arsenic, and it was a rational inference, from the surrounding circumstances, that appellant contemplated that the death of Miss Smith would be the result of the continued application of this "slow poison." His plan, however, was interfered with by the action of the district attorney.

The foregoing is not by any means an exhaustive resumé of the case for the people. Other circumstances of moment appeared to fortify the conclusion reached by the jury, two of which will be noticed in connection with the consideration of the question as to the admissibility of evidence. As to the showing made by the prosecution, it is sufficient comment to declare that seldom is such a case of circumstantial evidence made out. It is not only sufficient to support the verdict, but it is persuasive, satisfactory, and convincing. Furthermore, it may be said that it seems difficult to understand how any one can read the cold record, dispassionately and without bias, and not be impressed with an abiding conviction of appellant's guilty participation in the crime charged against him.

[6] Appellant complains bitterly of the conduct of the district attorney in his cross-examination of the character witnesses for the defense. Those witnesses testified to the good reputation of defendant for peace and quiet and also for chastity. On cross-examination they were asked if they had not heard that defendant had made a practice of com-

mitting abortions, and having improper intercourse with women, and of taking undue liberties with female patients. The court permitted these questions, but sustained an objection to the question asked of one witness if he had not heard of the defendant having been indicted by the grand jury of Lake county. No complaint is made of any question asked of the defendant himself. Under the authorities, the questions allowed by the court were properly permitted as affecting the weight of the testimony in relation to defendant's reputation. The district attorney did not claim anything as to the verity of the matters suggested or implied in his questions. The rule is that on cross-examination of character witnesses they may be asked as to specific reports concerning the trait of character involved, if they have a tendency to establish the bad reputation, although they may not be sufficient for that purpose. In People v. Ah Lee Doon, 97 Cal. 180, 31 Pac. 936, witnesses to the good disposition of defendant were permitted to be asked if they had heard of his prior conviction of murder and of his having drawn his pistol on different persons. The Supreme Court said: "In the cross-examination of witnesses testifying to reputation or character, such questions are permissible." In People v. Moran, 144 Cal. 63, 77 Pac. 783, on cross-examination of a witness who had testified to defendant's good reputation for peace and quiet, it was held proper to ask if he had not read that within eighteen months defendant had been arrested for disturbing the peace—the court, through the chief justice, stating that it was strictly in line of cross-examination, and that "the cases cited by counsel to the proposition that it was misconduct in the prosecuting attorney to ask about the arrest for vagrancy do not sustain him, the one nearest in point—People v. Crandall, 125 Cal. 134 [57 Pac. 785]—being distinctly against him." In People v. Perry, 144 Cal. 750, 78 Pac. 284, the questions on cross-examination whether the witnesses had heard that the defendant was charged with burglary and convicted of petit larceny were held admissible; the court quoting from People v. Gordon, 103 Cal. 574, 37 Pac. 535, to the effect that the opinion of the witness and the value of it "may be tested by asking him whether he has ever heard that the person in question has been accused of doing acts wholly inconsistent with the character which he has attributed to him." See, also, People v. Weber, 149 Cal. 342, 86 Pac. 671.

[7-9] Assuming that the question as to the indictment by the grand jury of Lake county was improper, it is sufficient to say that this is not a case where the mere asking of such a question should be held to require a reversal of the judgment. Counsel for appellant manifest a good deal of heat over the contention that the district attorney was not asking these questions in good faith. But how would counsel have the question of good faith determined? They did not ask the district attorney whether he was acting in good faith or whether he had any ground for believing that the witnesses had heard unfavorable reports concerning the conduct of appellant. And, if he had volunteered such information in the presence of the jury, it is clear that it would have been palpable error. The fact is that, under the circumstances, we must assume that he was conscientiously discharging his duty as he understood it, and we can see nothing in his conduct in the examination of witnesses that was prejudicial to any substantial right of appellant. Besides, the answers to the questions were unfavorable to the prosecution, and therefore appellant suffered no harm. People v. Chin Hane, 108 Cal. 604, 41 Pac. 697.

[10] The court did not abuse its discretion in limiting the number of character witnesses to 13. No evidence was offered by the prosecution to impeach that reputation, and, as stated in Bunnell v. Butler, 23 Conn. 68: "There must necessarily be a limit to such inquiries, and it is for the court to prescribe it." People v. Moan, 65 Cal. 532, 4 Pac. 545; People v. Casselman, 10 Cal. App. 241, 101 Pac. 693. It is not at all likely that any additional witness would have added to the force of the testimony of the large number testifying none of whom was impeached or contradicted.

[11] Miss Smith had testified on direct examination that she had sexual intercourse with appellant for the first time at Oakland in June, 1906. On cross-examination impeachment was sought by showing that before the grand jury she had testified that in April, 1906, at the sanitarium, appellant "did things that no physician should do with a patient." On redirect, she was allowed, over the objection of appellant, to answer the question: "What were those things?" The question was equivalent to an inquiry for an explanation of her statement. It would certainly be a very harsh and unjust rule that would close the mouth of a witness under such circumstances, where an answer is capable of a construction either consistent or inconsistent with his other statements under oath. The law, on the contrary, indulges the presumption that a witness is speaking the truth and affords him every reasonable opportunity to support that presumption and to appear in the proper light before the jury. On redirect examination, it is proper for him to state facts and circumstances that tend to correct or repeal any wrong impressions or inferences that arise from a matter drawn out on cross-examination, notwithstanding such facts and circumstances may prejudice the case for the defendant. People v. Corey, 8 Cal. App. 725, 97 Pac. 907. We need not consider the contention of respondent that "the testimony would have been admissible on direct examination as

showing the relation of the parties, and on the question of motive and as to the parentage of the child," as there can be no doubt that it was admissible in view of the cross-examination.

[12] It is claimed that the court erred in excluding testimony as to the purpose and motive in making the trip to Bills mine. This is, of course, an important consideration, and relates to the time when the dynamite was secured. The rule, no doubt, is that, "when the act of a party may be given in evidence, his declarations made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself are admissible in evidence. Lund v. Inhabitants of Tyngsborough, 9 Cush. (Mass.) 36. * * * The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact as his own testimony that he then had that intention would be." Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706; Rogers v. Manhattan Life Ins. Co., 138 Cal. 290, 71 Pac. 348. In harmony with this rule, the court allowed the greatest latitude to the appellant in showing what was said and done at the mine at the time he secured the dynamite. The court properly excluded evidence as to conversations between appellant and other parties that occurred days before the said visit to the mine. These conversations were no part of the res gestæ, and were clearly hearsay. As stated in Aguirre v. Alexander, 58 Cal. 26, the verbal declarations of a party to be admissible must accompany the act, the nature, object, or motive of which is the subject of inquiry. They must be contemporaneous with the act to which they were intended to give character. People v. Huntington, 8 Cal. App. 612, 97 Pac. 760, is a case directly in point. Therein it was stated by the court, through Presiding Justice Cooper, that "the law would not permit a party who intended to perform an act that was criminal to make statements or declarations a day or two before the act, as to the lawful purpose in mind and then introduce such declarations to justify himself." They are classed as self-serving declarations, and it is well settled that they are not admissible. Barkly v. Copeland, 86 Cal. 489, 25 Pac. 1, 405.

[13] The court permitted evidence that one Marian Derig gave money to Lu Smith to induce her to depart from the state prior to the trial. The theory of the prosecution was that the said Derig was acting in behalf of defendant. Upon this theory alone could the evidence be properly received. To establish the co-operation, the people relied upon circumstantial evidence. Of course, it would be rare that any direct evidence could be afforded of the criminal connection in such a case. These are the circumstances which respondent urges as sufficient to justify or at least to render rational the inference that Marian Derig was acting as the agent of appellant: She had been a friend to the defendant for some time, having been a patient at his institution years before. After defendant was charged with this crime, she left her home in Los Angeles, and came to the sanitarium under a fictitious name, and remained there until shortly after Lu Smith departed. She went to the private residence of the defendant, and did not register as guests usually do. Though not a patient, she took part of her meals at her private rooms, especially during the last of her stay, when the negotiations with Lu Smith were begun. She and the defendant conferred in her private room and the housemaid was told to come back later. She stayed at the institution at his expense. After Lu Smith wrote the defendant requesting money to go to Japan, Marian Derig sought Lu Smith in Berkeley where she was staying, and, during the pendency of the negotiations for the departure of Miss Smith, Marian Derig made trips to the sanitarium. Lu Smith had not seen nor corresponded with Marian Derig for four years prior to the commission of the offense. There was evidence that Marian Derig had no money of her own. There was no apparent reason why she should make a present of $750 to Miss Smith. There was evidence that Marian Derig fabricated a letter of exoneration of appellant, purporting to have been written by Lu Smith, which letter was offered by appellant at the trial for the consideration of the jury. It is insisted that it is a legal, and, in fact, the only reasonable, inference from these circumstances that the act of Marian Derig was authorized and directed by appellant, and with this contention we entirely agree. The evidence connecting appellant with the transaction is more persuasive than that imputing participation in a felonious conspiracy to defendant in the case of People v. Donnolly, 143 Cal. 394, 77 Pac. 177, and yet in that case a conviction of murder was upheld by the Supreme Court. As stated in Underhill on Evidence, § 491: "It need not be shown that the parties actually came together and agreed in express terms to enter into and pursue a common design. The existence of the assent of minds which is involved in a conspiracy may be, and from the secrecy of the crime, usually must be, inferred by the jury from proof of facts and circumstances which, taken together, apparently indicate that they are merely parts of some complete whole." We feel no doubt that the court was justified in permitting the jury to consider the testimony with the following admonition which it gave: "Unless you are satisfied from all the evidence in the case that the defendant did cause or authorize the persuasion or disappearance of

such witness, you cannot consider it as a circumstance against the defendant." Other instructive cases cited by respondent in this connection are: Chicago, etc., v. Collins, 56 Ill. 212; Clark v. State, 28 Tex. App. 189, 12 S. W. 729, 19 Am. St. Rep. 817; Fisher v. State, 73 Ga. 596; Wilkerson v. State, 73 Ga. 799; People v. Pitcher, 15 Mich. 397; McDowell v. Rissell, 37 Pa. 169; State v. Prater, 52 W. Va. 132, 43 S. E. 233; Hannon v. State, 5 Tex. App. 549; People v. Fehrenbach, 102 Cal. 396, 36 Pac. 678; People v. Smith, 151 Cal. 625, 91 Pac. 511.

[14] It is claimed that it was error for the court to allow the prosecution to impeach and attack the character of the said Marian Derig, who was not a witness in the case. Appellant has placed a wrong construction upon the testimony. The facts of which complaint is made were developed while the witness Pierce was upon the stand. He was interrogated as to the movements and financial condition of said Marian Derig which were material and relevant matters. His opportunity to know the facts and his relation to her were legitimate considerations for the jury. The substance of the testimony of Pierce to which objection is made is stated by respondent as follows: That he had lived with Marian Derig and had known her for four years; that she left Los Angeles in February on the train for San Francisco, and that she returned to Los Angeles about the 1st of May, stayed a short while and returned to San Francisco; that he had not seen her since, except once in October; that her maiden name was Summerville; that she had gone by his name for about four years; that he had known of her having no employment except demonstrating for him. "In weighing the testimony of witnesses a court or jury should, of course, take into consideration evidence disclosing their means of knowledge and relation to the parties and issues." 30 Am. & Eng. Ency. of Law, 1069. "The law regards as relevant all facts which tend to illustrate the credibility of the witness or which enable the jury to determine the weight of his testimony." People v. Saunders, 13 Cal. App. 747, 110 Pac. 825. "The life and associations of a witness whether impeachable or the reverse are all relevant." Underhill on Crim. Ev. § 244. Of course, the district attorney should not ask a witness a question merely for the purpose of degrading him or of any one connected with the case, but it cannot be said that we have an instance here of such misconduct.

[15-17] Appellant seems to think that it was "most prejudicial error" on the part of the court in excluding evidence "of Lu Smith's illicit relations with other men and as to acts of lewdness on her part." The contention is made upon the ground that the issue was tendered by respondent. As to this appellant is in error. Besides, unless confined to the period of possible conception, the evidence was immaterial. This is not one of the methods recognized by the law for impeaching the credit or character of a witness. She was asked by the district attorney whether during the months of May, June, July, and August or September, 1908, she had the company of any other man than Dr. Burke, and she replied: "I did not or any other month." This latter part of the answer was manifestly not responsive to the question, and should have been stricken out if a motion to that effect had been made. The purpose of the inquiry was clearly to eliminate the consideration of other than the defendant as the father of the child. On cross-examination, after testifying to the first act of intercourse with defendant, she was asked: "Up to that time had you never maintained any illicit relations with any man?" The district attorney objected to the question, and the court erroneously overruled the objection. The error was in favor of appellant, but it did not preclude the court from ruling right and excluding further evidence as to the morality of the witness at a time long prior to the period already mentioned. The court stated that it would allow the defendant to show the relations of Lu Smith and any man at any time when such relation might have any bearing upon the question of the parentage of the child. That was as far as the court was required to go, and no evidence within that limitation was offered by appellant. "A witness cannot be impeached by evidence of particular wrongful acts, nor is it proper to question the witness with reference to such matters." Sharon v. Sharon, 79 Cal. 673, 22 Pac. 26, 131; Barkly v. Copeland, 86 Cal. 490, 25 Pac. 1, 405; Pyle v. Piercy, 122 Cal. 386, 55 Pac. 141; Estate of James, 124 Cal. 657, 57 Pac. 578, 1008; section 2051, Code Civ. Proc.

In People v. Benson, 6 Cal. 221, 65 Am. Dec. 506, cited by appellant, evidence of intercourse with other men is said to be admissible in that class of cases, as tending to disprove the allegation of force. Here the act was voluntary on the part of each. Of course, it is also apparent that evidence of the character sought to be introduced would have no tendency to decrease the probability that appellant was the father of the child. As stated by respondent: "It would not legitimately aid the defendant to show that she was a prostitute, instead of a mistress."

[18, 19] The prosecution offered evidence to show that, after the offense was committed, an attempt was made to substitute other dynamite for that which it is claimed was exploded by appellant as charged in the indictment. The story is an interesting one, but we cannot enter fully into its details. Appellant testified, in his own behalf, that at the time of the explosion when Lu Smith was injured he had in his possession the dynamite which he had secured at the mine in December preceding, and that it continued

to remain on the premises. He also offered an explanation of his denial to the officers that he ever had any on the place. He produced in court what he claimed to be the original package of dynamite. It was therefore manifestly proper for the people, in rebuttal, to impeach the genuineness and integrity of this dynamite. The only possible legal objection to the district attorney's efforts to do so is found in the contention that appellant's connection with the transaction was not shown. In this respect the situation is similar to that existing in reference to Marian Derig as aforesaid. The undertaking to secure the additional dynamite originated with one Golden, and the question is whether he was the agent of appellant in the premises. As with Marian Derig, so with him, we think there was abundant evidence of his agency to authorize the ruling of the court. Appellant argues the point as though respondent relied upon the fact of Golden's employment as attorney for appellant to justify the inference of criminal agency, but we do not understand respondent to make any such absurd claim. Our attention is called to many facts and circumstances, which we deem it unnecessary to specify, that can leave little, if any, doubt in the unprejudiced mind that there was concert and collusion between Golden and the defendant to fabricate this evidence, as claimed by the people.

The witness B. F. Greenwell was called by the prosecution, and, among other things, he testified that Golden asked him to find four sticks of dynamite, and that Golden said he had destroyed evidence that was necessary to keep the doctor from the penitentiary. Over the objection of appellant, the witness was asked if he had not told certain parties that Golden said "he had destroyed that dynamite, which was the only evidence that would save the defendant from the penitentiary." The ruling of the court was proper under the authorities. People v. De Witt, 68 Cal. 586, 10 Pac. 212; People v. Cook, 148 Cal. 344, 83 Pac. 43; Zipperlen v. So. Pac. R. Co., 7 Cal. App. 217, 93 Pac. 1049. But, at any rate, the ruling was without prejudice, since the answer was favorable to appellant, and no impeaching evidence was offered by the people. People v. Chrisman, 135 Cal. 287, 67 Pac. 136.

[20, 21] During the progress of the trial Miss Smith, while on the stand one day, held her baby in her arms, and she was asked by the district attorney whether that was the child that she referred to in her testimony and she answered in the affirmative. It is claimed that it was "gross error for the district attorney to bring in Lu Smith's illegitimate child and exhibit it to the jury." We know of no rule that precludes a woman from bringing into the courtroom her own child, whether legitimate or otherwise, and, as to the said questions asked of the witness, it would be sufficient to say that no objection was made until they were answered. But, in view of the question as to the paternity of the child, it was altogether proper to exhibit it to the jury that they might observe the resemblance, if any, to the putative father. "Taken by itself, proof of such resemblance would be insufficient to establish paternity; but it would be clearly a circumstance to be considered in connection with other facts tending to prove the issue on which the jury are to pass." Gaunt v. State, 50 N. J. Law, 490, 14 Atl. 600; In re Jessup, 81 Cal. 417, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594. The later decisions hold such evidence admissible. In the second Biennial Supplement to Ency. of Evidence, p. 195, it is said: "Family resemblance being nature's own identification is so common and well known that there is no practical reason why the alleged offspring should not be exhibited to the jury in any case. * * * The jury are the best judges on the question of similarity, and, unless it exists, a production of the offspring would be in the defendant's favor." See, also, People v. Richardson, 120 Pac. 20.

[22] It is equally clear that the court did not err in rejecting testimony of appellant's generous disposition. The rule is well settled that incidental and remote traits of character are not involved. People v. Fair, 43 Cal. 137. The court was quite liberal in allowing character evidence, but it could not, with any degree of propriety, enter upon an exploration of this illimitable field of remote and speculative inquiry.

[23] We are satisfied, also, that the court did not improperly restrict the cross-examination as to the mental condition of Lu Smith. Appellant complains that he was not permitted to show that at times she labored under delusions and hallucinations. But it is pointed out by respondent that she was cross-examined for over two days as to every phase of her life and covering a period of over 30 years. There was no denial of defendant's right to the broadest inquiry of witnesses as to Lu Smith's sanity. He was not precluded from showing any acts or declarations of hers that would indicate mental unsoundness, and it is admitted that the opinions of witnesses upon the question were received together with the statement of the facts upon which they based their conclusions. The particular questions of which complaint is made were clearly not proper cross-examination, and it is at least doubtful whether they called for material testimony. The peculiar hallucination related to her belief that a certain professor in the university was in love with her, and it was argued that she was under a similar delusion as to defendant. The pertinency of the testimony is hardly apparent. But, at any rate, the professor was called by defendant, and an objection of the district attorney was sustained to this question: "Were your relations ever anything other than that of instructor and student?" The matter is too inconsequential for further comment, but it is sufficient to say that the objection was sustained with "leave to offer the testimony later on." Of this privilege, however, appellant failed to avail himself.

[24] It is earnestly contended that prejudicial error was committed by the court in permitting testimony of other crimes of appellant. Of the 13 specifications, 8 relate to matters concerning which the character witnesses for defendant were cross-examined. These we have sufficiently considered. Of the others one relates to the illicit relations with Lu Smith and the parentage of the child, one to subornation of perjury and preparation of false evidence, one to the inducement offered a witness to leave the state, one to lewd and lascivious conduct with the prosecuting witness and the other to an attempt to poison her in the treatment of the injury she received at the time of the explosion of the dynamite. Evidence of the parentage of the child was clearly admissible as bearing upon the subject of motive.

[25, 26] It is elementary that efforts to manufacture testimony or to induce adverse witnesses to leave the jurisdiction of the court is properly received as indicating a consciousness of guilt. The lewd and lascivious conduct was a circumstance naturally and logically connected with its expected and ordinary culmination to which we have referred. Appellant having been charged in the indictment with an intent to injure Lu Smith, a subsequent attempt on his part to take her life would be admissible to identify him as the one committing the original act. Besides, in another view, it would be properly received as an effort to destroy an important witness against appellant. It clearly does not come under the operation of the general rule that precludes evidence of one crime upon the trial of a charge for another. It is held by all the authorities that, whenever there is a clear connection between two offenses, from which it may be logically inferred that, if guilty of one, the defendant is also guilty of the other, evidence of such other offense is admissible. People v. Craig, 111 Cal. 460, 44 Pac. 186; People v. Sanders, 114 Cal. 216, 46 Pac. 153; People v. Wilson, 117 Cal. 691, 49 Pac. 1054; People v. Valliere, 123 Cal. 576, 56 Pac. 433; People v. Cook, 148 Cal. 341, 83 Pac. 43; People v. Zimmerman, 3 Cal. App. 87, 84 Pac. 446; People v. Crowley, 13 Cal. App. 324, 109 Pac. 493; People v. Arberry, 13 Cal. App. 751, 114 Pac. 411.

[27] The court did not err in declining to direct the district attorney to deliver to counsel for appellant a statement reduced to writing of Lu Smith in order that it might be used in the cross-examination of Sheriff Smith. He was not interrogated concerning it in his direct examination, and only incidentally referred to it in his statement of a conversation with appellant to which the question by the district attorney was addressed. The statement of Lu Smith was an entirely separate and distinct matter. There is no evidence that the sheriff had ever seen the written statement nor did he attempt to give its contents. He was permitted, however, on cross-examination to declare that he referred to her statement that Dr. Burke was the father of the child. Anything else in the writing was entirely beyond the legitimate scope of cross-examination. If it could be used at all, it would only be for the purpose of impeaching Lu Smith on some material matter, but it was not demanded in connection with her examination. People v. Glaze, 139 Cal. 158, 72 Pac. 965.

[28] But, even if it did not appear that it was not proper cross-examination, the refusal of the court to order the paper produced could not be held prejudicial error, as the record does not show the contents of the said statement. People v. Ruef, supra.

[29] We are satisfied the court did not unduly restrict the cross-examination of witness Dillard. Indeed, the court seems to have been quite indulgent in the matter of the examination of witnesses. The cross-examination of this particular witness covers over 100 pages of the transcript. The principal complaint in this connection, however, is directed to the court's ruling sustaining the district attorney's objection to the offer by appellant to introduce in evidence a certain letter written by the witness. We deem it unnecessary to set out the letter. It is manifest that portions of it are entirely immaterial. The material part of it, if any, could be properly received only to impeach the witness, and, in order to lay the basis for its introduction, the witness must have been interrogated concerning it. Appellant appears not to have pursued the course that the law requires, and he cannot now complain of the court's action.

[30] Appellant contends that "the court erred in excluding evidence of defendant's whereabouts on night of explosion." We find no error in this respect. The defendant testified fully as to where he was, and neither he nor any other witness was precluded from testifying to any relevant fact in the attempt to establish an alibi. The court properly sustained an objection to certain questions calling for the conclusion or opinion of the witness, but there was no invasion of the right of appellant to the fullest inquiry as to all pertinent facts. The declarations of appellant as to where he had been and whither he was going constituted hearsay and could be admissible only upon the theory that they were a part of the res gestæ. The res gestæ here must be directly connected with the explosion of the dynamite which caused the injury to the prosecuting witness. Declarations made at a different place and at a different time neither in law, logic, nor in fact can be

considered a part of said transaction. The subject is of elementary cognizance, and need not be discussed. People v. Kalkman, 72 Cal. 212, 13 Pac. 500, is directly in point. See, also, People v. Chin Hane, 108 Cal. 604, 41 Pac. 697; People v. Prather, 120 Cal. 664, 53 Pac. 259; People v. Huntington, 8 Cal. App. 621, 97 Pac. 760.

[31] R. A. Grigsby, a witness for defendant, qualified as a mining engineer, and, after describing the appearance of the rocks in the ditch hereinbefore referred to, he was asked the question: "From your experience as an engineer, what would be the most practical way to remove those rocks?" There was no error in the court's ruling that this was not a matter of expert testimony, and the witness was "in no better position as to that than these jurors, whether it required a crowbar or dynamite, or whether it required black powder, or what it might require." It may be said that appellant's witnesses were permitted to fully explain the situation as to the rocks so that there would and could be no doubt concerning the only feasible method of getting rid of them.

[32, 33] On the ground that it called for the conclusion of the witness, the court sustained an objection to the question asked of a Mr. Hedge: "Was there any secrecy about Dr. Burke's statements or movements or his actions in connection with the getting of that powder, Mr. Hedge?" Appellant was permitted the fullest latitude in showing his manner and conduct at the mine when he obtained the dynamite. What he said was also admitted in evidence. In fact, there was no showing of any secrecy in connection with his actions there, and it was not contended by the prosecution that there was anything clandestine or mysterious about his movements at the mine. Hence the ruling could not have been prejudicial if erroneous. But it is clear that the question called for an inference within the exclusive province of the jury, and the court was right in so holding.

If there had been any contention or evidence to the contrary, there might be some ground for the claim that the court erred in sustaining an objection to the question: "Did Dr. Burke say anything to you or to any person there at any time while he was there, asking you not to tell about giving the powder?" But, as already appears, this would not have been in rebuttal of anything introduced by the people. Besides, evidence of the declarations of appellant "at any time" while at the mine would not be admissible. At most, his statements made at the time he procured the dynamite could properly be and it may be said they were received in evidence.

[34] The district attorney's closing argument is made the subject of animadversion by appellant. It is declared that he "threw aside all discretion and all pretense of fairness, and loudly declared to the jury in substance and effect that the people of the state of California had already found the defendant guilty, and further threatened that the citizens of the state were watching, and that the jury would not dare to do anything but so declare by their verdict." It is asserted that "the books do not record a more flagrant instance of gross violation of a defendant's rights, or more far reaching in its prejudicial effect." It is apparent, though, that appellant, in characterizing and condemning the utterances of the district attorney, has manifested far more heat than did that officer in his address to the jury. Here is what he said: "Let us have a law that is equal for rich and poor, for those in high estate and those in low estate, and a law like that, if so administered, will enjoy the confidence, deserve the reverence and support of the people of our state. To-night the people of our state look here to you. They are not looking here—those who are familiar with the facts of the case—to find out whether or not the defendant is guilty. They have conceded that he is. They are looking here to find out if a court of justice is going to declare him so." An exception was taken to the statements, and the court said: "That statement as to what the public or other people think about it is to be disregarded by the jury. It is not proper matter for their consideration at all." The first part of the above extract from the address sounds like a quotation from the declaration of independence, and the latter part means simply that the people who are familiar with the facts of the case have already conceded that the defendant is guilty, and they expect justice to be meted out to him. It contains nothing like a threat, and it could be considered by the jury only as an expression of the opinion of the district attorney that the facts of the case were sufficient to convince any one of the guilt of defendant. The whole argument of the district attorney necessarily implied that he believed the defendant to be guilty, and that any fair-minded man familiar with the facts must reach the same conclusion. Of course, as held in many decisions, the range of discussion, illustration, and argumentation of counsel is very wide. Matters of common knowledge and historical facts may be referred to and interwoven in the argument, and allusion may be made to the prevalence of crime and the duty of the jury. People v. Molina, 126 Cal. 507, 59 Pac. 34; People v. Glaze, 139 Cal. 159, 72 Pac. 965; People v. Soeder, 150 Cal. 12, 87 Pac. 1016; People v. Craig, 152 Cal. 50, 91 Pac. 997; People v. McRoberts, 1 Cal. App. 25, 81 Pac. 734; People v. Ye Foo, 4 Cal. App. 740, 89 Pac. 450; People v. Amer, 8 Cal. App. 139, 96 Pac. 401; People v. Ruef, supra.

[35] But, if the remarks should be considered improper, we must presume that any injurious effect was forestalled or removed by the direction of the court. People v. Putnam,

129 Cal. 262, 61 Pac. 961; People v. Benc, 130 Cal. 165, 62 Pac. 404; People v. Shears, 133 Cal. 159, 65 Pac. 295. Manifestly, some allowance must be made for the zeal of attorneys and some confidence reposed in the intelligence and fairness of the jury, and it may be said, generally, that every statement of the district attorney criticised by appellant is less objectionable than what has been held by the Supreme Court to be insufficient to warrant a reversal of the judgment.

[36] There is a controversy between counsel as to whether the "substituted" dynamite was received in evidence, the contention of the district attorney being that it was, while, on the other side, it is insisted that it was a piece of metal connected with it rather than the dynamite itself which was introduced. The matter is too trivial for extended consideration, but there can be no doubt that such dynamite was exhibited to the jury by appellant, and therefore it became the subject of legitimate argument. Moreover, it is a fair inference from the record that it was actually received in evidence.

[37] We find no error of the court in giving or refusing proposed instructions. One of the directions to the jury to which exception is taken is the following: "Therefore, if you are satisfied from the evidence in the case beyond a reasonable doubt and to a moral certainty that the crime charged in the indictment was directly committed by the defendant, as therein set forth, it would be your duty to find him guilty. So, too, if you should be likewise satisfied from the evidence in the case that the explosive referred to in said indictment was deposited and exploded by some other person than the defendant, whose identity is unknown, and you should be also satisfied from the evidence beyond a reasonable doubt that the defendant was concerned in the commission of such crime, as above explained, but that he did not directly commit the act constituting the offense but aided and abetted in its commission, or not being present, advised, and encouraged its commission, you should likewise return a verdict of guilty." The contention of appellant was expressed in the following proposed instruction which was refused by the court: "There is no evidence showing or tending to show that the defendant caused or procured any other person to deposit or explode such explosives. Therefore, if you believe from the evidence that the defendant did not personally at the time and place alleged in the indictment deposit and explode the explosive as in said indictment alleged, you must acquit him." In his brief appellant goes a little further, and contends that, "if the evidence does not show who committed the act, the defendant should have been acquitted." We think appellant has taken an entirely erroneous view of the situation. In the first place, from the evidence introduced by the prosecution, it would be a fair inference either that the defendant personally exploded the dynamite or that it was done by some one else with his knowledge and co-operation. Hence, appellant's proposed instruction was properly refused.

[38] But it cannot be the law under our practice that a defendant must necessarily be acquitted of the crime charged, for the reason that it may be uncertain as to who committed the final act. Of course, it must be shown that the crime was actually committed. Of this there could be no doubt in the case at bar. And, since he can be charged in the indictment as a principal whether he actually committed the offense or aided and abetted or encouraged its commission, he can be justly convicted if the evidence shows that he was connected with the crime in either relation. The district attorney is not required to elect whether he will prosecute or ask for a conviction upon the ground that the defendant was the principal or an accessory before the fact, but he may ask for a verdict if the evidence satisfies the jury of either alternative. It appears to follow that the additional burden is not cast upon the people to identify some one else as having guilty connection with the crime. The rule seems to be correctly stated by the Supreme Court of Colorado, in Goldberger v. People, 45 Colo. 335, 101 Pac. 409. There, on a charge of arson, a similar instruction was given by the lower court, and in the opinion it is said: "We are unable to see how a more succinct and accurate statement of the facts and circumstances necessary for the jury to find in order to warrant a verdict of guilty could well have been formulated. The information charges the defendant Goldberger directly and personally with the offense of arson. The state was not committed by this charge to any one theory or to any single line of proof as is contended for defendant by his attorney. If upon the whole testimony adduced the jury could find, beyond a reasonable doubt, that Goldberger, either personally, or in conjunction with any other person or persons whomsoever, feloniously burned the buildings, or if it could find that he, by aiding, advising, or abetting any other person or persons whomsoever, procured the felonious, willful, and malicious burning of them, or either of them, then he was guilty, and it was the sole province of the jury, upon all the testimony, to determine that precise question. This instruction is clearly right, under the peculiar circumstances here shown. There was testimony to support, and the jury was warranted in returning a verdict of guilty, upon the theory that the defendant personally set out the fire, or upon the theory that he conspired with Hathaway and so procured it to be set out or that the defendant Hathaway and the witness Freund combined together to perpetrate the offense, or that he and Freund were the guilty co-conspirators. It would indeed be a novel doctrine if, un-

der these conditions, the defendant by motion could have compelled the state to elect upon which theory it would proceed. Under our practice and the charge made, in view of the circumstances of this case as disclosed by the testimony, the state had a right to an instruction, which permitted the jury, upon all of the evidence, to determine the ultimate fact of guilt, without a limitation confining it to a consideration of any specific theory or aspect of the case." We do not see how any other sensible view can be taken of the subject, and we feel satisfied that in this respect there was no violation here of any legal principle. In People v. Schoedde, 126 Cal. 373, 58 Pac. 859, cited by appellant, it was decided that the principle which we have stated is sound, but it was held that it had no application, the Supreme Court stating that, "under the evidence, there is not disclosed that aiding and abetting by defendant which would make him a principal in the crime."

All proper instructions requested by appellant were either given or included in the charge of the court. No fact was assumed against appellant, and every principle of law necessary for the proper understanding of the case was set forth in apt terms. An examination of the charge is a sufficient refutation of the criticism of appellant and we deem further specific notice unnecessary.

Counsel for appellant have severely criticised the conduct of the trial, and they have unsparingly denounced the attitude of the district attorney and of the trial judge. They seem to think that the constitutional rights of the defendant were ruthlessly trampled under foot, and that he was "hurried against the law and the evidence" to an unwarranted conviction. It was even asserted in oral argument that scarcely any case could be found furnishing a more striking illustration of unfair treatment accorded to a defendant. The intemperate language of counsel is surprising, and it is not justified by the record. It simply illustrates, however, the partisanship and zeal for a client's cause that often unwittingly lead able and upright advocates to indulge in extravagant utterances and to assume positions that cannot be sustained. After an earnest consideration of the case, we are unable to find evidence of any disposition on the part of the district attorney or of the trial judge to violate any of the rights of the accused. The representative of the people, it is true, conducted the prosecution with a good deal of vigor. Without it, however, he could not hope to prevail against the alert, aggressive, and able counsel for appellant who stubbornly contested every inch of the way. His good faith was aspersed, his witnesses were impugned, and his contentions ridiculed, and it is not surprising that he at times manifested some degree of asperity, but upon the whole his conduct of the case was admirable, and it cannot fairly be said that he departed in any substantial respect from the strict line of his duty. The intensity of the struggle and the persistence of counsel, it may be said also, tried the patience of the trial judge, but he presided with that decorum and unfailing sense of justice that should characterize an important judicial officer. Little that he said during the long trial calls for criticism or invites retraction, and nothing could have prejudiced the interests of defendant. In what we have stated we intend nothing in derogation of the character, ability, or sincerity of counsel for defendant, but, as we understand it, most of their contentions merit scant attention and none of them should prevail to overthrow the verdict of the jury.

In a word, appellant was fairly tried and justly convicted. The record is unusually free from error, considering the length of the trial and the vehemence of the contest, and we are convinced that no appellate court would be justified in interfering with the judgment of the trial court. The judgment and order are therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

17 Cal. App. 771

PEOPLE v. CONTE. (Cr. 166.)

(District Court of Appeal, Third District, California. Jan. 3, 1912. Rehearing Denied by Supreme Court Feb. 12, 1912.)

1. JURY (§ 103*)—CHALLENGE OF JURORS—JUDICIAL DISCRETION.

It was not an abuse of discretion to disallow accused's challenges to jurors, though they first stated that they would enter the jury box with an opinion that accused was guilty, or that they would throw the burden of proving his innocence upon him, etc., where, on further examination, they stated that they would be governed by the law as presented by the court, and would require the prosecution to bear the burden of establishing his guilt by the proper degree of proof.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 461–479; Dec. Dig. § 103.*]

2. JURY (§ 131*)—EXAMINATION OF JURORS—RESULTS OF OTHER CASES.

In examining a prospective juror, accused was not entitled to show the result of other murder trials in which the juror had previously served as a juror.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 561–582; Dec. Dig. § 131.*]

3. JURY (§ 91*)—JURORS—DISQUALIFICATION.

Under Pen. Code, § 1074, authorizing challenge of a juror in a criminal case for implied bias arising from the relation of attorney and client between the jury and the attorney of record, the relation must exist at the time of the trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 419; Dec. Dig. § 91.*]

4. JURY (§ 132*)—JURORS—DISQUALIFICATION—BURDEN OF PROOF.

The burden rests on accused in challenging a juror on the ground of disqualification, to clearly show the disqualification.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 583–585; Dec. Dig. § 132.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. Jury (§ 91*)—Jurors—Disqualification—Evidence—Sufficiency.

A juror on being asked on his examination whether the district attorney was then acting as his attorney stated, "Well, yes; to be considered so, I guess," is insufficient to show that the relation of attorney and client existed between them at the time of the trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 419; Dec. Dig. § 91.*]

6. Criminal Law (§§ 364, 427*)—Evidence—Admissibility.

In a trial for murder, testimony describing what witnesses saw and heard while defendants were beating decedent, and detailing the movements of defendants after a difficulty which occurred in another place just before decedent left there and shortly before the assault by defendants, was not inadmissible as not constituting part of the res gestæ, or because it was not shown that, before leaving such place, defendants conspired to assault decedent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 805, 808–810, 813, 816–818, 1012–1017; Dec. Dig. §§ 364, 427.*]

7. Criminal Law (§ 364*)—Evidence—Admissibility.

Testimony as to what witness saw while accused was beating decedent with a rock, and while the codefendant held decedent's arm, was properly received over objection that it was no part of the res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 805, 808–810, 813, 816–818; Dec. Dig. § 364.*]

8. Criminal Law (§ 730*)—Harmless Error—Statement by District Attorney.

It was not prejudicial error for the district attorney in his opening statement to explain to the jury the elements of the offense of which accused was charged, where he stated the law correctly, and the judge instructed that the jury must take the law from the court, and not from the counsel.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

9. Criminal Law (§ 1168*)—Harmless Error—Expert Testimony.

It was not prejudicial error for the court to refuse accused's request that some arrangement be made for the payment of a physician for his services as expert witness on accused's part, accused being without means to pay, where the court offered to permit accused to ask the physician the questions desired to be put.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129–3136, 3144; Dec. Dig. § 1168.*]

10. Witnesses (§ 28*)—Expert Witness—Compensation.

A physician having been sworn as a witness in a criminal case can be required to answer such pertinent questions as may be put to him, though they call for expert testimony, though he be not recompensed or guaranteed compensation for his services as an expert, but he cannot be compelled to make a scientific investigation for the purpose of qualifying himself to give expert testimony on a particular subject.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 65, 66; Dec. Dig. § 28.*]

11. Criminal Law (§ 1170*)—Harmless Error—Exclusion of Evidence.

It was not prejudicial error to exclude testimony that defendants had drunk enough wine before assaulting decedent to intoxicate them, where it was offered merely to support an alibi, and where the evidence clearly established defendants' guilt of deliberate murder.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145–3153; Dec. Dig. § 1170.*]

12. Criminal Law (§ 31*)—Homicide (§ 28*)—Inconsistent Defenses—Right to Make.

Inconsistent defenses may be interposed in a criminal case, and hence one accused of murder can rely on alibi and also on intoxication, reducing the offense to manslaughter.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 35, 36, 41, 50; Dec. Dig. § 31;* Homicide, Cent. Dig. §§ 45, 46; Dec. Dig. § 28.*]

13. Criminal Law (§ 829*)—Instructions—Refusal.

Instructions covered by those given are properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

14. Criminal Law (§ 814*)—Instructions—Evidence to Sustain.

It was not error to refuse to instruct that the jury were bound to consider the presumption of accused's good character, where there was no evidence submitted as to his good character for the traits involved in the charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979–1985, 1987; Dec. Dig. § 814.*]

15. Homicide (§ 254*)—Murder—Evidence—Sufficiency.

Evidence *held* to sustain a conviction of murder in the second degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 533–538; Dec. Dig. § 254.*]

Appeal from Superior Court, Amador County; Fred V. Wood, Judge.

Stefano Conte was convicted of murder, and he appeals from the judgment, and from an order denying a new trial. Affirmed.

Rehearing in Supreme Court denied (122 Pac. 457).

Spagnoli & Spagnoli, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

HART, J. The defendant and one Giacomo Sampo were jointly charged, by information, by the district attorney of Amador county with the crime of murder. The court, upon the demand of the defendent, accorded him a trial separately from that of his codefendant. Pen. Code, § 1098. The jury found the defendant guilty of the crime of murder of the second degree, and so returned a verdict. This appeal is from the judgment and the order denying the defendant a new trial.

The objections urged in this court against the judgment and the order are: (1) Errors in the rulings of the court disallowing challenges interposed by the defendant to certain jurors; (2) errors in the rulings rejecting and receiving certain evidence; (3) errors in the refusal by the court to give a number of the 127 instructions requested by the defendant; and (4) insufficiency of the evidence to justify the verdict.

The circumstances leading to and characterizing the homicide are set out with considerable detail in the case of the People v. Sampo (codefendant of Conte, appellant here), reported in 118 Pac. 957, but, for the purpose of illustrating some of the points made on this appeal, it is deemed proper to briefly repeat them in this opinion.

The homicide occurred at Drytown, in Amador county, on the 19th day of November, 1910. Late on the afternoon of that day the defendants and the deceased, Stefano Pistone, together with a number of others of their countrymen, including George Sampo, brother of the defendant of that name, met at the boarding house of one Cavallero. The game of "mori" and wine drinking were indulged in by the parties until supper, after partaking of which they returned to the barroom, where they resumed playing said game of "mori." Shortly thereafter, however, on suggestion of one of the parties, a dance was started, some one with an accordeon furnishing the music. George Sampo and several others danced with Eva Cavallero, the young daughter of the Cavalleros. Finally the young lady danced with Pistone, and this act seemed to have been resented by George Sampo, who proceeded, in a loud and angry manner, to use profane language. A general fight followed, and Pistone eventually left the room through the back door, going outside the house. In a brief time thereafter the two defendants departed from the house through the front door. These circumstances took place near the hour of 10 o'clock at night, and at about that hour a Mrs. Calandri, residing with her husband and family a short distance from the boarding house of the Cavalleros, heard noises which attracted her attention, and caused her to step out on to the front porch of her house. From this point she saw, only a few feet from and in front of her house, in the road, the defendant, Sampo, beating Pistone on the head, while the defendant in the case at bar was holding the deceased by the arm. Pistone was loudly exclaiming: "Please let me alone. I have nothing with you. Don't hit me. Let me alone, please." The defendant, Sampo, kept on beating the deceased, and the defendant, Conte, continued to hold him by the arm until one Burdisso finally put in an appearance and forced Sampo to cease beating Pistone, and took the former, accompanied by Conte, back to the boarding house. Pistone assisting himself by holding on to a fence extending from Calandri's house to the boarding house, went to the last-named place, where he went to bed, and died early on the following morning. The physicians, who made an autoptical examination of the body of the deceased, found a serious fracture of the skull, from the effect of which, so they testified, Pistone died. Early on the following morning, Mrs. Calandri went to the spot where the beating was administered to Pistone and there picked up a rock, large enough in dimensions, as one of the witnesses described it, "to fill a fellow's hand," and upon which she found what she termed "fresh blood stains." She placed the rock on the fence in front of her home, and shortly thereafter it was delivered, in her presence, to the sheriff, who, also in her presence, marked it with a cross for the purpose of its future identification. This rock was introduced in evidence at the trial and the doctors, testifying for the people, having declared that the wound they found on Pistone's head must have been produced by some blunt instrument, stated that such wound could have been caused by a violent beating on the head with said rock.

[1] 1. There are 12 assignments of alleged error involving the rulings of the court disallowing challenges made by the defendant to as many jurors. We have found in most of these assignments nothing calling for special notice or comment. Nearly all of them involve conflicting statements of the talesmen with regard to their mental attitude toward one accused of a public offense. For illustration, some of the jurors, in reply to questions by counsel for the defendant, declared that they would enter the jury box with an opinion that the accused was guilty, or that they would throw the burden of proving his innocence upon him, and other similar statements, but, upon being questioned by the district attorney, they invariably replied that they would be governed in their consideration of the case by the law as the court presented it to them; that they would presume the defendant innocent until his guilt was proved to their satisfaction; and that they would require the prosecution to bear the burden of establishing his guilt by the proper degree of proof. Under this state of the record upon the question whether such jurors possessed such bias as would prevent them from trying the case fairly and impartially, it was for the court to determine that preliminary issue, and in all such cases the court's discretion will not be disturbed on appeal unless it appears that it has been abused. We cannot say that the decision of the court in that regard was erroneous or involved an abuse of discretion. It may with propriety be observed, in this connection, that from common knowledge it is known that, where citizens are for the first time called to perform jury duty, they generally will say, until their duty under the law is fully and clearly explained to them, that they will presume or assume the defendant in a criminal case to be guilty, or that they will entertain a suspicion of his guilt until he shows that he is innocent, and this is even very often true with citizens who have had some experience as jurors in criminal cases. And this fact is not at all surprising, since it is true that those whose duty it is to serve on juries are, as a rule, laymen, possessing and pretending to pos-

sess no familiarity with rules of law—even with those rules, so commonly stated to juries, concerning the presumption of innocence, the burden of proof, etc. It is therefore no matter of wonder or one which may operate as a true test of a citizen's disqualification to serve as a juror in a criminal case or of his want of ability to try such a case with perfect fairness if he may say, in reply to questions which appear to call for that sort of an answer, that he will make the defendant prove his innocence, or that he has some suspicion of his guilt from the fact of his having been held to trial on a criminal charge. As is said in People v. Ryan, 152 Cal. 371, 92 Pac. 856: "Many persons, competent as jurors, have not given much attention to such subjects, are inexperienced as witnesses, and are unable readily to comprehend the force and effect of the language in which such questions are couched, and they generally answer without reflection as to the effect of their own words. Such contradictions are by no means infrequent, if, indeed, they are not the rule, rather than the exception. The trial court must decide which of the answers most truly shows the juror's mind. * * * Where there are such contradictions, its decision is binding upon this court"—citing a large number of cases. If, in other words, after the law as to his duty as a juror has been explained to a citizen called to the panel, he declares that he can and will give both sides a fair and impartial trial, that he is without prejudice for or against the accused; that he is not familiar with the facts of the case except what he might have learned of them through public rumor or from the newspapers, and nothing is otherwise made to appear as to the state of his mind with reference to the case or the parties thereto and the court believes such statements, then no legal reason can be suggested why he should not remain in the jury box as against a challenge for implied bias, notwithstanding that he may previously have said, in answering questions upon his voir dire, that he would require the defendant to prove his innocence. In every instance in the case at bar, it may be remarked, the juror declared that he would be governed in his consideration of the case by the law as the court stated it in its instruction, and where the court is convinced from the whole examination that the talesman will be so guided, if accepted as a juror, although his answers are contradictory, the refusal of a challenge for implied bias interposed to such juror involves only the exercise of a discretion which the law reposes in trial courts in such matters.

[2] Much stress is, however, laid on the action of the court in sustaining an objection to the question propounded by counsel for the defendant to Juror Blakeley, whereby counsel sought to show the result of, or the verdicts returned in, several different murder trials in which the juror had theretofore served as a juror. But the ruling disallowing this line of examination was perfectly proper. What an individual, serving as a juror, might do or whatever his course might have been in a particular criminal trial, would not constitute a criterion by which his conduct as a juror might be judged in another trial, even where the prosecution involves a similar charge. Where a jury have returned a verdict either of guilty or not guilty in a criminal action, the presumption is that they were influenced in arriving at the result solely by the record as made before them, and it would be plainly violative of every consideration of policy to permit such presumption to be set aside by the prosecution of an inquiry designed to disclose ulterior motives in reaching a verdict in another criminal action in which they have acted as jurors—a result which would irresistibly follow the acceptance of the conduct of a juror in a particular case as a test determinative of his qualifications to serve as such in some other case involving the prosecution of a like offense.

[3-5] It is also vigorously maintained that the court fell into prejuidical error by its ruling disallowing the challenge to Juror Allen for implied bias in that he was a client of the district attorney at the time of the trial. The juror stated, in reply to a question by counsel for the defendant, that the district attorney had rendered certain professional services for him, and was then asked: "Is he your attorney now?" to which the reply was made: "Well, yes; to be considered so, I guess." Among the grounds enumerated by section 1074 of the Penal Code upon which a challenge to a juror is authorized to be taken for implied bias are the following: "* * * (2) Standing in the relation of guardian and ward, attorney and client, master and servant, or landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or in his employment on wages." Even if it may well be conceded that the existence of the relation of attorney and client between the district attorney and the juror comes within the quoted language of section 1074 (a proposition which we need not here decide), it is very plain that the attorney for the defendant in the case at bar failed to make it satisfactorily to appear that the district attorney at the time of the trial was the regularly retained attorney of the juror challenged on that ground. Even if this be a good ground for challenge under the statute, it will not be claimed that a juror is disqualified from sitting upon a jury in a case in which one of the attorneys has at some previous time acted as his attorney or transacted legal business for him if, at the time of the trial, the relation of attorney and client does not exist between the attor-

ney and the juror. The true rule would be that, in order to make that an available ground of challenge for implied bias, the attorney and the juror must stand in the relation of attorney and client at the time of the trial, and, if that relation does not then exist, the juror could not be successfully challenged for that reason, although it may appear that the attorney upon some previous occasion had performed professional services for the juror. It is difficult to say from the answer given by the juror in the present case whether in point of fact the relation of attorney and client subsisted between him and the distinct attorney at the time of the trial. That the district attorney had at some previous time acted for the juror in a professional capacity is not proof of the existence of that relation between them at the time of this trial. The last answer of the juror is fairly and reasonably capable of either of two constructions, viz.: (1) That the district attorney was then acting as his attorney in some existing litigation or other uncompleted legal matters; (2) that the juror thus merely intended to say that, having employed the district attorney as his legal adviser on one occasion, he would again retain that officer should he find it necessary on any future occasion to employ the services of a lawyer. Thus it will be observed, as we have stated, the answer of the juror leaves the question whether the district attorney and the juror bore the relation of attorney and client at the time of the present trial in so much doubt that we cannot say what the fact really was. As the burden rested on the defendant to clearly and satisfactorily show the juror's disqualification for the reason constituting the basis of his challenge, assuming that that reason constituted a legal ground for challenge, and having failed to make such a showing, we cannot declare that the court's ruling in disallowing the challenge was improper. If, as a matter of fact, the district attorney was at the time of this trial the regularly retained legal adviser of the juror, counsel for defendant could without difficulty have developed the fact to a conclusive degree by pressing the inquiry further: but, in lieu of thus proceeding, they appear to have been satisfied to rest their challenge on the manifestly vague and indefinite "guess" of the juror in that regard. The state of the record upon this point, as before indicated, is such that we cannot declare the ruling erroneous, conceding that the statute authorizes a challenge on that ground.

2. Many of the rulings of the court upon the evidence objected to here involve precisely the same points reviewed by this court in the case of the People v. Sampo, codefendant of the defendant in the case at bar, reported in 118 Pac. 957, and decided adversely to the contentions here. There is no substantial difference between the evidence in the Sampo Case and that in the one at bar, and it will therefore be unnecessary to again go over with any particularity the field of inquiry covered by said points. They may, however, be restated here: That the court erred in allowing Mrs. Calandri to testify that on the morning following the night on which Pistone was assaulted she found and picked up at the spot where the assault occurred a large rock on which there were fresh blood stains; that it was error to receive said rock in evidence as an exhibit or a circumstance in the case; that it was improper to permit the doctors to testify that the wound found upon the head of the deceased must have been produced by the use of some blunt instrument; and that said wound could have been produced by means of the rock referred to, etc.

[6] But a further objection against the testimony of Mrs. Calandri and her husband describing what they saw and heard at the time the defendants were beating Pistone is urged on the ground that such testimony did not constitute a part of the res gestæ. Like objection is made to the testimony of Eva Cavallero detailing the movements of the defendants after the trouble in the house had ceased, and Pistone had taken his departure from said house through the back door. These objections are clearly destitute of merit. The departure of Pistone from the boarding house, followed immediately by the circumstance of the departure of the defendants through the front door, constituted pertinent, and, indeed, necessary, circumstances tending to connect the defendants with the commission of the assault. They were not admissible facts upon the theory that they constituted a part of the res gestæ, as that rule is technically understood, but as relevantly showing that the assault could have occurred where it was shown to have taken place, and that the defendants could have committed it. It would, indeed, be a curious rule of evidence that would preclude the state in such a case from showing that the accused left the place where the crime was not committed, or, in other words, from proving that the accused were in a position of opportunity to commit the act. Nor, as counsel seem to argue, was it necessary as a foundation for such proof for the district attorney to show that preliminarily to the departure of the defendants from Cavallero's the accused had actually entered into an understanding or conspiracy to commit an assault upon Pistone. If it were necessary to make any more potent proof of an agreement or understanding between the defendants to commit the assault than the very fact itself that they jointly committed it, the circumstance of their departure together from the boarding house immediately following the departure therefrom of Pistone would constitute a significant and pertinent link in the chain of circumstances leading to the establishment of a conspiracy.

What we have said in the foregoing applies with equal force to other parts of the testimony of Eva Cavallero. She merely described the occurrences in the boarding house immediately preceding the circumstances of the departure of Pistone and of the defendants from the house, and these are constituted important circumstances finally culminating in the homicide.

[7] It is further claimed that the testimony of the witness Burdisso, who saw the defendant Sampo beating Pistone with a rock, while the defendant, Conte, held the arm of the deceased, and whose testimony consisted solely of what he then saw, was improperly received, as "it was no part of the res gestæ." The force of this objection passes our comprehension. We are unable to discern how testimony bearing directly upon the very act which constitutes the basis of the crime for which an accused is tried is not about the most significant and pertinent proof that can be adduced in support of the charge. It is true that direct testimony is not admissible merely under the technical rule of res gestæ, strictly speaking, for, under that salutary doctrine, certain testimony and declarations tending to explain the nature of the act or intent or both of a criminal charge are admissible which would ordinarily be regarded as involving hearsay testimony or self-serving declarations, yet, accepting the term "res gestæ" (the transaction itself) in its true sense, we would be at a loss to understand the bearing or significance of direst testimony if it could be said in any case not to be of and concerning the res gestæ itself or the very transaction which in and of itself constitutes the basis of the crime with which the accused is charged.

[8] The further contention is urged that the court seriously erred in permitting the district attorney in his opening statement to explain to the jury the elements of the crime of murder. The prosecuting officer's definition of the crime with which the information charges the defendant was in accord with our code definition of murder, and was therefore correct. While it is not the duty or the right of attorneys to state the law to the jury in criminal cases, a defendant in such a case cannot justly be said to have suffered any prejudice where that rule has been violated, but where the law has not thus been misstated. Besides, in the case at bar, the court, upon the conclusion of the district attorney's opening statement, emphatically warned and instructed the jury that they should not accept the law of the case from counsel, but that it was their duty to be guided solely by the law as it was stated to them by the court. The defendant was not damaged by the conduct of the district attorney in the respect complained of.

[9] Appellant also insists that the court prejudiced his rights very seriously by its ruling with regard to the proffered testimony of Dr. Endicott in rebuttal of the statement of Mrs. Calandri that the surface of the rock she found at the scene of the assault bore blood stains. It appears that counsel for the defendant called the doctor to the witness stand and asked him to examine the rock any say, by a mere inspection and without a microscopical examination or other scientific analysis of the spots on said rock, whether there were blood stains thereon. The doctor refused to testify as an expert unless he was guaranteed the usual fee for such services, and counsel for the defendant requested the court to make an order for the payment of such fee out of the county treasury, declaring that his client was without the means to defray that expense. This the court refused to do. After considerable colloquy between court and counsel, the latter was ordered by the court to put the questions to the witness that he desired to ask, but counsel seemed to insist that some arrangement be first made for the payment of the doctor for his services as an expert witness, and that thereupon the latter be given possession of the rock for the purpose of making such an examination thereof as would enable him to determine and say whether the marks which Mrs. Calandri declared were blood stains were or were not caused by human blood. The court denied this request. We think the court's action in this matter cannot be made the predicate of prejudicial error.

At the trial of the defendant, Mrs. Calandri testified that the marks which she took for blood stains had undergone such a change in appearance that she could not then say that they were the result of blood stains, and it is highly probable that, under such circumstances, Dr. Endicott could not have determined any more than could a lay witness, in the absence of an appropriate chemical analysis of the marks, whether they were caused by blood or produced by some other cause. And we are familiar with no law requiring the court under such circumstances to order the services of an expert witness in behalf of a defendant to be compensated for out of the public funds.

[10] We have no doubt that the doctor, having been sworn as a witness, could have been required to answer such pertinent questions as might have been put to him, notwithstanding that they might call for expert testimony and the doctor not recompensed or guaranteed compensation for his services as an expert, but we know of no rule of law which would have authorized the court to compel him to go to the trouble and perhaps some expense of scientifically investigating the cause of the marks on the rock for the purpose of qualifying himself to give expert testimony on that subject.

[11, 12] But the problem which on first impression appeared to be the most serious one of those respecting rulings on the evidence is involved in the refusal of the court to permit the defendant to prove by the witness, Ferrari, that the defendants and their companions had drunk enough wine prior to the

assault to put them in a state of intoxication. In their opening statement, counsel for defendant declared that they could and would show that the defendant was not at the scene of the assault when it was committed. Their sole contention in behalf of the defendant would, in other words, be an alibi. The district attorney strenuously objected to any testimony relative to the amount of wine drunk by Conte and the other parties during the several hours immediately preceding that at which Pistone was assaulted, upon the theory, as announced by him, that, having declared that he intended to rely upon an alibi, the defendant could not set up a defense inconsistent with that contention. The court insisted upon counsel for the defendant making a statement as to the purpose of the testimony. Counsel declared that they had no intention of receding from their claim of an alibi for the defendant, but that they thought they were entitled to introduce proof having a tendency to reduce the crime to the grade of manslaughter in the event that the jury should regard the proof addressed to the alibi unworthy of belief. But, finally, counsel declared to the court that the proffered testimony bearing upon the quantity of wine which the parties had consumed and the condition produced thereby was intended as a support to the alibi contended for by the defendant. The court thereupon sustained the district attorney's objection to the testimony. We are unable to perceive how this testimony could have thrown any light on the claim of an alibi in this case, and, if that was the sole purpose of the testimony, we can see nothing harmful in the ruling disallowing it. It may be that the intoxicated condition of one accused of crime might, under some circumstances, be a circumstance in support of an alibi, but the circumstances of this case will not sustain the propriety of any such theory. But we may remark that had counsel adhered to the theory upon which they first offered the testimony—that is, to mitigate the grade of the crime in case the jury rejected the evidence addressed to the proof of the alibi—the court's ruling would undoubtedly have been erroneous, since it is well settled, we think, that inconsistent defenses or claims may be interposed in a criminal case as well as in a civil action, if counsel or the defendant may choose to take that course. But, in any event, the ruling could not, in our opinion, be held to be prejudicial, if erroneous, in view of the evidence and the nature of the circumstances by which the assault was committed. Article 6, § 4½, Const., added by Laws 1911, p. 1798. It could not be held, in other words, that the ruling, if erroneous, had resulted in a miscarriage of justice. The evidence appears to disclose, not only a deliberate, but a very cruel, murder. The jury would have been well justified in finding that Conte and Giacomo Sampo followed the deceased from the boarding house with the express design of assaulting and perhaps of killing him, and, as was said in People v. Sampo, supra, the defendant here may well consider himself extremely fortunate in having escaped the highest penalty prescribed for the willful and malicious destruction of human life. There is evidence in the record that all the parties, including the defendant, drank more or less wine during the early afternoon of the day of the homicide, but there is nothing to show that the defendants were at any time in such mental condition by reason of their indulgence in wine as to render them irresponsible or unable to know the difference between right and wrong, or that they were thus deprived of ability to form an intent to commit an assault upon or murder Pistone. Indeed, both the defendant and his codefendant seemed to experience no difficulty in detailing on the witness stand, in support of their claim that they were not at the scene of the assault when it was committed, every movement that they made that day and night. It is therefore most probable that the testimony of Ferrari as to the defendant's condition for sobriety, or inebriety, if offered for that purpose, would not have had the effect of reducing the verdict to a lesser grade of crime than that of which he was convicted. There are some other rulings to which exceptions are taken by the defendant which demand no special notice.

[13] 3. The defendant assigns a large number of errors in the action of the court in declining to allow and read to the jury certain instructions proposed by him. In addition to its own charge, which covers every possible phase of the case as made by the information and the evidence, the court allowed and submitted to the jury, in the precise form of language in which they were proposed, 44 out of the 127 special instructions requested by the defendant, and, besides, gave, in modified form, four of the remaining number. Many of the instructions requested by defendant and not given involved the statement of principles which the court covered in its charge and the others were objectionable either because they misstated the law or were argumentative or misleading or for other reasons obnoxious to just criticism. But we cannot conceive how the court could have submitted to the jury a more elaborate and explicit statement of the law pertinent to the case in all its features than its charge represents without converting the office of instructions to a jury into a prolix disquisition on the law of homicide.

[14] Counsel, however, particularly criticise the court's refusal to give the instructions, requested by defendant, declaring that it was the duty of the jury to consider, in the determination of the issue, the presumption of the good character of the accused. There was no evidence submitted as to the good character of the defendant for the traits involved in the charge in the informa-

tion, and the instructions requested on that subject were, therefore, properly refused. People v. Johnson, 61 Cal. 142; People v. Lee, 1 Cal. App. 169, 81 Pac. 969; Danner v. State, 54 Ala. 127, 25 Am. Rep. 662.

The court instructed the jury that the defendant was to be presumed to be innocent until the reverse was satisfactorily proved, and, as is said in People v. Johnson, supra, where a similar instruction as those refused here was rejected, no affirmative proof of the defendant's good character having been made "the consideration of his character would not add to the strength of the presumption of innocence." In the same case, in a concurring opinion, Justice McKinstry said: "If, in the absence of evidence on the subject, the presumption of good character is to weigh as much in his favor as affirmative proof of it, the necessity of proving good character would never arise; and the prosecution would frequently be in a worse case than if evidence of good character had been given, since the prosecution would be debarred from introducing evidence to overcome the presumption. When it is said that good character is to be presumed, it is only said that, in the absence of evidence, the jury should not attribute to defendant a general bad character with respect to the qualities involved in the alleged offense, nor give weight to his assumed bad character in determining the question whether the evidence established his guilt."

[15] 4. We have already sufficiently referred to the evidence to indicate that we do not assent to the contention that the evidence does not support or justify the verdict.

The testimony of Mrs. Calandri and Burdisso that the defendant was holding the deceased while Sampo was beating him was, if believable (and the jury did believe it), sufficient to establish Conte's connection with and participation in the commission of the crime.

We have, after a full examination of the record, discovered no substantial reason for disturbing the conclusion of the jury.

The judgment and order are therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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17 Cal. App. 771

PEOPLE v. CONTE. (Cr. 1,727.)

(Supreme Court of California. March 2, 1912.)

1. JURY (§ 91*)—CHALLENGE OF JURORS—CAUSES—PROFESSIONAL RELATIONSHIP.

Pen. Code, § 1074, subd. 2, permitting challenge of a juror for implied bias arising from relationship of attorney and client, does not authorize a challenge on account of the existence of that relationship between the district attorney and a juror in a criminal prosecution.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 419; Dec. Dig. § 91.*]

2. HOMICIDE (§ 339*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In a murder trial, exclusion of evidence as to accused's voluntary intoxication was harmless error where he was convicted of murder in the second degree only, doubtless because of other evidence tending to show he was intoxicated, since the evidence was admissible only to reduce the offense from murder in the first degree to murder in the second degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 714; Dec. Dig. § 339.*]

In Bank. On application for rehearing, after decision by the District Court of Appeals. Application denied.

For opinion of District Court of Appeals, see 122 Pac. 450.

PER CURIAM. The application for a hearing in this court after decision by the District Court of Appeal is denied. In denying such application, it is proper to say that we are not satisfied with what is said in the opinion on the question presented by the ruling disallowing the challenge of defendant to the juror Allen, or with what is said relative to the exclusion by the trial court of the proposed evidence of the witness Ferrari on the subject of the voluntary intoxication of the defendant.

[1] 1. In the matter of the challenge of Juror Allen, the proper answer to defendant's claim is that the existence of the relation of attorney and client between the district attorney, and a juror is not a ground of challenge under our statute. Subdivision 2 of section 1074, Penal Code, upon which the challenge was based, does not include such a case. The relationship there referred to is one existing between the juror and the defendant himself or "the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted." This was the reason given by the trial court for its ruling.

[2] 2. In the matter of the proposed evidence as to voluntary intoxication: The evidence was clearly admissible, and its exclusion was error. But the utmost effect of evidence of this nature would have been to exclude the idea of the deliberation and premeditation essential to murder of the first degree, and thus reduce the offense to murder of the second degree. The defendant was found guilty of murder of the second degree only, doubtless because of the evidence of other witnesses tending to show a condition of intoxication. Plainly no prejudice was suffered by defendant by reason of the erroneous ruling.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

162 Cal. 277

McBOYLE et al. v. UNION NAT. BANK et al.

(S. F. 5,628.)

(Supreme Court of California. Oct. 26, 1911. On Rehearing in Bank, March 2, 1912.)

1. Banks and Banking (§ 102*)—Officers—Cashier—Authority.

As a rule, a bank cashier has greater powers than any other corporate officer, having full charge of the bank's personal property, except as otherwise controlled by the directors.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 239–243; Dec. Dig. § 102.*]

2. Banks and Banking (§ 109*)—Officers—Authority—Cashier.

A bank cashier may negotiate a transfer of negotiable paper owned by the bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 257–260; Dec. Dig. § 109.*]

3. Banks and Banking (§ 258*)—National Banks—Powers.

National banks organized under the act of Congress (Act June 3, 1864, c. 106, 13 Stat. 99) have only those powers specified in the act and such other powers as are necessarily incidental thereto.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 258.*]

4. Banks and Banking (§ 260*)—Powers of National Banks—Dealing in Stock.

Under the act of Congress (Act June 3, 1864, c. 106, 13 Stat. 99) national banks are given neither the express nor incidental power to deal in stocks for speculation or investment, though they may be taken to satisfy a disputed or doubtful claim, or under foreclosure of a pledge.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 977; Dec. Dig. § 260.*]

5. Banks and Banking (§ 262*)—National Banks—Powers of Cashier—Resale of Collateral Bought in.

Under a by-law of a national bank authorizing the cashier to do "whatever may be necessary in the management of the business of the bank," the cashier may sell stocks pledged to the bank as security for a loan, which it has been compelled to buy in, the collection of debts being part of the business of the bank, and the realizing on the security being incidental to the collection of the debt, though the sale of property held for investment would be beyond the cashier's power unless authorized by the directors.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1001–1006; Dec. Dig. § 262.*]

Department 1. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by George McBoyle and another against the Union National Bank and another. From a judgment for defendants, and an order denying a motion for a new trial, plaintiffs appeal. Reversed.

T. C. Coogan, Powell & Dow, and W. H. Orrick, for appellants. Fitzgerald & Abbott and Leon A. Clark, for respondents.

SLOSS, J. The action was brought to recover from the Union National Bank 599 shares of the capital stock of Burnham-Standeford Company, a corporation. The complaint alleged that these shares, represented by certificate No. 59, were on January 3, 1907, owned by and in the possession of plaintiff Lulu May McBoyle; that she had then pledged them to the bank to secure the promissory note of George McBoyle, her husband, for $9,500; and that she had thereafter tendered to the bank the amount due on the note and demanded redelivery of her stock, which had been refused. The answer of the bank denied that plaintiff Lulu May McBoyle was the owner or in possession of said shares, or that she had pledged them to the bank. There was also an affirmative defense, in which the bank alleged that it had, for many years prior to January 3, 1907, been the owner of the 599 shares of stock, that on that day George McBoyle had made an offer to Charles E. Palmer, the cashier of the bank, to buy said stock for $11,000, $1,500 in cash and $9,500 on his promissory note, such note to be secured by a pledge of the stock. Palmer accepted the offer, and the transaction was carried out on these lines. There are averments that McBoyle misled Palmer by fraudulent misrepresentations regarding the value of the stock; but as there was no evidence to sustain these charges, and the court found against them, we need not notice them further. It was alleged that Palmer acted beyond his authority in attempting to make the sale, that the bank, upon learning the facts, promptly repudiated the transaction, and tendered to McBoyle the $1,500 received by it, with interest, and his note for $9,500. The tender was refused, whereupon the bank made a deposit of the money and the note in McBoyle's name, pursuant to Civil Code, § 1500. Morris, who had been appointed receiver of the bank pending the action, was joined as a party defendant, and by agreement of the parties the answer of the bank stood as his answer. The findings were in favor of the defendants on all the issues except that of fraud, and judgment went for them. The plaintiffs appeal from the judgment and from an order denying their motion for a new trial.

Various points are raised; but we think it will be unnecessary to consider anything beyond the attack by appellants upon the finding that Palmer exceeded the scope of his authority as cashier in undertaking to sell the stock in question. In view of the findings negativing fraud, the only ground upon which the bank could repudiate the sale to McBoyle, and the subsequent pledge, was the want of authority in Palmer to sell. If, in law and in fact, he had such authority, title to the stock passed by the sale, and the pledgor was entitled, upon tender of the amount for which he had pledged the shares, to a return of the certificate.

The powers of the cashier of the defendant bank were defined in its by-laws, a part of which read as follows: "The cashier shall have power to discount and purchase bills, notes and other evidences of debt, to buy and sell bills of exchange and to issue certificates of deposit. He shall have general charge and supervision, subject to the advice and control of the president and directors of the affairs of the bank, and shall be generally authorized to do whatever may be necessary in the management of the business of the bank. * * *"

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1, 2] The extent of the authority of a bank cashier has been considered in many cases. Generally speaking, he has "greater inherent powers than any other corporate officer." 2 Cook, Corp. § 718. He has "full charge of the bank's personal property, except so far as withdrawn from his control by the bank or by the directors." Morse on Banking, § 157; Wild v. Bank, 3 Mason, 505, Fed. Cas. No. 17,646. He is the "executive officer, through whom the whole financial operations are conducted." First Natl. Bank v. Greenville, etc., Co., 24 Tex. Civ. App. 645, 60 S. W. 828. That he may negotiate and transfer, on behalf of the bank, negotiable paper owned by it, is universally held. Morse on Banking, § 158.

The respondents contend, however, that the authority of the cashier, as such, does not extend to the disposition of the real property belonging to the bank, or of any personal property so belonging, other than negotiable paper. At the same time it is conceded that he has power to sell property mortgaged or pledged to the bank, as a means of collecting a debt due it. If we assume the correctness of these propositions, what is the basis of the distinction between a sale of property owned generally, and a sale of property held under mortgage or pledge to secure the payment of a debt? Undoubtedly it is that acts which are beyond the scope of the ordinary business of the bank, acts, that is to say, which call for the exercise of judgment or discretion affecting the policy to be pursued, are to be performed by or under the mandate of the directors, while acts which are included in the ordinary business are properly to be done by the cashier. The latter class of transactions is the one comprised in the provision of the by-laws of this bank, authorizing the cashier to do "whatever may be necessary in the management of the business of the bank." The sale of property held by the bank for investment or similar purposes is not a part of the ordinary business of the bank. On the other hand, the collection of debts due it is clearly a part of its ordinary business, and hence such collection, together with any acts incidental or necessary to such collection, may properly be carried on by the cashier under his inherent authority.

[3, 4] If we apply this rule to the situation disclosed by the record in the case at bar, we cannot doubt that the sale of the stock in question was within the scope of Palmer's authority as cashier. The 599 shares of the stock of Burnham-Standeford Company had originally been pledged to the Union National Bank as security for a loan. After so holding them for some years, the bank, in 1904, acquired the legal title to the stock by virtue of a sale made in proceedings in insolvency brought against the pledgor. The defendant bank was organized under the act of Congress as a national bank. As such, it had no powers beyond those specified in the act under which it existed, and such other powers as were necessarily incident to those expressly given. The act does not give power to deal in stocks or bonds, nor is such power incidental to any of the functions conferred. 2 Morse on Banking, p. 1310; Weckler v. Bank, 42 Md. 581, 20 Am. Rep. 95; First Nat. Bank v. Nat. Exch. Bank, 39 Md. 600; First Nat. Bank v. Nat. Exch. Bank, 92 U. S. 122, 23 L. Ed. 679. By this is meant, not that a national bank may not take title to stocks or bonds in compromise of a disputed or doubtful claim, or take them in pledge, or purchase them with a view to protecting or satisfying a claim secured by such pledge. The taking in each of such cases would be merely incidental to the business of making loans, etc., for which the bank is organized. What is prohibited is the purchase for speculation or investment, or the purchase and sale on commission.

[5] It would follow that, where a national bank had bought stock pledged to it, its duty would be to dispose of such stock as soon as a sale could, to proper advantage, be made. In fact, in this case there was evidence that the national bank examiners had criticised the defendant bank for retaining this stock so long. The only proper purpose of taking the stock was to enable the bank to realize upon its loan. The resale of such stock may properly be regarded as one of the steps taken in the process of collection. A sale under these circumstances was, therefore, we think, a part of the ordinary business of the bank, or, to use the language of the by-laws, it was an act "necessary in the management of the business of the bank." As such, it was within the powers of the cashier.

The judgment and the order denying a new trial are reversed.

We concur: SHAW, J.; ANGELLOTTI, J.

On Rehearing in Bank.

T. C. Coogan, Powell & Dow, and W. H. Orrick, for appellants. Fitzgerald & Abbott and Leon A. Clark, for respondents. James M. Allen, Lilienthal, McKinstry & Raymond, Heller, Powers & Ehrman, Morrison, Dunne & Brobeck, Cushing & Cushing, Gavin McNab, and S. C. Denson, for various banks.

PER CURIAM. Upon further consideration of this case, after a rehearing before the court in bank, we are satisfied that the conclusion reached by the court in department is correct. In the opinion of Mr. Justice SLOSS, there rendered, it is said that the National Banking Act does not give a national bank "power to deal in stocks or bonds." The question of the right or power to deal or invest in bonds is not involved. The words "or bonds," in the passage quoted, and subsequently, are surplusage and are stricken from the opinion. As thus amended the opinion of the court in department is adopted as the opinion of the court in bank.

The judgment and order denying a new trial are reversed.

The department opinion as thus amended is as follows:

"The action was brought to recover from the Union National Bank 599 shares of the capital stock of Burnham-Standeford Company, a corporation. The complaint alleged that these shares, represented by certificate No. 59, were on January 3, 1907, owned by and in the possession of plaintiff Lulu May McBoyle; that she had then pledged them to the bank to secure the promissory note of George McBoyle, her husband, for $9,500; and that she had thereafter tendered to the bank the amount due on the note and demanded redelivery of her stock, which had been refused. The answer of the bank denied that plaintiff Lulu May McBoyle was the owner or in possession of said shares, or that she had pledged them to the bank. There was also an affirmative defense, in which the bank alleged that it had, for many years prior to January 3, 1907, been the owner of the 599 shares of stock; that on that day George McBoyle had made an offer to Charles E. Palmer, the cashier of the bank, to buy said stock for $11,000, $1,500 in cash and $9,500 on his promissory note, such note to be secured by a pledge of the stock. Palmer accepted the offer, and the transaction was carried out on these lines. There are averments that McBoyle misled Palmer by fraudulent misrepresentations regarding the value of the stock; but as there was no evidence to sustain these charges, and the court found against them, we need not notice them further. It was alleged that Palmer acted beyond his authority in attempting to make the sale, that the bank, upon learning the facts, promptly repudiated the transaction, and tendered to McBoyle the $1,500 received by it, with interest, and his note for $9,500. The tender was refused, whereupon the bank made a deposit of the money and the note in McBoyle's name, pursuant to Civil Code, § 1500. Morris, who had been appointed receiver of the bank pending the action was joined as a party defendant, and by agreement of the parties the answer of the bank stood as his answer. The findings were in favor of the defendants on all the issues except that of fraud, and judgment went for them. The plaintiffs appeal from the judgment and from an order denying their motion for a new trial.

"Various points are raised, but we think it will be unnecessary to consider anything beyond the attack by appellants upon the finding that Palmer exceeded the scope of his authority as cashier in undertaking to sell the stock in question. In view of the findings negativing fraud, the only ground upon which the bank could repudiate the sale to McBoyle, and the subsequent pledge, was the want of authority in Palmer to sell. If, in law and in fact, he had such authority, title to the stock passed by the sale, and the pledgor was entitled, upon tender of the amount for which he had pledged the shares, to a return of the certificate.

"The powers of the cashier of the defendant bank were defined in its by-laws, a part of which read as follows: 'The cashier shall have power to discount and purchase bills, notes and other evidences of debt, to buy and sell bills of exchange and to issue certificates of deposit. He shall have general charge and supervision, subject to the advice and control of the president and directors of the affairs of the bank, and shall be generally authorized to do whatever may be necessary in the management of the business of the bank. * * *'

"The extent of the authority of a bank cashier has been considered in many cases. Generally speaking, he has 'greater inherent powers than any other corporate officer.' 2 Cook, Corp. § 718. He has 'full charge of the bank's personal property, except so far as withdrawn from his control by the bank or by the directors.' Morse on Banking, § 157; Wild v. Bank, 3 Mason, 505, Fed. Cas. No. 17,646. He is the 'executive officer, through whom the whole financial operations are conducted.' First Nat. Bank v. Greenville, etc., Co., 24 Tex. Civ. App. 645, 60 S. W. 828. That he may negotiate and transfer, on behalf of the bank, negotiable paper owned by it, is universally held. Morse on Banking, § 158.

"The respondents contend, however, that the authority of the cashier, as such, does not extend to the disposition of the real property belonging to the bank, or of any personal property so belonging, other than negotiable paper. At the same time it is conceded that he has power to sell property mortgaged or pledged to the bank, as a means of collecting a debt due it. If we assume the correctness of these propositions, what is the basis of the distinction between a sale of property owned generally, and a sale of property held under mortgage or pledge to secure the payment of a debt? Undoubtedly it is that acts which are beyond the scope of the ordinary business of the bank, acts, that is to say, which call for the exercise of judgment or discretion affecting the policy to be pursued, are to be performed by or under the mandate of the directors, while acts which are included in the ordinary business are properly to be done by the cashier. The latter class of transactions is the one comprised in the provision of the by-laws of this bank, authorizing the cashier to do 'whatever may be necessary in the management of the business of the bank.' The sale of property held by the bank for investment or similar purposes is not a part of the ordinary business of the bank. On the other hand, the collection of debts due it is clearly a part of its ordinary business, and hence such collection, together with any acts incidental or necessary to such collection, may properly be carried on by the cashier under his inherent authority.

"If we apply this rule to the situation disclosed to the record in the case at bar, we cannot doubt that the sale of the stock in question was within the scope of Palmer's authority as cashier. The 599 shares of the stock of Burnham-Standeford Company had originally been pledged to the Union National Bank as security for a loan. After so holding them for some years, the bank, in 1904, acquired the legal title to the stock by virtue of a sale made in proceedings in insolvency brought against the pledgor. The defendant bank was organized under the act of Congress as a national bank. As such, it had no powers beyond those specified in the act under which it existed, and such other powers as were necessarily incident to those expressly given. The act does not give power to deal in stocks, nor is such power incidental to any of the functions conferred. 2 Morse on Banking, p. 1310; Weckler v. Bank, 42 Md. 581, 20 Am. Rep. 95; First Nat. Bank v. Nat. Exch. Bank, 39 Md. 600; First Nat. Bank v. Nat. Exch. Bank, 92 U. S. 122, 23 L. Ed. 679. By this is meant, not that a national bank may not take title to stocks in compromise of a disputed or doubtful claim, or take them in pledge, or purchase them with a view to protecting or satisfying a claim secured by such pledge. The taking in each of such cases would be merely incidental to the business of making loans, etc., for which the bank is organized. What is prohibited is the purchase for speculation or investment, or the purchase and sale on commission. It would follow that where a national bank had bought stock pledged to it, its duty would be to dispose of such stock as soon as a sale could, to proper advantage, be made. In fact, in this case there was evidence that the national bank examiners had criticised the defendant bank for retaining this stock so long. The only proper purpose of taking the stock was to enable the bank to realize upon its loan. The resale of such stock may properly be regarded as one of the steps taken in the process of collection. A sale under these circumstances was therefore, we think, a part of the ordinary business of the bank, or, to use the language of the by-laws, it was an act 'necessary in the management of the business of the bank.' As such, it was within the powers of the cashier.

"The judgment and the order denying a new trial are reversed."

(162 Cal. 297)

BOLING v. ALTON. (Sac. 1,961.)

(Supreme Court of California. March 5, 1912.)

APPEAL AND ERROR (§ 411*)—TAKING APPEAL—NOTICE—REQUISITES.

Code Civ. Proc. § 940, provides that an appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice "stating the appeal from the same" and serving a similar notice on the adverse party or his attorney. Section 941b, prescribing the only other mode of appeal, declares that an appeal may be taken by filing with the clerk a notice entitled in the cause stating that the person giving the same does thereby appeal to the Supreme Court or District Court of Appeal, which notice shall identify the judgment or part appealed from with reasonable certainty. *Held*, that a notice to the clerk of the court in which a judgment had been entered, that the defendant "has appealed to the district court of appeal of the state of California, and the first district thereof, from that certain judgment rendered on July 1, 1911, in favor of the plaintiff, and against the defendant," and requesting the clerk to prepare a transcript of the evidence offered and received, etc., in accordance with Code Civ. Proc. § 953a, providing for a substitute for a bill of exceptions, was not a notice of appeal and was insufficient to perfect an appeal under sections 940, 941b.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2100; Dec. Dig. § 411.*]

In Bank. Appeal from Superior Court, Madera County; W. M. Conley, Judge.

Action by J. F. Boling against Thomas Alton. Judgment for plaintiff, and defendant attempted to take an appeal. On motion to dismiss. Granted.

M. G. Gallaher and Everts & Ewing, for appellant. Geo. Cosgrave (L. L. Cory, of counsel), for respondent.

SHAW, J. The plaintiff moves to dismiss the so-called appeal on the ground that no notice of appeal has been given and that consequently no appeal has been taken.

Section 940 of the Code of Civil Procedure declares that "An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice upon the adverse party or his attorney." The defendant has not filed any notice "stating the appeal" from any judgment or order or any part thereof, or any paper purporting to be a notice of appeal under this section.

Section 941b, prescribing the only other mode of appeal, declares that any person having the right of appeal from a judgment, order, or decree "may appeal therefrom by filing with the clerk of the court in which the judgment, order, or decree is rendered a notice entitled in the cause in which said judgment, order, or decree was made, which said notice shall state that the person giving the same does thereby appeal to the Supreme Court or district court of appeal, as the case may be, from the judgment, order, or decree, or some specific part thereof; and the said notice must identify the said judgment, order, or decree, or the part thereof appealed from with reasonable certainty." No notice conforming to this section, or purporting or attempting to comply therewith, has been filed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The only proceeding taken by the defendant in the cause after the judgment was to file a notice with the clerk of the superior court, as provided in section 953a, to obtain a transcript of the evidence in lieu of a bill of exceptions. He also served the plaintiff with a copy of this notice. The part of the section relating to such notice is as follows: "Any person desiring to appeal from any judgment, etc., * * * may, in lieu of preparing and settling a bill of exceptions pursuant to the provisions of section six hundred and fifty of this Code, file with the clerk of the court from whose judgment, order or decree said appeal is taken, or to be taken, a notice stating that he desires or intends to appeal, or has appealed therefrom, and requesting that a transcript of the testimony offered or taken, evidence offered or received, and all rulings, instructions, acts or statements of the court, also all objections or exceptions of counsel, and all matters to which the same relate, be made up and prepared. Said notice must be filed within ten days after notice of entry of the judgment, order or decree."

The subsequent parts of the section prescribe the method by which such transcript is to be made up, corrected, settled, and authenticated.

The notice, after the title of the cause, was as follows: "To W. R. Curtin, clerk of the county of Madera, state of California: You will please take notice that the defendant in the above-entitled action, Thomas Alton, has appealed to the District Court of Appeal of the state of California, and the first district thereof, from that certain judgment rendered on July 1, 1911, in favor of the plaintiff and against the defendant above named, and said defendant requests that you prepare a transcript of the testimony offered or taken, evidence offered or received, and all rulings, instructions, acts, or statements of the court, also all objections of counsel and all matter to which the same relate, together with the finding and judgment in accordance with section 953a of the Code of Civil Procedure."

Section 953a merely provides a substitute for a bill of exceptions. It does not purport to authorize an appeal, or prescribe how it may be taken. The language of this notice is a literal compliance with this section. It does not comply with the provisions of section 940 or 941b, prescribing the method of taking an appeal. It states, in effect, that an appeal had been theretofore taken, which was not true. The service of a copy of this notice on the attorney for the plaintiff does not help the matter. In view of the terms of section 953a, above given, and the exact correspondence of the notice thereto, the attorney would naturally suppose that no other object or purpose was intended, and that the notice was served to inform him that defendant was proceeding to prepare a record under that section. Defendant had the right to do this whether he had appealed or only desired or intended to appeal. It might cause the attorney to examine the files to see if a notice of appeal under section 941b had been filed. Finding none, no action or further attention, on his part, was called for. The Code is plain on all these subjects. There is no difficulty in following its provisions. We do not think that a notice which is a literal and proper compliance with section 953a, and which merely initiates the statutory proceeding there prescribed for making up the record, should be turned by construction into a notice of appeal and held to be good, as such, under a section with which it does not comply.

The so-called appeal is dismissed.

We concur: ANGELLOTTI, J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.

162 Cal. 268

MOORE v. TROTT et al. (L. A. 2,727.)

(Supreme Court of California. March 2, 1912. Rehearing Denied April 1, 1912.)

1. APPEAL AND ERROR (§ 1195*)—MATTERS CONCLUDED—DELIVERY OF DEED.

A judgment in a former appeal that decedent's delivery of deeds to a third person for the benefit of defendant was not a valid and complete delivery is not conclusive in a second trial as to whether the deeds had been subsequently delivered to the defendant by the decedent himself.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661–4665; Dec. Dig. § 1195.*]

2. APPEAL AND ERROR (§ 1195*)—SUBSEQUENT APPEAL—LAW OF THE CASE.

The doctrine of the law of the case is applied only to the principles of law laid down by the court as applicable to a retrial of fact, and it does not include the facts themselves or points of law not presented and determined.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661–4665; Dec. Dig. § 1195.*]

3. DEEDS (§ 56*)—DELIVERY—SUFFICIENCY—INTENT.

The delivery of a deed is a question of intent, and no precise form of words and no particular character of act is necessary, but the delivery is sufficient if from any or all of the circumstances the grantor has made known his intention to part irrevocably with his control over the deed to the end that it may presently vest title in another.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 117–123, 125; Dec. Dig. § 56.*]

4. DEEDS (§ 208*)—SUFFICIENCY OF EVIDENCE—DELIVERY.

Evidence in an action to quiet title *held* to sustain a finding that a deceased grantor had irrevocably parted with all his control over certain deeds, and had made a complete delivery thereof to defendant.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 625–632, 634; Dec. Dig. § 208.*]

5. DEEDS (§ 58*)—DELIVERY TO THIRD PARTY.

Where a grantor has made a deposit of deeds with a third person which was ineffective as a delivery to the grantee for lack of intention to part irrevocably with control over them, subsequent declarations by the grantor to the grantee and others, indicative of his altered intent that the deeds shall be complete and effective, will support a finding of a new, independent, and complete delivery, though no notice of the change of intention was given to the depositary of the deeds.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 130–135; Dec. Dig. § 58.*]

In Bank. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by Mary O'Connor Moore, as administratrix of Patrick Moore, deceased, against Mrs. George Trott and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Wm. Shipsey (P. F. Dunne, of counsel), for appellant. C. U. Armstrong, T. A. Norton, Sullivan & Sullivan, and Theo. J. Roche, for respondents.

HENSHAW, J. This is a second appeal. The decision upon the first appeal will be found reported in 156 Cal. 354, 104 Pac. 578, 134 Am. St. Rep. 131. Upon the second trial, the court found that the deeds to the land in controversy had been by Patrick Moore delivered to defendant, Mrs. Trott, "between the 1st day of June, 1905, and the date of Patrick Moore's death, and that, when said deeds were delivered as herein found, said Patrick Moore parted with all dominion and control over said deeds, and each of them, and with the right to recall or change, or affect the same, or either of said deeds, and intended to and did in fact make a complete and perfect delivery thereof." From the judgment which followed upon these findings, and from the order denying her motion for a new trial, plaintiff appeals.

Upon this appeal it is earnestly contended that the evidence is the same in both cases; that the decision of this court upon the former appeal is the law of the case; that under the law of the case as laid down in the former appeal there was no delivery of the deeds, and therefore it was error for the trial court to have found otherwise.

Upon the first trial general issue was joined upon the question of delivery or nondelivery. The trial court adopted the view that the delivery to Tietzen was absolute and complete, the finding in this regard being the following: "That at the time said Patrick Moore delivered said deeds to said P. O. Tietzen, as herein found, he parted with all dominion over said deeds and each of them, and reserved no right to recall or in any way control said deeds or either of them. That said deeds were so delivered absolutely." This is a finding of a particular delivery made in a specified way. It was the only finding upon the question of delivery which the trial court made, and was therefore the only finding which came under this tribunal for review. In this connection it will be noted that the finding itself, after reciting the circumstances of the delivery, is at pains to declare that the "deeds were so delivered absolutely." Upon the second trial defendant insisted that independent of the delivery to Tietzen, which this court had determined did not measure up to the requirements of law, the evidence in the case showed a subsequent and complete delivery made by Moore after his return from the Los Angeles hospital. It is unjust to characterize this contention as an afterthought occurring to respondents' counsel subsequent to the overthrow by this court of the first judgment based upon the delivery to Tietzen. For it appears without dispute that this very proposition was argued to the court below upon the first trial of the action. The question there arose before the second trial under an amendment to the answer proffered by defendants' counsel; which amendment specifically set up a delivery made by Moore after his return from Los Angeles, and in offering it counsel for respondents addressed the court as follows: "That proceeds upon the theory, may it please the court, that under the decision of the Supreme Court there was no valid delivery, and that Mr. Tietzen held these deeds as agent of Patrick Moore up to the time and after he returned from Los Angeles after this operation had been performed upon him; and after his return, and while his agent had these deeds, while the deeds were therefore in contemplation of law within his (Patrick Moore's) custody, he (Patrick Moore) manifested the intention that there should be an absolute delivery of these deeds, having been previously informed that in order to effect a valid delivery he had to part with all dominion over these deeds, and we claim that the question of delivery is one resting entirely upon intention; and, Patrick Moore having delivered these deeds into the custody of Tietzen, the law did not require him to ask Mr. Tietzen to return to him these deeds, and then deliver them back to M. Tietzen between the date of his return from the hospital at Los Angeles, after which the time had passed when the contingency referred to in the communication referred to could have happened, and his death."

Objection to the proposed amendment was made by Mr. Shipsey, attorney for plaintiff, upon the ground that it was unnecessary, that the issue had already been joined, and that the amendment was but an "attempt to plead evidence of an issue already made by the pleadings in the case," and, referring to the argument before the lower court upon the first trial, the following took place. Mr. Shipsey, addressing the court, said: "I will call your honor's attention to the argument made by the learned counsel upon that trial. I presume you have notes of this argument, as I have here. The case was tried August 15, 1906. I think the argument took place the next day. Now, the learned counsel upon that occasion, after making the argument that by the letter that passed Pat Moore made a delivery of this deed, he then made the same argument he is trying to explain to your honor now, in this way: That if no delivery was had at the beginning, by sending the letter to Tietzen, that by this letter and the oral declarations that were made after he came back from Los Angeles he changed his mind, and made this delivery to Mrs. Trott. Your honor will find that in your notes, if you have them, of the trial of this case, which commenced August 15, 1906. The identical point that counsel says here was never made before in this case was argued to this court on that trial, and argued by the counsel who is now making the point. Mr. Roche: I didn't say that, Mr. Shipsey. I said it was not made in either of the upper courts. While it was argued in this court, that was immaterial, as that was not the theory upon which the court made its decision. Mr. Shipsey: You admit then that the point was made at the first trial of the action in this court? Mr. Roche: It was argued by me at the conclusion of the trial." Mr. Shipsey further declared: "I have the testimony here, and for the purpose of showing that it has never been claimed by us that this supposed second delivery is not permissible under the pleadings as they now stand." To this the court replied that it doubted not that such an argument had been made, but that it created no strong impression upon the court's mind, which was entirely concerned with the argument upon the delivery, based on the Tietzen letter, the court saying: "The question was whether that constituted a delivery. I think that was the question before us. That being true, that was the thing we confined our attention to, that our attention was concentrated upon. This other matter may have been embraced in the pleadings or not embraced, but it was not considered as determinative of the question before the court." With this, the court permitted the amendment from an excess of caution, though it was quite correct in its statement that the whole matter was embraced within the general issue, under which any and all evidence of delivery could be received. And, finally, it is proper to add, as touching the fairness of the witnesses, that no attempt is apparent of any effort to shade, modify, or change the testimony upon this question which was given at the former trial, and appellant is correct in stating that the evidence in all essentials in the same upon the second trial as it was upon the first.

[1] As has been said, upon the former appeal this court was considering solely the delivery which the trial court found Moore had made. It could not have been considering any other delivery, for no other delivery was found by the trial court or argued before this. The holding in legal effect was that the delivery under the Tietzen letter was not a lawful delivery, and such a determination is of course the law of the case. But it would be a most unwarranted extension of the doctrine of the law of the case to apply it to other questions of fact (for delivery is usually, if not always, a question of fact), which have never been determined by the trial court, and which consequently could not have been presented to the consideration of this court. If, to illustrate, upon the first appeal respondents had declared that the evidence established a delivery subsequent to that under the Tietzen letter, and had sought to argue this question, the answer to that argument which would have been made both by opposing counsel and by this court would necessarily have been that such a delivery had not been found by the trial court, and therefore could not come under the consideration of the appellate tribunal for review.

[2] So well settled is the proposition that the doctrine of the law of the case, generally speaking, is applied only to the principles of law laid down by the court as applicable to a retrial of fact; that it does not embrace the facts themselves, and does not even embrace points of law not presented and determined; that no quotation from the authorities is necessary, and it is sufficient to cite from the multitude: Nieto v. Carpenter, 21 Cal. 488; Sneed v. Osborn, 25 Cal. 619; Cross v. Zellerbach, 63 Cal. 623; Wixson v. Devine, 80 Cal. 385, 22 Pac. 224; Mattingley v. Roach, 84 Cal. 207, 23 Pac. 1117; Klauber v. San Diego St. Car Co., 98 Cal. 107, 32 Pac. 876; People v. Hamilton, 103 Cal. 496, 37 Pac. 627; Mattingly v. Pennie, 105 Cal. 518, 39 Pac. 200, 45 Am. St. Rep. 87; Heidt v. Minor, 113 Cal. 385, 45 Pac. 700; Wallace v. Sisson, 114 Cal. 42, 45 Pac. 1000; Robinson v. Thornton, 114 Cal. 276, 46 Pac. 79; Stockton, etc., Works v. Glens Falls Ins. Co., 121 Cal. 174, 53 Pac. 565; Allen v. Bryant, 155 Cal. 259, 100 Pac. 704.

[3, 4] There is thus left for review the single question whether the finding of delivery here under review is supported by the evidence. It is of course abundantly establish-

ed that the deceased intended to dispose of the property in accordance with his deeds, and that he believed that he had made an effectual disposition of the land under the deeds. It is shown by the attorney who drew the deeds for Mr. Moore that he advised Mr. Moore that the deeds should be delivered and that "they must be placed beyond his control," and Mr. Moore replied that he understood that to be the law. After his return from the hospital in Los Angeles, he stated to more than one person that he had disposed of a great deal of his property, that he had "deeded it," and that "the deeds would be delivered when he would not be here." He declared to other witnesses than the defendant Mrs. Trott that he had left the deeds to her with Mr. Tietzen to be delivered when he should pass away. He declared that he had settled up all his business and left deeds to his property so there would not be any "lawing over it after he had passed away." These declarations, one and all, were made after his return from the Los Angeles hospital. Mrs. Trott, first having testified to a conversation with Mr. Moore in which Mr. Moore declared that he intended to deed her these properties, which conversation was had between them before his departure for Los Angeles, testified further that at his home after his return she had a conversation with Mr. Moore in which he declared to her "that he had deeded her the land that he told her he would," saying, "I have given you a deed to that land I told you I would. I left it with Mr. Tietzen"; that "Mr. Tietzen would give her the deeds after he (Moore) passed in his checks," and "that she should have them recorded immediately."

It has long, if not always, been the rule that the delivery of an instrument is a question of intent, and that to a complete delivery no precise form of words and no particular character of act is necessary. The delivery is sufficient and complete if from any or all of the circumstances the grantor has made known his intention irrevocably to part with his dominion and control over the instrument, to the end that it may presently vest title in another. "The delivery," says Touchstone, "is either actual, i. e., by doing something and saying nothing; or else verbal, i. e., by saying something and doing nothing, or it may be both; and either of these may make a good delivery and a perfect deed." 1 Shep. Touch. 57. This principle is recognized and expressed in all the cases. Hastings v. Vaughn, 5 Cal. 319; Hibberd v. Smith, 67 Cal. 552, 4 Pac. 473, 8 Pac. 46, 56 Am. Rep. 726; Black v. Sharkey, 104 Cal. 280, 37 Pac. 939; Kenniff v. Caulfield, 140 Cal. 40, 73 Pac. 803; Bogie v. Bogie, 35 Wis. 667; Waddell v. Hewitt, 36 N. C. 475; Rawson v. Fox, 65 Ill. 210; Warren v. Swett, 31 N. H. 340; Standiford v. Standiford, 97 Mo. 331, 10 S. W. 836, 3 L. R. A. 299; Souverbye v. Arden, 1 Johns. Ch. (N. Y.) 255; Scrugham v. Wood, 15 Wend. (N. Y.) 545, 30 Am. Dec. 75; Glade Gold Min. Co. v. Harris, 65 W. Va. 152, 63 S. E. 873; Shoptaw v. Ridgway's Adm'r (Ky.) 60 S. W. 723; Conlan v. Grace, 36 Minn. 276, 30 N. W. 880; Kelsa v. Graves, 64 Kan. 777, 68 Pac. 607; McLure v. Colclough, 17 Ala. 96. In diverse terms this unvarying rule is declared by the courts. Thus, "An actual or formal delivery of a deed never was necessary. A deed may be good by constructive delivery as well as by actual delivery. Any words or acts showing an intention on the part of the grantor that the deed shall be considered as completely executed, and the title conveyed, are sufficient." Kelsa v. Graves, supra. "There is no set ritual of delivery. When a deed is executed and the minds of the parties to it meet, expressly or tacitly, in the purpose to give it present effect, the deed is validly delivered; and that such meeting of minds may be gathered from acts or signs, words or silence, in multitudinous variety of circumstances." Bogie v. Bogie, supra. "Whenever it appears that the contract or arrangement between the parties has been so far executed or completed that they must have understood that the grantor had divested himself of title, and that the grantee was invested with it, delivery will be considered complete, though the instrument itself still remains in the hands of the grantor." Ruckman v. Ruckman, 32 N. J. Eq. 259. "The main thing which the law looks at is whether the grantor indicates his will that the instrument should pass into the possession of the grantee, and, if that will is manifest, then the conveyance inures as a valid grant, although, as above stated, the deed never comes into the hands of the grantee." Stevens v. Hatch, 6 Minn. 64 (Gil. 19). And in Kenniff v. Caulfield, supra, this court has said: "A valid delivery is accomplished when the conduct and acts of a grantor manifest a present intent to dispose of the title conveyed by the deed. There is no particular form necessary, but any act or thing which manifests such an intent is sufficient to establish it. It is always a question of fact, and must be determined by the circumstances surrounding each particular transaction."

[5] Without further multiplication of quotations, we may come to a consideration of the evidence bearing upon delivery, and it is to be remembered in this connection that the single question for determination is whether the evidence supports the court's finding of a delivery. Therefore, the proposition is not whether this evidence fairly conveys an inference that Moore in these declarations had in mind the delivery which he made to Tietzen, but it is, "Does the evidence support the inference which the court made and embodied in its finding to the effect that the testator, subsequent to the Tietzen letter, expressed his intent and made a new, independent, and complete delivery?" We think it cannot be said that such an in-

ference is not permissible, and, if it be permissible, it supports the finding of the court. It is true that Tietzen was not advised of the grantor's changed determination, but it is equally true that it was not necessary so to advise him to effect a new and complete delivery. Ruiz v. Dow, 113 Cal. 490, 45 Pac. 867; Sprague v. Walton, 145 Cal. 228, 78 Pac. 645; Keyes v. Meyers, 147 Cal. 702, 82 Pac. 304. It was not necessary that the depositary should have notice of the new, changed, and executed intent of Moore, nor did the fact that he had not such notice preclude proof of such changed and executed intent. Thus, while it may be freely conceded that from the evidence it is a fair inference that Moore in these declarations made reference to the Tietzen delivery, nevertheless it is also fairly inferable that after his return from the Los Angeles hospital, finding himself in failing health, he intended that the deeds which he had left with Tietzen should absolutely be delivered without power of revocation upon his part, and that he expressed this intent to the grantee under such circumstances as to perfect the delivery.

For these reasons, the judgment and order appealed from are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; MELVIN, J.

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162 Cal. 300

FRANK H. BUCK CO. v. BUCK et al.

(Sac. 1,907.)

(Supreme Court of California. March 6, 1912. Rehearing Denied April 5, 1912.)

1. Chattel Mortgages (§ 110*)—Construction—Debts Secured—Future Advancement—Extinguishment.

Civ. Code, § 2909, provides that a lien is extinguishable as any other accessory obligation, and section 2884 declares that a lien may be created by contract to take effect as security for the performance of obligations not then in existence. A mortgage upon crops of fruit then grown and thereafter to be grown on land was executed by an owner to a fruit exchange to secure an indebtedness of $2,500 and future advances to the mortgagor, and which further provided that if the mortgagor should pay the amounts due or to become due, the mortgage was to become void and the exchange which thereunder received and marketed the crops made numerous advances to the mortgagor, guaranteed and paid his note, and had a continuous balance against him except on two particular dates, when there was a balance in his favor, but the mortgagor then gave no notice that he had extinguished the mortgage, or that it was canceled. *Held* that, in the absence of such notice, the mortgagor's subsequent indebtedness was secured by the mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 192; Dec. Dig. § 110.*]

2. Chattel Mortgages (§ 110*) — Extinguishment or Satisfaction.

Where a chattel mortgage was executed to secure a present indebtedness and future advances, and the mortgagor gave a number of notes to the mortgagee, which by their terms became due after the date when there was a balance in favor of the mortgagor, but which had been charged to him at the time of the advances, and which, in fact, matured when the balance was heavily against the mortgagor, the mortgage continued as security for such balance.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 192; Dec. Dig. § 110.*]

3. Set-Off and Counterclaim (§ 36*)—Payment.

Moneys in the hands of a payee of a note to the credit of the maker cannot be applied as an offset to the notes before their maturity without the maker's consent.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 65–69; Dec. Dig. § 36.*]

4. Chattel Mortgages (§ 110*)—Construction—Debts Secured—Guaranty.

Under a chattel mortgage given as security for a present indebtedness and for future advances, the amount paid by the mortgagee to a bank upon its guaranty of a loan to the mortgagor was a charge secured by the mortgage, since the mortgagee was not a volunteer in paying the debt, and the fact that the advances were indirectly made by the bank did not change the nature of the transaction.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 192; Dec. Dig. § 110.*]

5. Chattel Mortgages (§ 52*)—Construction—Form of Mortgage—Description of Debt—Future Advances.

A chattel mortgage given to secure future advances, in the absence of statutes providing otherwise, need not definitely state the amount secured, and all that is required is that it should describe the nature and amount of such advances with reasonable certainty and be sufficient to put subsequent incumbrancers on inquiry.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 106–108; Dec. Dig. § 52.*]

6. Chattel Mortgages (§ 150*)—Construction—Priorities.

Advances made by the mortgagee under a recorded mortgage to secure future advances, before the giving of a subsequent mortgage, are secured by the recorded mortgage; the subsequent mortgagee being chargeable with notice thereof.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 246–252; Dec. Dig. § 150.*]

Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by Frank H. Buck Company against F. M. Buck, California Fruit Exchange, and another. Judgment for plaintiff on default of Buck and another, and California Fruit Exchange appeals. Reversed and remanded.

A. L. Shinn, C. F. Stewart, C. L. Shinn, Frank R. Devlin, and C. G. Shinn, for appellant. Wm. M. Sims and T. T. C. Gregory, for respondents.

HENSHAW, J. Appellant, California Fruit Exchange, a corporation, is the mortgagee of a recorded crop mortgage executed to it by respondent F. M. Buck. It claims priority of right and lien by virtue of this crop mortgage and by virtue of an unrecorded crop contract also executed to it by F. M. Buck, over a subsequent chattel mortgage executed by F. M. Buck to respondent Frank H. Buck Company, a corporation. The action was commenced by the Frank H. Buck Company to foreclose its chattel mortgage for the sum of $15,000 and for a decree establishing its priority of right over the California Fruit Exchange contracts. Frank M. Buck suffered default, judgment passed for plaintiff as prayed for, and from that judgment and from the order denying its motion for a new trial the California Fruit Exchange appeals.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The facts disclosed are the following: In December, 1905, F. M. Buck executed to the appellant a mortgage upon the crops of fruit "now standing and growing and that may hereafter be grown upon his farm and orchard comprising 140 acres in Solano county." The mortgage was given to secure an indebtedness of $2,500. It contained an added provision as follows: "Provided, nevertheless, and these presents are upon the express condition that if the said party of the first part, his heirs, executors, administrators or assigns, shall well and truly pay, or cause to be paid unto the said party of the second part, its successors or assigns, all sums of money that are now due, or that may hereafter become due, from the party of the first part to the party of the second part, then these presents shall be void. It is the purpose of this mortgage to secure future advances to, as well as the present indebtedness of, the party of the first part." It likewise contained a covenant upon the part of the mortgagor to deliver the crops grown on the land to the mortgagee to be marketed. This mortgage was duly recorded. Under it appellant marketed the crops and credited them to the account of Buck, and also made numerous advances of money to Buck, many of which were evidenced by his promissory notes. In December, 1906, Buck requested appellant to assist him in obtaining a loan of $3,000 from the Fort Sutter National Bank of Sacramento, appellant did so assist, and Buck secured the money upon the guaranty by the appellant of the loan. This note was a demand note. No part of the interest was paid by Buck. Appellant paid it all, and finally paid the principal on September 27, 1907. At the trial an expert, employed to examine into and report upon the condition of Buck's account with appellant as disclosed by the appellant's books, reported in effect that the books showed a continuous balance against Buck, excepting that on September 15, 1907, there appeared upon the books a sum to the credit of Buck greater than the debits in the amount of $442.32, and on September 21, 1907, appeared an amount so in excess of the debits in the sum of $1,238.44. As between the parties, however, no balance had been struck by the appellant, no statement had been made to Buck, and there were promissory notes from Buck to appellant which were not yet due upon either of these dates. Buck continued as before to receive advances from and to request payments of money to be made by appellant, and the condition of the account from one of apparent credit to one of actual debit was speedily changed. Thus on September 27th there was the payment of $3,000 on the promissory note guaranteed by appellant. On October 4th following $550 was paid out by appellant on Buck's account, on October 8th in like manner $750, on October 25th $70, and on October 26th $1,078. Thereafter the transactions between Buck and appellant continued apparently as before until October 27, 1908, when, by reason of such advances, Buck was indebted to appellant in the sum of $5,447.70. On May 19, 1909, Buck executed the chattel mortgage to the plaintiff in the sum of $15,000, for the foreclosure of which in the full amount this action was brought.

[1] The court found the indebtedness from Buck to appellant of $5,447.70, above mentioned, but determined that this sum was not secured by appellant's mortgage. The soundness of this determination presents the principal question in controversy. The court's determination in this regard was based upon the language of the mortgage "that if all sums due shall be paid, then these presents shall be void," taken with section 2909 of the Civil Code to the effect that a lien is extinguishable in like manner with any other accessory obligation. The court concluded that as the books of appellant showed a balance in favor of Buck on September 15, 1907, the mortgage had been paid and in effect canceled, and that the future advances made by appellant to Buck were made without the security of the mortgage. The reasoning of the trial court would unquestionably be sound had the mortgage been given for but a single existing debt or obligation. The payment of that debt or the extinguishment of that obligation would indisputably operate to release the lien of the mortgage. Nor could such a lien be recreated without a new agreement between the parties. Such, however, were not the terms and conditions of this mortgage. It was a mortgage creating a lien for future as well as past advances. The very section of the Code declares that a lien "may be created by contract to take immediate effect as security for the performance of obligations not then in existence." Civ. Code, § 2884. The mortgage in terms declared that it was security for "all sums of money that are now due or that may hereafter become due," and that "it is the purpose of this mortgage to secure future advances to as well as the present indebtedness of the party of the first part." Under such a mortgage, designed by its very terms to be of indefinite continuance and to afford the mortgagee security for his future advances to the mortgagor, much more is required for the extinguishment of the lien than the mere acci-

dental circumstance that the books of one or another of the parties show a balance in favor of the mortgagor upon a given date. The plainest considerations of equity demand, so far as the mortgagor is concerned, that if he has knowledge of this and means to cause the mortgage to be canceled and treated no longer as security for advances made to him, he should so notify the mortgagee. Otherwise equity would be countenancing the palpable fraud of permitting the mortgagor to borrow moneys upon the security of a mortgage which the mortgagee believed to be valid and existent, but which the mortgagor, at some future time when it suited his convenience, was to be permitted to say had been extinguished. Unquestionably, then, if Buck did know that the books upon September 15th or September 21st showed a balance in his favor and he meant to take advantage of this fact by declaring the mortgage canceled, it was his duty, before seeking further advances, so to have notified his mortgagee. Not having done so, he will not be allowed to profit by his silence, for it is not for a moment to be supposed, nor even is it contended, that the appellant made these later advances, aggregating over $5,000, other than upon the faith of the mortgage security, or that it would have advanced $1 had it been notified that the mortgage security was by Buck regarded as at end. The controlling principles governing a mortgage such as this for future advances are well set forth in the American & English Encyclopedia of Law (vol. 20, 2d Ed., pp. 962, 1055): "A mortgage given to secure an existing indebtedness and also such other indebtedness as might afterwards accrue from sales of goods to the mortgagor, is, as regards future liabilities, a security by way of continuing guaranty under which the mortgagee has an implied authority to sell, trusting to his security, until revocation." And even where a mortgage has been in form extinguished, by payment or otherwise, equity will keep it alive or consider it extinguished as will best subserve the interest of justice and the actual and just intent of the parties."

[2, 3] Aside from these general equitable considerations which forbid that the mortgage should be treated as extinguished, the same matter regarded from a narrower point of view equally establishes the unsoundness of the trial court's conclusion. Thus, it is shown that Buck had given a number of promissory notes to appellant which by their terms became due after the date when, as the court found, there was a balance in favor of Buck, and the mortgage lien therefore came to an end. Whatever moneys Buck may have had to his credit in the hands of the appellant could not be applied as an offset, without Buck's consent, to those notes before their maturity. McKean v. German-American Bank, 118 Cal. 334, 50 Pac. 656. Nor did the fact that the appellant had charged the amount of these notes to Buck's account at the time of the advances affect this principle. Under the written contract of the parties evidenced by the notes, these sums were not due until the maturity of the notes, and when the notes did in fact mature the balance was heavily against Buck upon his account.

[4] No well-grounded reason can be advanced why the payment of the $3,000 to the Sutter National Bank under the appellant's guaranty should not be made a charge against Buck under the mortgage lien. The evidence discloses that Buck applied to appellant for this loan, that appellant felt unable to advance the money to Buck directly at that time, and secured the money for him from the Sutter Bank by guaranteeing his indebtedness. The guaranty was an independent obligation. The appellant did not become a mere surety and was in no sense a volunteer in paying the debt, the very interest upon which it had been compelled to meet. If the appellant had advanced the money directly to Buck, no question would arise but that the advancement would be secured under the terms of the mortgage. The advances thus indirectly made by the Sutter Bank and afterward taken over by appellant through its payment to that bank in no material sense changed the nature of the transaction.

[5] Respondent contends that the mortgage is void in that it does not state the total amount of future advances for which it is to create a lien upon the mortgagor's property. This contention finds support in the language of Tully v. Harloe, 35 Cal. 302, 95 Am. Dec. 102; but the language there used was not necessary to the decision, and the decision itself, upon this proposition, has never been affirmed. That there is a diversity of opinion upon the subject may be conceded; but the correct rule is declared by the American & English Encyclopedia of Law (vol. 20, p. 927), is: "Whether the ultimate amount intended to be secured should be definitely stated on the face of the instrument is a question upon which there is considerable diversity of opinion; but the weight of authority sustains the principle that, in the absence of statutes providing otherwise, a definite statement of amount is unnecessary, and that all that can be required is that a mortgage designed to secure such future liabilities should describe the nature and amount of them with reasonable certainty, so that they may be ascertained by the exercise of ordinary diligence on proper inquiry, the jurisdictions holding that the maximum amount intended to be secured should be stated being in the minority." This court has adopted that rule and has so expressed itself in Tapia v. Demartini, 77 Cal. 383, 19 Pac. 641, 11 Am. St. Rep. 288, where it is said: "If the mortgage discloses upon its face that it is to stand as security for future advancements, the amount of the advances to be

made need not be set out. It is sufficiently definite to put subsequent incumbrancers on inquiry, and they must ascertain the extent of the lien, or suffer the consequences." This principle finds support in Witczinski v. Everman, 51 Miss. 841; Lovelace v. Webb, 62 Ala. 271; Ackerman v. Hunsicker, 85 N. Y. 43, 39 Am. Rep. 621.

[6] Moreover, even under the rule contended for by respondent, the advances made by appellant to Buck, having been extended before plaintiff's mortgage was given, are secured by the lien of appellant's mortgage. Thus Jones lays down the rule (1 Jones on Mort. § 364) as follows: "But even where a limitation is necessary in order to constitute a continuing security which will not be affected by subsequent conveyances, a recorded mortgage for an unlimited sum is notice to a subsequent incumbrancer as to all sums advanced upon the mortgage before the subesquent lien attaches."

The foregoing renders unnecessary a discussion of any of the questions advanced upon the second branch of this case—that of the priority of the lien of the unrecorded crop contract over the subsequently executed chattel mortgage to plaintiff.

For the reasons already given, the judgment, in so far as it affects the California Fruit Exchange, appellant herein, is reversed, and the cause remanded.

We concur: LORIGAN, J.; MELVIN, J.

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162 Cal. 315

DEITER v. KISER et al.

KISER et al. v. DEITER et al.

(S. F. 5,443.)

(Supreme Court of California. March 8, 1912.)

APPEAL AND ERROR (§ 151*)—JUDGMENT—PARTY AGGRIEVED.

Where, in a suit by an assignee of a purchaser to reform a deed executed by the vendor to the purchaser and placed in escrow and fraudulently altered by him while in escrow, the purchaser and his wife were made parties and alleged that the assignee was entitled to the deed, and they asked no relief in their own behalf, the purchaser and his wife were not aggrieved by a judgment for the vendor, and an appeal by them must be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 947–952; Dec. Dig. § 151.*]

Department 2. Appeal from Superior Court, San Benito County; M. T. Dooling, Judge.

Action by George A. Deiter against J. N. Kiser and others, in which defendants filed cross-complaints against plaintiff and E. E. Bray and another. From a judgment for defendants, E. E. Bray and another appeal. Dismissed.

See, also, 158 Cal. 259, 110 Pac. 921.

W. M. Gardner, W. C. Kennedy and A. D. Shaw, for appellants. Briggs & Hudner and H. W. Scott, for respondents.

LORIGAN, J. This is a motion to dismiss the appeal of F. W. Bray and E. E. Bray. The complaint averred an agreement entered into between defendants and one E. E. Bray upon the performance of which a deed conveying a two-thirds interest in certain mining property was to be delivered to her; that said E. E. Bray assigned her rights and interest under said contract to the plaintiff; that a deed conveying said interest to E. E. Bray was placed in escrow, and while so in escrow was fraudulently altered by defendants and thereafter delivered to her, who, ignorant of the alteration, had it recorded. Plaintiff, as assignee of said E. E. Bray, brought this action against defendants for a reformation of the deed. Defendants answered denying the averments of the complaint and filed a cross-complaint in which the plaintiff and E. E. Bray and F. W. Bray, her husband, were made cross-defendants, and a decree sought against them that the deed in question and the agreement under which it was executed be both declared void and the title of the defendants to the property described in the deed be quieted. The court ordered the Brays brought in as parties, which being done, they with their cross-defendant, the plaintiff Deiter, filed a joint answer to the cross-complaint. Judgment was entered in favor of the defendants and cross-complainants in accordance with their cross-complaint. Plaintiff and the Brays moved for a new trial which was denied, and they took a joint appeal from both the judgment and the order. Thereafter a motion was made here by respondents to dismiss both appeals as to all the parties appealing. The motion to dismiss the appeal of Deiter, the original plaintiff, was based on the ground that the attorneys giving the notice of appeal on his behalf had no authority to do so. As to the Brays it was based upon the ground that they were not parties having any interest in the action or parties affected or aggrieved by the judgment or order appealed from. The motion to dismiss the appeal of Deiter was granted. 158 Cal. 259, 110 Pac. 921. It was denied as to the Brays for the reason that its determination would require an examination of the entire record and of the merits of said appeal which this court will not make in advance of a hearing upon the merits. It was stated that the motion might be renewed when the cause came up on such hearing. Subsequently, the case being set down for hearing on the merits, the respondents renewed their motion to dismiss the appeal taken by the Brays for the same reason assigned on the original motion—that they are not parties interested in the action.

An examination of the record satisfies us that this point is well taken. In fact, it appears clearly from the brief itself filed by the appellants in the case that these appellants—the Brays—had no interest in the subject-matter of this action. Nor is it at all apparent from the record why they were made parties to the action at all. F. W. Bray was the husband of E. E. Bray and negotiated with the defendants in procuring the agreement and deed, but it appears he had no interest whatever growing out of the execution of these instruments or in the property which was the real subject-matter of the controversy. He was doubtless joined because he was the husband of E. E. Bray, who alone was the party with whom the defendants and cross-complainants made the agreement to convey an interest in the mining property and to whom the deed therefor, placed in escrow and subsequently delivered, ran. The complaint avers that long prior to the commencement of the action plaintiff Deiter had acquired all the rights and interest held by said E. E. Bray and became the legal owner of all of her interests in said mining property. The cross-complaint averred that Deiter asserted such a claim, and, in the answer thereto made jointly by Deiter and the Brays, the latter admitted that their cross-defendant Deiter claimed by assignment from E. E. Bray all the rights granted under the agreement and that he was "the absolute owner of two-thirds interest in and to said mining claims and property," and averred full performance by him of all the conditions which were contained in the agreement between defendants and herself whereby "he became entitled to the deed and transfer to him of said two-thirds of the mines and mining property."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The opening brief of counsel for appellant states that "the assignment to Deiter by E. E. Bray carries with it all her right, title, and interest in the property conveyed to her by the deed of August 26, 1907."

It is quite apparent, under this showing from the record, and the declaration of counsel for appellants, that the Brays have no interest whatever in this controversy. They ask for no relief in their own behalf under their pleadings, but simply that the relief which their cocross-defendant Deiter asks in his complaint, and in which he averred ownership by assignment from E. E. Bray of all her interest in the property in question, be granted him. No relief was denied these appellants because they asked for none. All that the trial court by its judgment determined, as far as they are concerned, is that they had no interest in the property or in the deed thereto, and they are in no position to assert that they are aggrieved by such judgment because, not only by their pleadings do they concede that the interest which E. E. Bray originally had in this property vested long before the action was commenced absolutely in the plaintiff Deiter, but this is also the position taken by counsel representing them and Deiter on this appeal.

As, therefore, the Brays had no interest in the subject-matter of this action which could be or was affected by the judgment or order appealed from, they are not parties aggrieved thereby or entitled to appeal, and the motion of respondents to dismiss their appeal is therefore granted.

We concur: HENSHAW, J.; MELVIN, J.

162 Cal. 258

In re BROOME'S ESTATE. (L. A. 2,951.)

(Supreme Court of California. March 2, 1912.)

1. Executors and Administrators (§ 497*) — Compensation — "Extraordinary Service."

Under Code Civ. Proc. § 1618, which declares that in fixing the compensation of an executor or administrator, the court may make "such further allowance" as it may deem just and reasonable "for any extraordinary services," "extraordinary" means beyond or out of the common order or rule, and where an administrator with the will annexed went out and lived on the ranch which comprised the estate, and made it much more profitable by his management, his services were such as he was not bound to render and should be compensated specially under the statute.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2117–2124; Dec. Dig. § 497.*

For other definitions, see Words and Phrases, vol. 3, p. 2629.]

2. Appeal and Error (§ 1008*)—Review—Findings of Court.

While a court on appeal will be reluctant to disturb a determination of a probate judge, either that an administrator or executor is entitled to extra compensation for "extraordinary" services, or as to the value of such services, yet where the probate court found the nature and extent of services rendered by an administrator, and determined that they were not extraordinary so as to require additional compensation under Code Civ. Proc. § 1618, the court on appeal may examine the facts shown to determine whether or not the conclusion is justified.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955–3969; Dec. Dig. § 1008.*]

3. Descent and Distribution (§ 82*)—Distribution of Estate—Breach of Agreement—Further Litigation.

Where under an agreement between heirs providing for the speedy distribution of the estate, found by the probate court to have been made to settle the litigation and controversy between the parties, an administrator with will annexed was, as heir, entitled to a sum of $3,000, a suit by him against one of the parties is not such a breach of the agreement as would preclude him from obtaining the sum settled thereunder, where the litigation was for the purpose of obtaining personalty belonging to the estate which the defendant, who had been executor, refused to surrender.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 318–321; Dec. Dig. § 82.*]

4. Descent and Distribution (§ 82*)—Distribution — Agreement — Breach—Leasing Premises.

Leasing a ranch which was the greater part of an estate for five years by an adminstrator with the will annexed, who was an heir, is not such a violation of an agreement between the heirs for the speedy distribution of the estate as will preclude him from asserting a right to a share set apart to him thereunder, where the agreement was filed in the probate court before the making of the lease, as the lease could not have been executed without the consent of the judge who must have determined that it was advantageous to the estate in spite of the agreement before him.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 318-321; Dec. Dig. § 82.*]

5. Executors and Administrators (§ 315*)—Distribution—Agreement of Heirs.

Where an estate has ample funds over and above all possible demands on its moneys to pay sums due under an agreement between the heirs for a distribution, a sum due an heir may be decreed to be paid upon a decree of partial distribution, though the recital of the agreement is to the effect that such sum shall be paid "upon the distribution of the estate."

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298-1314; Dec. Dig. § 315.*]

6. Executors and Administrators (§ 510*)—Charges—Expert Advice—Reasonableness.

If technical or expert knowledge was necessary to aid an administrator with the will annexed in preparing his opposition to the account of an executrix, whom he displaced, it was his duty to secure such assistance, but the determination of its necessity is a matter for the probate judge, taking into consideration whether the matter required a greater degree of business ability or expert knowledge than could be expected from the administrator as an ordinary business man, and the reasonableness of the charge, so that, in the absence of any finding as to such necessity by the probate court, the appellate court cannot pass on the propriety of the allowance of an item for the payment of an expert accountant in the account of the administrator with the will annexed.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2235-2256; Dec. Dig. § 510.*]

7. Appeal and Error (§ 544*)—Presentation of Grounds—Bill of Exceptions—Necessity.

Code Civ. Proc. § 950, provides that, on an appeal from a final judgment, the appellant must furnish the court with a copy of the notice of appeal, of the judgment roll, and of any bill of exceptions or statement in the case upon which the appellant relies. Section 951 provides that on appeal from a judgment rendered on an appeal or from an order, except an order granting or refusing a new trial, an appellant must furnish the court with a copy of the notice of appeal, of the judgment or order appealed from, and all papers used on the hearing below. *Held*, where an appeal was taken on the judgment roll alone from portions of a probate decree on an administrator's accounting, which also awarded partial distribution of an estate, no bill of exceptions, or other certification under rule 29 of the Supreme Court (119 Pac. xiv), was necessary to bring up the petition, the oppositions of the parties, and the findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2426, 2478, 2479; Dec. Dig. § 544.*]

Department 2. Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

In the matter of the estate of William Richard Broome, deceased. From a decree of partial distribution, Thornhill Broome, administrator, with the will annexed, appeals. Modified.

Canfield & Starbuck, for appellant. R. L. Horton, for respondent.

HENSHAW, J. This is an appeal by the administrator with the will annexed of the estate of William Richard Broome, deceased, from certain portions of a decree of partial distribution of said estate made in the superior court of the county of Santa Barbara on the 30th day of January, 1911.

[1] 1. He appeals from that portion of the decree which denies his application for an allowance by way of compensation for extraordinary services rendered by him in the administration of the estate. The findings are voluminous. By them it is shown that William R. Broome died leaving Frances Broome, his surviving widow, and two sons and one daughter, Thornhill, administrator with the will annexed, Thornhill's brother Montague, and his sister Amy Lillian, who are respondents upon this appeal. As part of his estate, William R. Broome left a large ranch. The widow was appointed and qualified as executrix of the will on the 25th day of July, 1891, thereupon entered on the administration of the estate, and so continued as executrix (the quotations are from the findings) "until the 2d day of April, 1909, at which time she was removed from said office as executrix by this court acting on its own motion and not upon the petition or application of her son Thornhill, and solely because of her failure to render at any time since her appointment as such executrix any exhibit or account of her administration of said estate, although duly cited by this court so to do." Thereupon letters of administration with the will annexed were duly issued to Thornhill Broome, who ever since has been and now is the administrator with the will annexed of this estate.

"The said Broome Estate ranch comprises about 4,000 acres of tillable farming land and about 18,000 acres of hilly and mountainous pasture land, and constitutes substantially all the income-producing property of said estate, other than the property of said estate still remaining in the hands of said Frances Broome; that for the more efficient discharge of his duties as administrator of said estate, and for the closer supervision of the agricultural operations carried on on said lands by tenants thereof under leases, covering the first farming season after his appointment as such administrator made by said Frances Broome as his predecessor in office, and by tenants under leases made by himself for the farming season last past, and for the better collection of the rentals due from said tenants and for the more effective and profitable management of said property, said administrator with the will annexed, immediately after the issuance to him of letters of administration as aforesaid, took up his residence in an unoccupied building on said ranch, and repaired the boundary fences of said pasture lands which had become dilapidated, and inaugurated an improved system of management of the business of pasturing horses and cattle for hire on said ranch, and has from the time of his appointment as such administrator devoted his entire time to the care and management of the property of said estate, and particularly of said Broome Estate ranch, and to the carrying on and management of the business of pasturing horses and cattle on said ranch; that such management of the lands of said estate and business thereon conducted by said administrator with the will annexed has been very profitable to said estate, and has resulted in the realizing of net annual returns from said Broome Estate ranch since his appointment approximately four times the amount of annual net returns realized by his predecessor in the administration of said estate, for many years preceding the revocation of her letters as aforesaid, and contributed materially to the success of the negotiations for the aforesaid lease which were conducted by said administrator; that the services rendered by said administrator with the will annexed as aforesaid, though profitable to said estate and beyond the services which he was bound to render as such administrator, were not such as under the law could justify any allowance therefor as for extraordinary services claimed by him."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appellant contends that by virtue of this finding he is entitled to extra compensation (the will making no provision for the compensation of the executor or administrator), under section 1618 of the Code of Civil Procedure, which declares that, "In all cases such further allowance may be made as the court may deem just and reasonable for any extraordinary services." It is to be noted that the court withheld this compensation, not because the services set forth were not of great value to the estate, for it is found that they were, but under the conviction that they were not of the character described as extraordinary. But were not these services extraordinary? Respondent cites the definition of "extraordinary" given in 12 Am. & Eng. Ency. of Law (2d Ed.) 609, as follows: "Extraordinary is defined to mean beyond or out of the common order or rule; not usual, regular, or of a customary kind; not ordinary; remarkable; uncommon; rare." This definition may be accepted. Unquestionably the services performed by the executor and described by the court were of this unusual, uncommon, and rare kind, and the court itself finds that they were services which he was not bound to render as such administrator. Respondent further rests upon the general rule enunciated in 11 Am. & Eng. Ency. of Law (2d Ed.) p. 1306, to the following effect: "It is well settled, as a general rule, that if an executor or administrator, in the course of his administration, renders to the estate services not ordinarily required or expected of him, he is not entitled to special compensation therefor, unless it is so provided by statute or by the will under which he acts; and this is true though he might properly have employed a third person at the expense of the estate to perform such services." But an examination will disclose that this general rule is invoked in those states where there are no statutes providing for the allowance of extra compensation for extraordinary services. As illustrative, may be cited Gamble v. Gibson, 59 Mo. 585, where it is declared that the acts for which the executor claimed extra compensation were "acts done by him in his official character." And the court says: "The executor charged his commission and got credit for it. * * * That is all the law will permit him to retain." But, at variance with this general rule, the same learned work upon the next page points out the fact that the statutes of several states provide that: "In addition to the allowance by way of commissions or otherwise for the time, labor, and risk incident to the management and settlement of the estate, the court may allow every executor or administrator a reasonable compensation for any extraordinary services rendered by him."

In Brenham v. Storey, 39 Cal. 179, it is declared that it is no part of the administrator's duty or authority to manage the estate for the benefit of the estate or of the heirs. So far as they are concerned, it is his duty simply to preserve the estate until distribution. It being no part of the executor's or administrator's duty so to manage the estate, if he undertakes the management of it and loss results, he is chargeable with that loss. If, upon the other hand, profit over and above normal results from his endeavors, it would indeed be a harsh rule which would deny him extra compensation for a risk which he has voluntarily assumed and for which, if losses resulted, he would have been responsible. See, also, In re Rose, 80 Cal. 166, 22 Pac. 86.

In Estate of Runyon, 125 Cal. 195, 57 Pac. 783, extraordinary compensation had been awarded for services quite similar to those found in the case at bar. It was declared that the services were not such as were incumbent upon the executor in the common course of his duties. The allowance for extra compensation was disallowed by this court upon the ground that the will had fixed such compensation, and, accepting the trust under the will, the executor was bound by its provision in this regard.

[2] Where serious question arises, either over the character of the service or the value of the service to the estate, this court,

under familiar principles, will be reluctant to disturb the determination of the judge in probate. So, also, will it be reluctant to disturb an order fixing the amount of compensation where extraordinary services are found to have been rendered. Such, and such only, is the import of the language in Estate of Hedrick, 127 Cal. 184, 59 Pac. 590. In this case, however, we have a detailed finding of the nature and character of the services, and the court manifestly withheld compensation in the belief that, though they were of great value, and not such as the administrator was bound to render, they still did not come fairly within the category of extraordinary service. On this we think the court erred. The administrator was clearly entitled to extra compensation; the fixing of the amount of which is, of course, primarily vested in the probate court.

[3, 4] 2. The second branch of this appeal is from that portion of the decree denying the administrator's petition for distribution to him of the sum of $3,000 provided to be paid to him on distribution of the estate by an agreement between all of the parties in interest, entered into upon April 21, 1910. Growing out of the mismanagement by the executrix of the estate and her failure for a period of many years to render any account of her trust, differences arose between the executrix and her son Thornhill, which involved the other members of the family. These differences were compounded and settled by an agreement between them. The estate was solvent; the decree establishing notice to creditors had been filed, and there were no creditors of the estate. The parties to the agreement were all of the parties in interest. The court finds "that, for the purpose of terminating said controversy and putting an end to said litigation, all the parties interested in said estate and their respective attorneys entered into an agreement in writing dated the 21st day of April, 1910, and filed in this court the 22d day of April, 1910, wherein and whereby it was provided among other things that upon the distribution of said estate there should be distributed to said Thornhill Francis Broome the sum of $3,000, and to said Montague W. Broome the sum of $3,000, to be paid out of the funds of said estate; * * * that on the final distribution of said estate there will become payable to said Thornhill Francis Broome the sum of $3,000, and to said Montague W. Broome the sum of $3,000 out of the cash funds of said estate prior to distribution in accordance with the above-mentioned compromise agreement of April 21, 1910." It will thus be seen that the court makes full recognition of appellant's right to the $3,000, but defers payment of it until final distribution of the estate. Still, in passing, it may with propriety be pointed out that respondents' objections to the payment of the $3,000, advanced in argument, are at total variance to the other findings in the case. Thus it is said that the agreement provided that the administrator would "proceed diligently to secure the final distribution of the said estate, to the end that the decree of final distribution may be had on or before the 1st day of June, 1910," and it is argued that he has violated this agreement and delayed distribution by plunging the estate again into litigation with his mother, and by leasing the ranch for the period of five years, notwithstanding the fact that the agreement further provided that all litigation between the parties should be ended. But the court's findings in this regard are that, while the agreement contemplated the delivery to the administrator by Frances Broome, executrix, of all the property of the estate in her hands, "she has failed and refused to deliver to him as such administrator personal property of said estate remaining in her hands"; that an action by the administrator was thus necessitated, and that action is now pending, and "that a reasonable time has elapsed in which to bring this estate to a close by way of final distribution, but that, by reason of the failure and refusal of said Frances Broome to deliver to said administrator with the will annexed the personal property of said estate, the final distribution of said estate has been and is being delayed." The lease of the ranch could not have been made without the approval of the court, and that approval would have been withheld unless it were for the clear advantage of the estate. The court in probate had before it the agreement of the parties, and it is idle to contend that the lease made under the circumstances here indicated was in violation of that agreement. As little weight attaches to the declaration by respondents that one of the chief inducements and reasons for entering into the agreement by the sister Amy Lillian was to prevent any further litigation and effect the immediate distribution of the estate, and that therefore she consented to the payment of $3,000 to her brothers in excess of any sum to be received by her, the fact being, as set forth in the agreement, that this extra allowance of $3,000 to the brothers was "intended to equalize the amounts so received by them with the amount heretofore received by Amy Lillian Broome out of said estate."

[5] Coming thus to the ultimate question, it is further established by the findings that the estate has ample funds with which to pay this sum over and above all contingent or possible demands upon its moneys. Indeed, specific sums of moneys are by the court ordered to be set apart to await disposition upon final distribution. Amongst these sums are the amount estimated in closing the estate by way of costs, commissions of executrix and administrator, and the $6,000 to be paid, $3,000 each to Thornhill and Montague, upon final distribution. The language of the agreement is that this $3,000 shall be distributed to Thornhill "upon the distribution of said estate." There is nothing in this language to limit the time to the final distribution, and there is nothing in the findings to justify the withholding of the money until final distribution. The situation presented is that the funds are in the estate available for the purposes indicated, are by the order of the court segregated, with direction to the administrator to hold them for payment upon distribution, and no reason appears why they may not with propriety be paid under this decree of partial distribution.

[6] 3. The third matter presented upon this appeal is the disallowance by the court of an item of expense of $173.75 incurred by the administrator under the following circumstances: The executrix Frances Broome finally presented to the court her account. Upon this the court finds: "That the aforesaid account rendered by Frances Broome of her administration of said estate as executrix of said will was very voluminous, consisting of more than 6,000 items, and was accompanied by several thousand papers as vouchers for said items of account, and embraced, besides transactions for account of said estate, numerous expenditures for the personal use of said Frances Broome and for the use of her family and the maintenance and education of her children, which expenditures were made indiscriminately out of moneys of said estate and out of the private funds of said Frances Broome; that for the purpose of analyzing said account and classifying the items thereof, and classifying and arranging the papers filed as vouchers in support of said items, for their more convenient consideration by the court, an expert accountant was employed on behalf of said administrator with the will annexed by his said attorneys at an expense of $173.75, which amount was paid to said accountant by said administrator and charged against said estate in his account; * * * that the preparation of his opposition to said account was one of the duties of said administrator with the will annexed, and that the estate is not chargeable with the expense of the preparation of such opposition."

No question is thus presented but that the expert was honestly and properly employed by the administrator in the interest of the estate. The sole question is as to whether he may charge the estate with the cost of those services. In Estate of More, 121 Cal. 609, 54 Pac. 97, where the court in probate disallowed the administrator payment for the services of a bookkeeper under his contention that the estate was of great value and that many important transactions required the service of an expert accountant, this court held that there were undoubtedly cases where such an employment would be proper, "but whether an administrator should be allowed for payments made for the services of a bookkeeper depends upon the circumstances of the estate, and is a matter properly left to the discretion of the probate judge." As the court here found, it was undoubtedly the duty of the administrator with the will annexed to prepare his opposition to the account of the executrix. But this is not wholly determinative of the question presented. He is expected to bring to the administration of his trust the capacities of the ordinary business man. If in this particular matter more than that knowledge and capacity were required properly to prepare and present the opposition, if technical or expert knowledge is a necessity, manifestly it is the administrator's duty to employ such technical and expert knowledge in the performance of his duty. This is the underlying question which the court's finding does not fully answer, and therefore the appeal as to this item is allowed, and, upon a retrial of the matter before the court in probate, that court, in the exercise of its discretion, will allow or disallow this item, as it shall determine the propriety or necessity of the employment by the administrator of this expert knowledge and skill, and the reasonableness of the charge therefor.

[7] Respondents' preliminary objection to the consideration of this appeal, upon the ground that the transcript is not sufficient, and that the appeal is not taken in conformity with section 950, Code of Civil Procedure, or section 951, Code of Civil Procedure, is without merit. No bill of exceptions or other certification as provided by law and by rule 29 (119 Pac. xiv), of this court is necessary. Estate of Isaacs, 30 Cal. 105; Estate of Page, 57 Cal. 238; Miller v. Lux Estate, 100 Cal. 609, 35 Pac. 345, 639; Estate of Ryer, 110 Cal. 556, 42 Pac. 1082. Treating the decree from portions of which this appeal is taken as "in effect a judgment" (Miller v. Lux Estate, supra), this appeal is taken upon the judgment roll alone; that is to say, the petitions of the parties, the oppositions thereto, the findings of the court thereon, and the decree based upon those findings. No bill of exceptions was necessary, and no certification other than that here given is required.

The judgment of this court therefore is: (1) That upon the findings here made the administrator is entitled to compensation for extraordinary services in such sum as the court in probate, in the exercise of its sound discretion, may fix. (2) That the administrator is entitled to present distribution to him under the decree of partial distribution of the sum of $3,000 as fixed by the convention of the parties. (3) That the court will make further determination and finding as to the item of $173.75 in conformity with the foregoing, and in accordance with such determination will allow said item as a proper charge and disbursement by the administrator, or will withhold its approval of the same.

We concur: LORIGAN, J.; MELVIN, J.

(162 Cal. 281)

KARRY et al. v. SUPERIOR COURT OF SAN JOAQUIN COUNTY et al.

(Sac. 1,968.)

(Supreme Court of California. March 5, 1912. On Rehearing, April 4, 1912.)

1. Certiorari (§ 28*)—Jurisdiction of Superior Court—Excess of Jurisdiction.

Where a justice's court had jurisdiction of an action on a bond, given to secure costs in a former action, the taking of jurisdiction on an appeal to the superior court therefrom was proper; and the fact that an appeal was pending from the judgment in the action in which costs were adjudged, and that it operated as a stay of proceedings, were matters of affirmative defense, and, though uncontroverted, and the court erroneously determined that the judgment given on the bond was proper, its act was only an erroneous exercise of jurisdiction, and could not be annulled by a writ of certiorari for excess of jurisdiction.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 33, 41; Dec. Dig. § 28.*]

2. Appeal and Error (§ 65*) — Decisions Reviewable—Amount in Controversy.

The judgment of a superior court on appeal from a justice's court in cases where the amount claimed is less than $300 is final and conclusive, where no excess of jurisdiction appears.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 315-328; Dec. Dig. § 65.*]

Beatty, C. J., dissenting on rehearing.

In Bank. Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Certiorari by A. T. Karry and others against the Superior Court of San Joaquin County and J. A. Plummer, judge thereof. From a judgment against the petitioners, they appeal. Affirmed.

R. W. Dodge, for appellants. Webster, Webster & Blewett, for respondents.

ANGELLOTTI, J. This is a proceeding in certiorari, originally commenced in the District Court of Appeal for the Third District, and transferred to this court after decision by that court.

The purpose of the proceeding, as stated in the prayer of the petition for certiorari, was to annul a judgment of the superior court of San Joaquin county, given and made in a certain action pending therein on an appeal from a justice's court of one of the townships of said county, in which action one Fanny Fieg was the plaintiff, and the petitioners herein were the defendants. The action was one within the jurisdiction of the justice's court, being for the sum of $295.75 for and on account of costs incurred by Fanny Fieg in a certain action theretofore begun and prosecuted by petitioner Gjurich against her in the superior court of said county, and damages by reason of an attachment levied on her property in said action, and being on the bond or undertaking given for such costs and damages in said action by said petitioner and his copetitioners, the sureties on such bond. The justices' courts have jurisdiction "in actions upon bonds or undertakings conditioned for the payment of money, if the sum claimed does not amount to three hundred dollars, though the penalty may exceed that sum." Code Civ. Proc. § 112, subd. 5. It is not questioned that the justice's court acquired jurisdiction of the persons of the defendants in such action; that they appeared therein and presented their defense to the action; that the justice's court gave its judgment in favor of Fanny Fieg, the plaintiff therein; that the petitioner herein, defendants therein, regularly appealed from such judgment to the superior court of San Joaquin county; that the action was regularly tried in said superior court on such appeal; and that said superior court gave judgment on the merits in favor of said Fanny Fieg and against these petitioners for the sum of $145.71.

The claim that this judgment was in *excess of the jurisdiction of the superior court*, for, of course, it is not claimed that *certiorari* will lie, unless such jurisdiction has been exceeded, is based solely on the following facts, which are alleged to exist, and which, for all the purposes of this proceeding, may be conceded to exist: The judgment of the superior court in the former action of Gjurich v. Fieg was against the plaintiff and in favor of said Fieg for her costs, taxed at $145.71. This $145.71 was the money said Fieg was suing to recover in her justice's court action against petitioners. Prior to the commencement of the justice's court action, Gjurich had regularly appealed from such judgment to this court, and such appeal is still pending and undetermined. It may be conceded here, as held by the District Court of Appeal, that the effect of this appeal was to stay "all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein." Section 946, Code Civ. Proc. The point of respondents in this connection, one apparently held good by the learned trial judge of the superior court in giving judgment in the subsequent justice's court action, is that, as there was no bond given by Gjurich on his appeal to stay the enforcement of the judgment for costs, no stay was effected by the appeal. Section 942, Code Civ. Proc. We do not deem it important to consider this question here, and assume that the effect of the appeal was as stated in the above quotation from section 946, Code of Civil Procedure. There are other facts that are, perhaps, material on the question of said Fieg's present right to damages by reason of the attachment; but they present no legal question, material here, differing from the question presented relative to the costs, and, as the judgment complained of here awarded her nothing on account of such damages, it is unnecessary to set forth such facts.

[1] It is very clear that the facts recited

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

show no excess of jurisdiction on the part of the superior court in its disposition of the justice's court action appealed by petitioners to it. Granting everything claimed as to the facts, nothing more than error in the exercise of its jurisdiction is shown. The justice's court, as we have seen, has jurisdiction of this class of actions, where the amount claimed is less than $300. The appeal from the judgment therein given brought the case within the jurisdiction of the superior court. It is not claimed that the facts alleged in the complaint were not sufficient to state a cause of action, though even this is not essential to jurisdiction. The matters alleged by petitioners were all matters of defense, to be set forth by them in that action, and to be passed upon by the trial court, as they were. No material difference is perceived between such defenses in an action for the recovery of money and any other defenses that might be made, such, for instance, as a defense that the alleged bond had not been executed, or that plaintiff was estopped by a former judgment in the same matter. It was for the superior court, in the exercise of its jurisdiction, to determine the effect of the matters alleged in defense, and to give judgment according to its determination. Any error that it may have committed in the way of mistaking the facts, or the legal effect of admitted facts, with the result that its judgment awarded to the plaintiff money which she should not have recovered, was simply error in the exercise of its jurisdiction. As has often been said, a court has *jurisdiction* to decide wrongly as well as correctly; and the only remedy of a party aggrieved by a merely erroneous decision is such as may be afforded by our statutory provisions relating to motions for a new trial and appeals. If no such remedy be given, the action of the trial court, *within its jurisdiction*, is conclusive. The fact that there was no conflict in the evidence adduced on the trial can make no difference. It has never been held, and, of course, never can be held if elementary principles relative to jurisdiction are kept in mind, that a judgment on the merits totally at variance with the admitted facts is, for that reason alone, in excess of the jurisdiction of the court giving it. Such a judgment is simply erroneous. The syllabus to Monreal v. Bush, 46 Cal. 79, which correctly states the matters decided, illustrates the principle applicable here. It is as follows: "The rendition of the judgment for a demand which was not due when the action was commenced is not an excess of jurisdiction, but error in the exercise of jurisdiction." The application there was for a writ of certiorari to annul a judgment of the county court on appeal from a justice's court judgment, and the writ was denied on the ground stated in the syllabus. We deem it entirely unnecessary to cite other authorities in support of what we have said. Decisions to the effect that mandamus will lie to compel a court having jurisdiction of an appeal to proceed with the hearing thereof, where the admitted facts show such jurisdiction, notwithstanding that such court has held that such admitted facts do not give jurisdiction, or that certiorari will lie to annul an order dismissing an appeal under such circumstances, or that prohibition will lie to prevent a court proceeding with the hearing of an appeal, where the admitted facts show that it has no jurisdiction, notwithstanding its own decision to the contrary, are not in point at all. Such decisions simply mean that a court cannot give itself jurisdiction or divest itself of jurisdiction by an erroneous decision as to the legal effect of admitted facts. And, of course, decisions staying the hand of the court that has given a judgment or order, where an appeal has been taken that stays the operation of such judgment or order from proceeding with the enforcement thereof, are not in point. We have no such case here. The apparent mistake of the learned District Court of Appeal in this matter was in considering the two actions as being connected in such a way as to make the justice court action in legal effect a proceeding to enforce the former judgment in the same manner and to the same extent that a motion in the superior court in the former case for the issuance of an execution would have been such a proceeding. So far as any question of jurisdiction is concerned, the two cases were entirely separate and distinct. The proceedings in the first case were available to petitioners as matters of defense in the second case, to be given such weight therein as the trial court deemed them entitled to under the law. But they could not operate to divest that court of the jurisdiction that it had over the subject-matter of the action and the persons of the defendants. We have here no different case in principle from the one we would have if the action had been one on a promissory note for $100, appealed to the superior court, and not only the answer and the uncontradicted evidence, but also the findings, showed that the note had been fully paid, and nevertheless the superior court had given judgment in favor of the plaintiff for the full amount of the note. Such a judgment would, of course, be erroneous; but there would have been no excess of jurisdiction, and the aggrieved party would have been without any remedy by way of certiorari. A judgment that fails to accord to a party his legal rights is, of course, always to be regretted. But there must be a point in every proceeding beyond which the law will not permit further controversy as to the merits of the case.

[2] In actions of the character of the one under consideration, where the amount claimed is less than $300, the final appellate jurisdiction is in the superior court. Even if the judgment of that court on the merits was clearly erroneous in this case, a ques-

tion we do not decide, it is final and conclusive; no excess of jurisdiction being made to appear.

The judgment of the superior court is affirmed.

We concur: SHAW, J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.

On Rehearing.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing of this cause and from the doctrine of the decision. The point decided is that the action was one within the jurisdiction of the justice's court, and therefore, of course, within the final appellate jurisdiction of the superior court, and the judgment, though erroneous and subversive of the rights of the petitioner, secured to him by his appeal to this court, entirely irremediable. It is, in short, a confession of impotence on the part of this court to secure to an appealing litigant the fruits of a successful appeal. The argument in support of this conclusion seems to be that, no matter how clearly and conclusively it may be made to appear, as matter of fact, *and by way of defense*, that the action commenced in a justice's court will, if it prevails, defeat the rights of the defendant involved in his pending appeal to the Supreme Court from the judgment of the superior court, the justice of the peace nevertheless has *jurisdiction* to render such a judgment, and the superior court to affirm it, and thus accomplish indirectly what the superior court could not do by a direct proceeding (as by the issuance of execution) after the filing of a sufficient undertaking to stay proceedings. For here the opinion of the court concedes—and the fact is—that in the case of Gjurich v. Fieg a sufficient undertaking to stay proceedings, pending the appeal, had been filed before the action against the petitioners (Gjurich's sureties) had been commenced.

The instance with which this case is compared by way of support of the argument is the disregard of a plea of another action pending in another court. But this is a plea which may be disregarded without an excess of jurisdiction, where the other action is not pending in a superior court of exclusive jurisdiction. When a cause is on appeal to this court, even the superior court is without jurisdiction to decide any question directly or indirectly involved in the appeal; and if there is a stay of proceedings it can enforce no part of its judgment. Can a justice of the peace do what the superior court cannot do, and his action be made final and conclusive by the indorsement of the superior court? If it can, it is a result not contemplated by the framers of our Constitution, when they expressly provided that the powers of justices of the peace should "not in any case trench upon the jurisdiction of the several courts of record except that said justices shall have concurrent jurisdiction *with the superior courts* in" certain cases of forcible entry and detainer, and to enforce certain liens on personal property. Constitution, art. 6, § 11. The Supreme Court is a court of record; by reason of Gjurich's appeal, it acquired exclusive jurisdiction of every question in that case, including the right of the defendant to enforce the judgment for costs. But it seems that a justice of the peace can forestall our judgment upon that question; and that his judgment, affirmed by the superior court, though confessedly erroneous, is remediless, because it is no excess of jurisdiction for a justice of the peace to enforce a part of a judgment, less in amount than $300, while the validity of that judgment is a question pending in this court. I prefer, however, the opposite conclusion of the District Court of Appeal.

162 Cal. 307

WALL et al. v. BROWN et al. (S. F. 5,595.)

(Supreme Court of California. March 8, 1912. Rehearing Denied April 6, 1912.)

1. HOMESTEAD (§ 151*)—DEATH OF WIFE—CONVEYANCE TO WIFE—EFFECT.

Code Civ. Proc. § 1474, provides that if the homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both were living, was selected from the community property, or from the separate property of the persons selecting the same, it vests on the death of the husband or wife absolutely in the survivor, but, if it was selected from the separate property of either spouse without his consent, it vests on the death of the one from whose property it was selected in his heirs. *Held*, that a deed from a husband to his wife, conveying a half interest in property acquired by him as community property, upon which the wife had theretofore filed a homestead declaration, did not defeat the husband's right to the whole of the homestead after his wife's death, so that her heirs would not take the interest conveyed to her by him.

[Ed. Note.—For other cases, see Homestead Cent. Dig. §§ 286–292; Dec. Dig. § 151.*]

2. HUSBAND AND WIFE (§ 266*)—COMMUNITY PROPERTY.

A conveyance by a husband to his wife of a half interest in community property acquired by him vested such interest in her as separate property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 925–928; Dec. Dig. § 266.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Michael Wall and others against Thomas Brown, individually and as administrator of Alice Brown. From a judgment for defendants, plaintiffs appeal. Affirmed.

Stafford & Stafford and H. I. Stafford, for appellants. R. W. Gillogley and Kierce & Gillogley, for respondents.

LORIGAN, J. This is an action brought by the plaintiffs as heirs at law of Alice Brown, deceased, to quiet title to an undivided one-fourth interest in a certain lot of land in the city and county of San Francisco, to which, in his answer, the defendant Brown asserted sole ownership.

The case was tried on stipulated facts. Thomas Brown, the defendant, and Alice Brown, deceased, were husband and wife, and on May 26, 1876, said Thomas Brown acquired title to the lot in question as community property. On June 26, 1885, said Alice Brown filed a valid declaration of homestead on this property, which was never abandoned. On October 24, 1901, Thomas Brown made a deed of gift to his said wife conveying to her an undivided one-half interest in and to said lot, which deed was duly recorded, and said Alice Brown continued to own said undivided interest up to the time of her death. She died intestate on October 24, 1902, leaving as her heirs at law her husband and the plaintiffs, her brothers and sister. Thomas Brown was appointed administrator of her estate, and on a petition filed by him setting forth the fact that the declaration of homestead was filed on the property by Alice Brown in her lifetime the court, on April 9, 1903, made a decree in the matter of her estate setting aside the property to him as a homestead. Subsequently the estate of Alice Brown was settled and closed, but no distribution was made of the undivided interest in the lot acquired by her under the deed from Thomas Brown. This property was not referred to either specifically or generally in the decree.

Upon these stipulated facts the court held as a conclusion of law that upon the death of Alice Brown the title to the entire lot in controversy vested absolutely in her surviving husband, and entered a decree accordingly, from which these plaintiffs appeal.

[1] The real question presented here is, Did the deed from Thomas Brown to his wife of an undivided one-half interest in the community property, theretofore impressed with the homestead, defeat his right to have the whole property on the death of his wife descend absolutely to him, or did her heirs take the interest conveyed by him to his wife, subject to the right of the court to set it apart to the husband as a portion of the homestead premises for a limited time? Section 1474 of the Code of Civil Procedure provides that: "If the homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both were living, was selected from the community property, or from the separate property of the person selecting or joining in the selection of the same, it vests, on the death of the husband or wife, absolutely in the survivor. If the homestead was selected from the separate property of either the husband or the wife, without his or her consent, it vests, on the death of the person from whose property it was selected, in his or her heirs, subject to the power of the superior court to assign it for a limited period to the family of the decedent." Section 1265 of the Civil Code is practically the same as far as it affects the present question. It will be observed from a reading of the sections referred to, and this is to be borne in mind in considering the question here involved, that the right to have property upon which a homestead has been impressed vest absolutely in the surviving spouse is made to depend upon the character of the property at the time the homestead upon it is selected. If the homestead "was selected from the community property or from the separate property of the person selecting or joining in the selection of the same," it vests absolutely in the survivor. It vests otherwise, if selected under

certain conditions, from the separate property of either spouse. The homestead here under consideration was selected by the wife from the community property, and hence under the code provision absolute ownership in the whole property impressed with the homestead became vested in Thomas Brown on the death of his wife as survivor, unless, as contended by appellants, that right of survivorship was destroyed as to an undivided one-half interest in the homestead property by the conveyance thereof from him to his wife after the homestead was selected. The position of appellants is that the deed from Brown to his wife destroyed the character of the property as community property, and, so far as the interest conveyed to her is concerned, she held that interest thereafter as her separate property.

[2] There can be no question under the decisions of this state, but that the effect of the deed to her by her husband was to vest in her the interest conveyed as her separate property. But it does not follow because a conveyance is made by the husband to the wife of an interest in the community property impressed with a homestead that the homestead is impaired or the right of survivorship created thereby is to the extent of the property conveyed destroyed. The homestead is something distinct from the legal title. It qualifies and limits the right of the owner of the title for the benefit and protection of both spouses while living, and to insure future protection to the survivor. A conveyance of the community property to the wife does not affect any of the characteristics incident to the homestead itself. It affects only the title to the property which has been so impressed. What was community property when the declaration was filed becomes by the conveyance her separate property, but, though the character of the title is changed, this does not affect the homestead, but the title is taken subject to it.

It is contended, however, by appellants that after the deed to the wife, the homestead which she had theretofore impressed on the whole property while it was community property is, as to the interest conveyed to her, to be deemed and treated as if selected from her separate property without her consent, and as vesting in her heirs under the provisions of section 1474 on her death. In support of this contention reliance is placed on the cases of Burkett v. Burkett, 78 Cal. 310, 20 Pac. 715, 3 L. R. A. 781, 12 Am. St. Rep. 58, and In re Lamb, 95 Cal. 397, 30 Pac. 568. But in the former case the court was not considering a homestead selected from community property, or the effect on the right of survivorship of a conveyance by the husband subsequently made to the wife of such property. The parties in the Burkett Case had been husband and wife. During coverture the husband had declared a homestead on his separate property, and thereafter conveyed it to his wife. Subsequently his wife obtained a decree of divorce, but there was no adjudication as to property rights. Plaintiff, after the divorce decree had been entered, brought an action against his wife to quiet title to the property covered by the homestead. The trial court made a decree in favor of plaintiff, holding that the deed to his wife of the homestead property was void. On appeal here it was held that the deed to the wife was valid, and conveyed the property to her subject to the homestead. But the question which the court was considering there was as to the disposition to be made of homestead property upon a decree of divorce, under subdivision 4, § 146, of the Civil Code, which provides that: "If a homestead has been selected from the separate property of either, it shall be assigned to the former owner of said property, subject to the power of the court to assign it for a limited period to the innocent party."

No question was involved as to what was the effect of the conveyance of the husband to the wife on the homestead previously declared. The section referred to had reference only to the disposition upon a divorce of separate property upon which a homestead was impressed. Under that section, it is immaterial who of the spouses makes the declaration, and the right on a divorce to have the property assigned freed from the homestead, or subject to be set apart to the innocent spouse for a limited period, does not in the least depend upon who made the declaration or who owned the separate property when the homestead declaration was made, but upon the question as to who was the owner of the property when the divorce proceedings were instituted or the divorce decree rendered. In disposing of separate property in a divorce decree, even though it has been impressed with the homestead character the subdivision of the section referred to requires it to be assigned to the "former owner of such property," and the former owner under the section is the spouse in whom the title is vested as separate property, when the divorce proceedings are inaugurated, not the one in whom the title as separate property was vested at the time the homestead was selected. This is the extent of the ruling of this court in the Burkett Case, for it is said in the opinion (78 Cal. 316, 20 Pac. 718, 3 L. R. A. 781, 12 Am. St. Rep. 58): "We pass to the question as to the effect of the divorce upon the title. At the time the divorce proceeding was instituted and the decree rendered therein, the property was a homestead upon the separate property of the wife by virtue of the declaration by the husband and his subsequent conveyance to her. * * * The husband having conveyed the property to the wife by a valid deed prior to the commencement of the divorce suit, she must be regarded as the 'former owner' under this section, and entitled to the property subject only to the power of the court to set aside the same to her husband for a limited time if he appeared to be the innocent party."

A careful consideration of the above case relied on by appellants shows that the construction of the section as to the disposition of separate property in an action of divorce was the sole point involved, and has no bearing on the position taken here by appellant that the effect of the deed from Brown to his wife was to destroy the right of survivorship created by the filing of a declaration by her when the property was community property. The court in that case was not considering a homestead selected from community property, or whether the right of survivorship therein was affected by a subsequent conveyance by the husband to the wife. Nor is the case of In re Lamb, supra, in point. In that case the wife had filed a homestead declaration on 160 acres of land which was the separate property of her husband. He subsequently conveyed 50 acres of the tract to his wife, thereby constituting that portion her separate property. The wife died and the superior court in the matter of her estate set apart the whole 160 acres, including the portion deeded to the wife, absolutely to the husband as a homestead. Her heirs appealed from the order as far as it affected the 50 acres, and this court held that the superior court erred in setting apart absolutely to the husband this 50 acres conveyed to his wife in her lifetime and which constituted her separate property. After quoting section 1474 of the Code of Civil Procedure, the court said: "It will be observed that, in order to bring a homestead within the provisions of this section so that upon the death of one spouse 'it vests absolutely in the survivor,' it must be made to appear that it was selected from the community property in the first instance 'or from the separate property of the person selecting or joining in the selection of the same.' * * * The land in controversy was not community property at the date when the deceased made and recorded her declaration claiming the same as a homestead but it was the separate property of the petitioner. * * * It only remains to consider the nature of the homestead so far as it affects the fifty acres of which deceased was the owner. Can it be said in view of the facts as we have stated them that this homestead was selected by her from her separate property within the meaning of section 1474 of the Code of Civil Procedure? It is clear to us that this question must be answered in the negative. It is true the declaration of homestead was made and recorded by her, but this was at a time when all of the land in controversy was the separate property of her husband, the petitioner, and the subsequent acquisition by her of the title to fifty acres thereof as her separate property did not have the effect to change the prior declaration into a selection by her of a homestead from her separate property. When the statute speaks of the selection of a homestead 'from the separate property of the person selecting or joining in the selection of the same,' it has reference to the status of the property as separate property at the time when the selection is made; for only in such case can there be properly imputed to the person making the selection an intention to dedicate his or her property for homestead purposes, and thus to vest in the other spouse an estate therein, which, upon the contingency of survivorship, will ripen into an absolute title to the land so dedicated. * * * It follows from these views that the court erred in setting apart to petitioner absolutely, and, as his property, the 50 acres which he conveyed to his wife in her lifetime. Such property is to be treated as if the homestead thereon had been selected without her consent, and as vesting in her heirs, 'subject to the power of the superior court to assign it, for a limited period, to the family of the deceased.'"

But it is to be noted that in this Lamb Case the court was considering a homestead originally impressed upon the separate property of the husband by the wife. It was not dealing with a homestead selected by the wife from the community property and the effect on the right of survivorship in the husband of a subsequent conveyance to the wife of such property as her separate estate. It was dealing with a homestead selected by the wife from the separate property of the husband, and the effect on survivorship of a conveyance of such property subsequently made by him to his wife, and applying the provisions of section 1474 to that situation, it was held that, to bring a homestead selected from separate property within the right of survivorship on the death of either spouse, it must appear that the selection was "from the separate property of the person selected or joining in the selection of the same"; that it is the status of the property as separate property at the time when the selection is made and by whom made that controls; that the selection by the wife of a homestead from property which, when the selection was made, was the separate property of her husband, did not have the effect as to the 50 acres which was subsequently conveyed to her as her separate property of changing the prior declaration made by her on his separate property into a selection by her of a homestead from the separate property so acquired by her; that such property, after the conveyance to her, is to be treated as if the homestead upon it had been selected without her consent, and, under section 1474, vested in her heirs.

But not only do the Burkett and the Lamb Cases, for the reasons we have pointed out, furnish no support to the claim of appellant, but the construction given to section 1474 in the Lamb Case supports the contrary view, and sustains the judgment of the lower court. The conclusion reached in the latter case was based upon the construction given by the court to section 1474, to the effect that it is the status of the property when the homestead is selected which determines whether it vests absolutely in the surviving spouse. Such absolute right was denied the husband in that case as to the portion of the homestead property conveyed by him to his wife subsequent to the filing of the homestead because at the time she impressed the homestead upon the property it was the separate property of her husband and not hers, the court declaring as the plain language of the section itself declares that, in order to vest absolutely in the surviving spouse the property upon which a homestead has been selected, "it must be made to appear that it was selected from the community property in the first instance or from the separate property of the person selecting or joining in the selection of the same." In the present case it was the status of the property at the time the homestead was declared upon it which determined whether it vested absolutely in the surviving spouse. It was community property when the wife selected it as a homestead and under the sections of the Code, that being its character at that time, the right of the surviving spouse to take the property absolutely attached, and the subsequent mutation of title to the homestead property affected by a subsequent conveyance of a portion of it to the wife as her separate property did not affect that right.

The judgment appealed from is affirmed.

We concur: HENSHAW, J.; MELVIN, J.

(18 Cal. App. 128)

RUBENSTINE v. SUPERIOR COURT, LOS ANGELES COUNTY, et al.

(Civ. 1,115.)

(District Court of Appeal, Second District, California. Jan. 29, 1912.)

1. Justices of the Peace (§ 159*)—Service by Mail—Affidavit.

Under Code Civ. Proc § 1012, providing that service by mail may be made where the person making it and the one on whom it is to be made reside or have their offices in different places, between which there is a regular communication by mail, the affidavit of service, in such way, of the notice of exceptions to sureties on bond for appeal from a justice, must show such diversity of place of residence or office and such regular communication.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 550–578; Dec. Dig. § 159.*]

2. Certiorari (§ 15*)—Orders Merely Erroneous.

The superior court having jurisdiction to hear a motion to dismiss an appeal from a justice because of failure of the sureties on the appeal bond to qualify after exception to them, its order denying the motion is not reviewable on writ of review, even though its determination against the sufficiency of the proof of service of notice of the exception was erroneous.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 23–27; Dec. Dig. § 15.*]

Application by Z. H. Rubenstine against the Superior Court for the County of Los Angeles and the judge thereof for writ of review. Denied.

Fette, Potter & Bearman, for petitioner. Denio & Hart, for respondents.

PER CURIAM. It appears from the record that in an action pending in a justice's court of Long Beach township, Los Angeles county, wherein petitioner was plaintiff and one M. A. Dyer was defendant, judgment was rendered against defendant; that within due time notice of appeal was served upon petitioner by defendant, and an undertaking on appeal filed on the 14th day of October, 1911; that on the 16th day of October, 1911, petitioner filed with the said justice written exception to the sureties, and on the same day deposited in the United States mail at the city of Los Angeles a notice of such exception, addressed to the attorneys of defendant at Long Beach, Cal., in which notice the petitioner assumed the duty of fixing the date for justification of the sureties, and fixed the 18th day of October, 1911, as the date for the appearance and justification; that on said date all parties appeared at the office of the magistrate, who was absent from the city of Long Beach and was not present at his office during the entire day, and the sureties did not justify, although being in attendance for that purpose. The justice transmitted all of the papers to the clerk of the superior court, and thereafter the petitioner moved the court to dismiss the appeal, because the sureties did not justify after exception filed. This motion to dismiss was heard by the superior court, and denied, and this court is asked to annul and adjudge void such order denying the motion to dismiss the appeal.

[1] It does not appear from the record that service of the notice of exception to the sureties was had upon counsel for appellant, which notice is said to be necessary in Roush v. Van Hagen, 17 Cal. 122. The affidavit attached to the notice merely states that the same was placed in a sealed envelope, addressed to Denio & Hart at their offices in the city of Long Beach, county of Los Angeles, state of California, postage prepaid. It nowhere appears in the record that the attorneys of plaintiff and defendant resided or had their offices in different places, or that there was any communication by mail between Long Beach and the city of Los Angeles. The service of notice of the exception upon appellant's counsel was substituted service, attempted to be made under section 1012, Code of Civil Procedure. This section provides that service by mail may be made when the person making the service and the person on whom it is made reside or have their offices in different places, between which there is a regular communication by mail. "Service by mail is good only where the person making the service and the person on whom it is to be made reside in different places, between which there is regular mail communication; and the affidavit of service must show a strict compliance with these provisions of the statute, or otherwise the evidence is insufficient to establish the fact of service." Linforth v. White, 129 Cal. 191, 61 Pac. 910.

[2] Assuming the right of petitioner herein, notwithstanding the insufficiency of the proof of service of notice, to establish the facts amounting to the same by other evidence, and assuming the right of the court upon the motion to hear evidence touching the acts of the parties in connection with the attempted justification as tending to show personal service, nevertheless it was within the jurisdiction of the superior court to determine the sufficiency of such proof, if any was offered; and having jurisdiction to hear the motion, and proof in support thereof, this writ will not lie, even though the court was in error in its judgment. We are of opinion that the rule laid down in Buckley v. Superior Court, 96 Cal. 121, 31 Pac. 8, and Sherer v. Superior Court, 96 Cal. 653, 31 Pac. 565, may be properly invoked in this proceeding.

Application for writ denied.

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18 Cal. App. 149

BONSLETT v. BUTTE COUNTY CANAL CO. (Civ. 908.)

(District Court of Appeal, Third District, California. Feb. 7, 1912.)

1. Evidence (§ 450*)—Parol Evidence—Ambiguity.

Where the parties to a contract radically disagree as to the meaning of its language and insist on diametrically opposite constructions, there is such ambiguity in the contract as will justify testimony to aid in its construction, as authorized by Civ. Code, § 1647, and Code Civ. Proc. § 1860, providing that a contract may be explained by reference to the circumstances under which it was made, including the situation of the subject of the instrument and of the parties.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066–2082, 2084; Dec. Dig. § 450.*]

2. Waters and Water Courses (§ 254*) — Public Service Corporations—Contracts to Supply Water for Irrigation — Construction.

An irrigation corporation contracted to supply water to a customer on a form partially printed and furnished by it. The printed provisions bound the corporation to furnish to the customer all the water that might be required for irrigation, and bound the customer to construct a ditch from a gate placed in the bank of a canal. The written provisions described the land to be irrigated, reserved to the customer the right to relocate water at any time prior to the use of water, and declared that the first payment should commence when water was ready "for delivery at the highest possible level on the north line" of the N. W. ¼ described. The corporation had previously contracted to deliver water in a branch running on the north line of the customer's land to a point most convenient for delivery of water for use on the land; but physical conditions interfered with performance thereof. The corporation, on entering into the present contract, represented to the customer that it would deliver the water at the highest point on the north line of the quarter section, and for some time the customer received the water at such point. *Held*, that the contract obligated the corporation to supply water at such point, when construed as required by Civ. Code, §§ 1638, 1639, 1641, 1647, 1649, 1651, and Code Civ. Proc. § 1860, requiring the court to ascertain the intention of the parties, and, where a contract is partly written and partly printed, the written part controls, etc.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 311; Dec. Dig. § 254.*]

Appeal from Superior Court, Butte County; John C. Gray, Judge.

Action by A. Bonslett against the Butte County Canal Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

W. H. Carlin and Geo. F. Jones, for appellant. W. E. Duncan, for respondent.

CHIPMAN, P. J. Mandamus. Plaintiff brings the action to compel defendant to deliver water to plaintiff's land in accordance with the agreement set forth in his amended complaint. It is alleged that defendant is a corporation formed "for the purpose of appropriating and selling water for irrigation and domestic purposes in the county of Butte, * * * and of constructing and maintaining a system of canals, main branch, and lateral ditches for the distribution and sale of said water so appropriated by it;" that "defendant has heretofore constructed and is now the owner of a certain system of canals, main branch, and lateral ditches diverting water from Feather river, and conveying the same to various points in Butte and Sutter counties;" that part of said system of canals is a certain canal, which diverts water from the west side of said river about five miles below the city of Oroville, following the contour of the country south through Butte county into Sutter county, herein designated for convenience "Butte County Canal"; that, in addition to said canal, defendant is also "the owner of certain other canals, main branch, and lateral ditches, aggregating 20 miles in length, exclusive of said Butte County Canal, and is also the owner of all the water flowing in all of said system of canals;" that defendant "is, and at all of the times herein mentioned has been, the owner of a certain main branch or lateral ditch, designated for convenience as 'Lateral No. 6,' which said lateral diverts water from said Butte County Canal at a point [particularly describing it], and said main branch or lateral ditch extending thence in a general southwesterly direction through the lands of [describing various tracts of land], and ending on the north line of the N. W. ¼ of section 7, township 17 N., range 3 E. M. D. M., said lateral No. 6 being about four miles in length, and approximately running along the high ridge south of what is known as Morrison's slough; that the southwesterly or lower end of said Lateral No. 6 main branch ditch is on the highest possible level on the north line of the N. W. ¼ of said section 7;" that plaintiff is the owner of the S. E. ¼ of the N. W. ¼ of said section 7; that on June 29, 1904, defendant entered into an agreement with plaintiff, by which defendant agreed to sell to plaintiff "such water as might be required by him to irrigate the crops of trees growing upon said lands, herein described, not exceeding at any given time at a rate of one cubic foot of water per second for each 160 acres, * * * and agreed to deliver to the plaintiff the said water at the highest possible level on the north line of the N. W. ¼ of said section 7," a copy of which agreement is attached to the complaint as Exhibit A; that said agreement was prepared by defendant upon a form partly printed, used and furnished by defendant, a portion of which is written, as indicated; that plaintiff has complied with each and all the terms of said agreement, and is able and willing hereafter to continue to do so; that ever since April 15, 1904, there has been a large quantity of water flowing through said Butte County Canal, which quantity is, and at all times herein mentioned has been, sufficient to supply all consumers using water under contract with defendant, and at all said times defendant has had water sufficient to supply plaintiff for the irrigation of said land; that it is practicable to irrigate said lands from the end of said Lateral No. 6 on the highest point on the north line of the N. W. ¼ of said section 7, and said water is necessary to irrigate plaintiff's said land, and defendant is able to and can, if it desires, deliver water to plaintiff at said point as specified in said agreement. Then follow averments that, on May 1, 1910, plaintiff demanded of defendant to deliver water to plaintiff as by the terms of said agreement provided, said delivery to be made on May 5, 1910; that defendant was then in a position to deliver, and could have delivered, if it had desired, the water to which plaintiff was entitled under said agreement, but defendant neglected and refused to so deliver, or deliver water at all, to plaintiff; that, unless water is immediately delivered to plaintiff at the said point mentioned in said agreement plaintiff's crops will be damaged in the sum of $400; that plaintiff is the party beneficially interested, and has no plain, speedy, and adequate remedy in the ordinary course of law, and that plaintiff has no means of irrigating said land, except by and through said Lateral No. 6; and that the law specifically enjoins upon defendant, as a public service corporation, the duty of supplying water to plaintiff as set forth in said agreement.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Defendant interposed a general demurrer to the complaint, and also demurred thereto as ambiguous in certain particulars. Demurrer was overruled, and defendant answered: Admitted corporate capacity and its general purposes, as alleged in the complaint; denied ownership or control of the alleged branch or lateral ditch, but alleged ownership of a canal conveying water to various points in said counties; admitted ownership of water flowing through its main canal, but denied ownership of water in any alleged branch or lateral connecting with said canal; denied the averments of the complaint as to lateral No. 6; admitted plaintiff's ownership of land, as alleged, and the execution of the contract of March 29, 1904, but denied that by said, or any, agreement it agreed to deliver water on the north line of said N. W. ¼ of said section 7; admitted that defendant is able and can deliver water to plaintiff at the point specified in said agreement, but denies that said point is other than a point on the line of its main canal, at which point, it is alleged by defendant, the agreement specifically provided that water should be delivered, and alleged its readiness to deliver water to plaintiff at said point; denied the averments of injury to plaintiff's crops and as to damage thereto; alleged that by said agreement defendant agreed to furnish water to plaintiff at a point on its main canal, and not otherwise, which it is now, and at all said times has been, ready to do.

The court made findings substantially in accord with the averments of the complaint. In the matter of the alleged agreement, the court found that prior thereto, to wit, December 2, 1903, defendant entered into an agreement with plaintiff to deliver him water "in a branch line running on the north line of the said land of plaintiff," which agreement is set forth in the findings; "that thereafter it was discovered by the parties to said agreement that it was impracticable to run a main branch or lateral ditch upon the north line of said lands of plaintiff, for the reason that said north line was lower at the northwest and northeast corners than at the point between said points; that, for the purpose of overcoming and obviating the physical difficulty preventing the defendant from delivering said water through said ditch to be run upon said plaintiff's north line, the said plaintiff and defendant entered into a further agreement of the 29th day of June, 1904," the agreement mentioned in said complaint; "that in said agreement of December 2, 1903, defendant agreed to deliver said water to said plaintiff in a lateral or main branch ditch running on the north line of said plaintiff's land; that in and by said agreement of June 29, 1904, the said defendant agreed to deliver said water to plaintiff at the highest possible level on the north line of the N. W. ¼ of said section 7;" that the intention of the parties, by the agreement of June 29, 1904, was "to change the manner or mode of delivery of said water from delivering the same through a main branch or lateral ditch, running upon the north line of the land of plaintiff, to providing for the delivery of said water upon the highest possible level on the north line of lands of said plaintiff."

Plaintiff had judgment as prayed for, with $50 damages and costs of suit. Defendant appeals from the judgment, and from the order denying its motion for a new trial.

Defendant contends: (1) That the demurrer for insufficiency of facts should have been sustained; (2) that the court erred in admitting testimony for the purpose of construing the contract in question; (3) that plaintiff failed to prove the ability of defendant to comply with the writ prayed for.

It becomes necessary to set forth so much of the agreement of June 29, 1904, as will illustrate the points made by the parties, respectively. It consists of a printed form, used by defendant, in which certain portions are written, which latter will be indicated by italics. It purports to have been made by defendant as first party and plaintiff as second party:

"Witnesseth: That for and in consideration of the mutual covenants and considerations herein set forth, the parties hereto mutually agree, that is to say, the party of the first part agrees, to furnish to the party of the second part from its system of canals, to be constructed by it, all the water that may be required (not exceeding at any given time at the rate of 1 cubic foot per second for each 160 acres), for the purpose of irrigating the following described lands, to-wit: *The southeast quarter of the northwest quarter of section seven (7) in township seventeen north, range three east, containing forty (40) acres of land, in the county of Butte, state of California.*

"The party of the second part, A. Bonslett, hereby reserves *the right to re-locate water on any other forty (40) acres in the northwest quarter of said section seven (7) at any time prior to the use of water.*

"*First payment to commence at such a time as water may be ready for delivery at the highest possible level on the north line of the northwest quarter of said section seven (7)*—from the time of the completion and delivery of water in the main canal of said system to such a point as is most convenient for the delivery of water in same for use on said lands, at which point the said party of the second part agrees to take and receive such water.

"The part*y* of the first part agrees to place a suitable gate (if there is not already one there), in the bank of said canal or a main branch thereof, at the point at which water is to be delivered to the part*y* of the second part.

"The part*y* of the second part shall construct a ditch from said gate to said land at his own risk, cost and expense, and shall maintain and keep in repair the same; and it is further agreed that said ditch so constructed and maintained may, at the option of the part*y* of the first part, become a branch ditch of the said part*y* of the first part and be under its control; in such event it shall have the right to use and enlarge such ditch, provided such use shall not interfere with the flow of water to said land. And the part*y* of the second part hereby grant*s* to the party of the first part rights of way over and through said land, with right of entry thereon for the purpose of constructing, using and repairing ditches, canals, pipes and flumes across said land, and the flowing of water in a practical and customary manner, including all privileges necessary or convenient to the full enjoyment of said right of way; said rights of way, and uses to be used with due regard for the rights of the part*y* of the second part.

"It is understood and agreed that the water covered by this agreement shall not be used by the part*y* of the second part on any lands except those herein described, nor shall the same be by h*im* permitted to go to waste or be discharged upon other lands. * * *

"The part*y* of the second part, in consideration of the construction of said main canal, and ditch rights and delivery of water agree*s* to pay annually to the part*y* of the first part, at its office, in gold coin of the United States, on the first day of September of each and every year hereafter, the sum of *sixty (60)* dollars, (that is to say at the rate of $1.50 per acre annually), the first annual payment hereunder to become due and payable on the first day of September in the year in which water is first delivered at said gate, and shall be paid annually thereafter. * * *

"It is further agreed, that the part*y* of the first part may shut off the water for the purposes of general or special repair of its canals or ditches, dams, gates, etc., in the fall of any year and at such other times as urgent necessity may require; but shall restore the water in said canals or ditches as speedily as possible, the conditions, circumstances and requirements considered.

"If at any time the quantity of water flowing in the main canals shall be less than the full capacity thereof, each piece of land covered by water contracts with the part*y* of the first part shall be entitled only to its proportional share of the water then flowing. * * *"

Certain rules are found in the Codes, bearing upon the contentions of the respective parties, which must be borne in mind. The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity (Civ. Code, § 1638); and, subject to certain other rules, the intention of the parties is to be ascertained from the writing alone, if possible. Id. § 1639. The whole of the contract is to be taken together; each clause helping to interpret the other. Id. § 1641. A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates. Id. § 1647. Where there is ambiguity or uncertainty, the contract must be interpreted in the sense in which the promisor believed, at the time of making it, the promisee understood it. Id. § 1649. Where a contract is partly written and partly printed, or is written or printed under special directions of the parties, to meet their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties or contract in question, the written controls the printed parts. If the two are absolutely repugnant, the printed part must be disregarded. Id. § 1651. The circumstances under which the contract was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret. Code Civ. Proc. § 1860.

[1] Each party contends that the agreement is free from ambiguity and uncertainty, and that its intention is plainly to be ascertained from its language and needs no interpretation. Unfortunately the parties disagree radically as to the intention said to be imported so plainly by the language. The only conclusion to be derived from these conflicting views is that there must be ambiguity or uncertainty in this plain language, else two diametrically contrary results could not be reached from it, namely, by plaintiff, that defendant was to deliver water at the highest point on the north line of the said N. W. ¼ of section 7; by defendant, that it was to be delivered at a point on its main canal some miles distant from plaintiff's land. If forced to reach a conclusion from the language of the agreement alone, we think the more reasonable interpretation would be that given by plaintiff.

[2] Reading the entire instrument, and having in view the rules above stated, we should feel inclined to interpret the written clause, "first payment to commence at such time as water may be ready for delivery at the highest possible level on the north line of the northwest quarter of said section seven," to indicate the point of delivery of water, as well as indicating the time when payment for water was to commence. The clause immediately following is the provision on which defendant relies; but it is part of the printed portion of the contract, and must be har-

monized with the written part, or, if repugnant thereto, must be disregarded. One thing is clear to our minds, namely, that if there was uncertainty it was as to the point where the water was to be delivered by defendant. It agreed to deliver water to plaintiff "from its system of canals * * * for the purpose of irrigating the following described lands." It agreed to place a gate for plaintiff's use "in the bank of said canal, *or a main branch thereof*, at the point at which water is to be delivered to" plaintiff. The clause, "from the time of the completion and delivery of water in the main canal of said system to such point as is most convenient for the delivery of water in same for use on said lands," is printed, and is not connected with what precedes it in a way to show what is meant, and is in fact an incomplete sentence. It is not probable that plaintiff would have surrendered a contract more favorable to him, and have agreed to pay for water delivered some miles from his land, and without any apparent means of bringing it to his land; but defendant claims such to have been the agreement. There is certainly room for grave doubt as to the contract having such meaning. This doubt was satisfactorily resolved by the evidence, which, we think, was rightly admitted.

It appeared that, in December, 1903, a contract was made with plaintiff by the agent of defendant and in its behalf, by which, as found by the court, defendant agreed to deliver the water contracted for "in the main branch running on the north line of said place [plaintiff's land] of said system to such a point as is most convenient for the delivery of water in same for use on said lands, at which point the said party of the second part [plaintiff] agrees to take and receive such water." The finding of the court as to this contract, and the reason given for making a new one, is supported by the evidence. Plaintiff testified that at the time the second contract, June 29, 1904, was entered into it was represented to him that defendant would deliver the water at the highest point on the north line of the N. W. ¼ of section 7. At that time, neither the lateral nor the main canal had been completed. Later the canal was completed, and a ditch constructed to the point named, called "Lateral No. 6," and on through plaintiff's land. Defendant sent statements to plaintiff for rental for 1905, 1906, and 1907, which he ignored. He was called to defendant's office, and he then told defendant that he would pay for water when delivered to him; whereupon he was informed that the defendant would do so, and shortly after plaintiff received the water at the point claimed by him as agreed upon, and he paid defendant for water thus delivered for 1908 and 1909. This was an acquiescence in and confirmation by defendant of plaintiff's construction of the contract.

Upon the question of ownership or control of lateral No. 6, there was evidence that it was constructed by labor paid for by defendant, and we have seen that defendant so far controlled it as to deliver water to plaintiff through this lateral. Defendant introduced no evidence on any issue. We think the finding on the question of defendant's ownership or control of this branch ditch finds support in the evidence.

Defendant admits its liability to furnish all the water it agreed to deliver; its claim being that it was to be delivered at its main canal. That it did deliver water to plaintiff through the lateral No. 6 and collected rentals for the service is shown without conflict; and there was evidence from which the inference was justified that defendant has the ability, if so minded, to now comply with its agreement as the trial court found it to be. The demurrer rested on defendant's construction of the contract, and, as we think such construction unwarranted, the demurrer was rightly overruled.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

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18 Cal. App. 142

OSTROM v. WOODBURY. (Civ. 910.)

(District Court of Appeal, Third District, California. Feb. 1, 1912.)

1. PLEADING (§ 388*) — "MATERIAL VARIANCE."

A variance is not "material" unless it is so misleading as to prejudice the party in maintaining his action or defense on the merits.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1305–1308; Dec. Dig. § 388.*

For other definitions, see Words and Phrases, vol. 5, p. 4408.]

2. APPEAL AND ERROR (§ 1039*)—ACTION—VARIANCE.

Plaintiff sued on certain notes without reference to stock options indorsed on the back thereof. Defendant admitted the execution and delivery of certain notes to plaintiff and his assignor, but denied that the notes pleaded were those executed and delivered. He then pleaded as a special defense that the notes made were conditional, with certain conditions indorsed on the backs thereof which had not been complied with, and the notes offered and received in evidence bore the indorsements as alleged. *Held*, that defendant would be presumed to have known of any defense that he might have interposed against the notes, and was therefore not misled to his prejudice by the variance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075–4088; Dec. Dig. § 1039.*]

3. PLEADING (§ 403*)—COMPLAINT—CURE BY ANSWER.

Where plaintiff sued on certain notes without referring in the complaint to indorsements contained thereon, but defendant in a verified answer set up that the notes, by reason of such indorsements, were conditional and that the conditions had never been fulfilled, the averments of the answer were sufficient to tender an issue on the proposition whether the notes declared on were made and delivered by defendant and were therefore sufficient to cure the defect in the complaint.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1343-1347; Dec. Dig. § 403.*]

4. APPEAL AND ERROR (§ 1050*)—EVIDENCE—PREJUDICE.

Defendant executed notes to plaintiff and his assignor for money borrowed, and on the back of them wrote that they were given to protect plaintiff and his assignor from loss on account of the purchase of a thousand shares of mining stock and that the payees had the option during its life of surrendering the note and keeping the thousand shares of stock or surrendering the stock and receiving payment of the note. *Held* that, since such indorsements were in legal effect only an option or offer by defendant to the payees to accept the stock in payment of the notes in lieu of payment in money, such writing did not affect the nature of the notes as an absolute obligation to pay; and hence defendant was not prejudiced by parol evidence that the notes were given for a loan of money and that the indorsements were written by defendant merely to guarantee to the payees the right to purchase the mining stock in case the corporation "struck it rich," and that the payees never agreed to buy the stock or intended to do so.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

5. BILLS AND NOTES (§ 429*)—OPTIONS—REJECTION—COMMENCEMENT OF ACTION.

Where certain notes for money loaned had an option indorsed on the back thereof that the payees should be entitled to purchase certain mining stock in lieu of payment of the notes in money, the commencement of an action against the maker on the notes constituted an election to reject the option and to require payment according to the terms of the face of the notes.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1245-1250, 1262, 1263; Dec. Dig. § 429.*]

Appeal from Superior Court, Sierra County; Stanley A. Smith, Judge.

Action by Isaac Ostrom against L. P. Woodbury. Judgment for plaintiff, and defendant appeals. Affirmed.

Wehe & Redding, for appellant. James F. Hunt, for respondent.

HART, J. The complaint in this action is in three counts: (1) For the sum of $267, alleged to have been loaned by plaintiff to the defendant; (2) on a promissory note for the sum of $500 and interest, said note having been, it is alleged, executed in favor of and delivered to plaintiff by the defendant; and (3) on a promissory note executed by defendant in the sum of $500 in favor of one Richard Lindvall, the latter having assigned said note to the plaintiff. The court found in favor of plaintiff on all the counts of the complaint and thereupon caused to be entered in favor of plaintiff judgment for the sum of $1,459.41. This appeal is by the defendant from the order denying him a new trial.

The general contention of the appellant is that the evidence does not support the decision of the court, the action having been tried by the court without a jury, and that errors were committed in the admission of certain evidence. The note, as pleaded in the second count of the complaint, reads as follows: "Alleghany, November 9, 1908. Six months after date I promise to pay to the order of Isaac Ostrom, five hundred dollars for value received, with interest at 7 per cent. per annum, from date until paid, both principal and interest payable only in United States gold coin, and in case suit is instituted to collect this note or any portion thereof — promise to pay such additional sum as the court may adjudge reasonable as attorney's fees in said suit. L. P. Woodbury." The note executed by Woodbury to Lindvall and as pleaded in the third count of the complaint is in words and figures precisely the same as those of the foregoing note; the only difference being in the name of the payee. The answer traverses the averments of the first count of the complaint and, besides, sets up a special defense thereto which need not be further noticed, since the sole complaint of appellant against the order is involved in the attack upon the rulings of the court with respect to the second and third counts. As to the last-mentioned counts, the answer denies that the defendant executed the notes as therein declared upon and described, but alleges that each of the notes that he did execute and deliver to the respective payees named in said notes "was a conditional note, with certain conditions indorsed on the back thereof, which conditions have not been complied with," and that he is not indebted to the plaintiff on account of said notes "in any sum of money whatever, or at all." The real point of objection to the soundness of the order denying the defendant a new trial lies in the contention: (1) That there is a material variance between the allegations of the second and third counts of the complaint and the proof offered and received in their support; and (2) that, in allowing said evidence, the court committed prejudicial error. The note made in favor of and delivered to the plaintiff by the defendant contained, upon the back thereof, the following: "This note is given to protect Isaac Ostrom from loss on account of the purchase of 1,000 shares of Red Star Gold Mining Co.'s stock. Said Ostrom has the option during the life of this note of surrendering this note and keeping the 1,000 shares of stock or surrendering the stock and receiving payment on the note." This indorsement is signed by the maker of the note, defendant herein. The note from Woodbury to Lindvall, and which is the subject of the third count of the complaint, bears upon its back, mutatis mutandis, a similar indorsement. At the trial, the defendant objected to the admission of the notes in evidence on the ground that the notes offered as evidence were not the notes pleaded. Thereupon the plaintiff offered the face of the notes in evidence, to which defendant objected on the first-mentioned ground and on the additional ground that "counsel could not offer half of a note," and "that plaintiff must recover on the notes pleaded and not upon" other contracts. The court reserved its rulings on all these objections until a later period in the progress of the trial. At the conclusion of plaintiff's testimony, the court made an order overruling the objections to the evidence referred to, and counsel for defendant thereupon moved to strike said testimony from the record upon the grounds upon which the original objections thereto were urged. The court denied this motion, and the defendant thereupon rested his case without offering proof in support of the allegations of his answer or upon the merits of his special defenses to the second and third counts of the complaint.

[1] It is clearly manifest, from the averments of the answer and the course pursued by the defendant in the trial, that the variance complained of did not actually mislead him to his prejudice in maintaining his defense upon the merits, had he chosen to press the special defenses set up in his answer upon their merits, and it is the rule in this state that, where the variance is not so misleading as to prejudice a party in maintaining his action or defense upon the merits, such variance is immaterial. Code Civ. Proc. § 469; 31 Cyc. p. 703, and California cases cited in the footnote.

[2] The defendant does not deny, but admits, the execution and delivery of certain notes to the plaintiff and his assignor, and merely denies that the notes pleaded in the complaint are the notes so executed and delivered. He is therefore to be deemed to have known of any defense, if any, which he might have interposed against recovery upon the counts setting up the notes. Indeed, the averments of his answer, wherein he sets up an alleged special defense against the validity of the claims of the second and third counts of the complaint, are plainly affirmative of the possession of actual knowledge by him of the defense that he could and in fact did by his pleading, interpose to a recovery upon the notes as pleaded in the complaint. The answer, replying to the second and third counts of the complaint, alleges, as we have seen, that the notes made by the defendant in favor of Ostrom and Lindvall were "conditional notes, with certain conditions indorsed on the backs thereof, which conditions have not been complied with." The notes which were offered and received in evidence in support of plaintiff's case bore upon their backs the indorsements referred to by the answer. How could the defendant have been misled to his prejudice in maintaining his defense when he set up what appears to be and evidently is the only defense that he could plead against recovery upon the notes?

Obviously, there does not and cannot exist any ground for a diversity of opinion as to the elementary rule that the probata and allegata must correspond. And if the defendant had rested upon a mere denial of the execution of the pleaded notes and the writing on the back of the notes actually made and delivered by him might be held to be material or as vitally affecting the nature of the instruments, he would now be in a position to claim a want of correspondence between the averments of plaintiff's complaint and the proof. But, in the place of such a course, he, as we have shown, preferred to set forth in his answer the nature of the contracts to which he really bound himself, and in so doing betrayed evidence of the only defense, if defense at all, which it was within his power to advance against the second and third counts of the complaint.

We are unable to perceive an analogy, as appellant insists exists, between the case at bar and the cases of Owen v. Meade, 104 Cal. 179, 37 Pac. 923, Bailey v. Brown, 4 Cal. App. 515, 88 Pac. 518, and Edinger v. Sigwart, 13 Cal. App. 667, 110 Pac. 521. In none of those cases does the question arise whether the answer to the complaint is such as to disclose that the defendant was or was not misled by the variance between the complaint and the evidence. In each of those cases it is merely held that the evidence failed to establish the contract as pleaded, and, of course, a judgment obtained under such circumstances would be without a prop to support it.

[3] Moreover, the effect of the pleading of the special defenses in the answer was to aid the complaint in those particulars in which it is claimed that plaintiff's pleading is defective and to supply the omissions objected to. Herman v. Hecht, 116 Cal. 553, 559, 48 Pac. 611; Herd v. Tuohy, 133 Cal. 55, 60, 65 Pac. 139; Lyles v. Perrin, 134 Cal. 417, 66 Pac. 472; Daggett v. Gray, 110 Cal. 169, 42 Pac. 568; Pomeroy's Remedies and Remedial Rights, § 579. The answer is verified, and, as seen, the defendant therein, in effect, alleges that the notes as pleaded in the complaint were not the notes executed by him, in that it did not appear from the complaint that they bore upon their backs the written matter referred to. The averments of the answer with regard to the notes were sufficient to and did tender a clear issue upon the proposition whether the notes upon which the plaintiff declared were the notes made and delivered by the defendant.

Manifestly, under our view of the issues which were tendered by the pleadings, the rulings of the court admitting the notes in evidence were perfectly proper. But it is further objected that the court erred in permitting plaintiff and his assignor to explain the writing on the backs of the notes. If there was error in allowing some of the testimony concerning said writing, we think it was without prejudice.

[4] The court found that the written matter on the backs of the notes was "surplusage." This finding was based upon the testimony of Ostrom and Lindvall, payees of the notes, to the following effect: That when the defendant, having previously secured a promise by Ostrom and Lindvall for a loan of $500 from each, delivered the notes to the payees, he explained that he desired them to have some of the stock in the Red Star Gold Mining Company and that his purpose in putting the writing on the backs of said notes was merely to thus guarantee the right to Ostrom and Lindvall to purchase and acquire 1,000 shares of stock each in the corporation in the event that said mining corporation "struck it rich"; that the payees never agreed to buy stock in said corporation, never intended to do so, and never authorized the defendant to put the writing referred to on the backs of the notes; that they merely made a straight loan of the money evidenced by the notes and expected payment of the same strictly according to the terms of the face thereof. It may be conceded that some of this testimony was incompetent, still it was without prejudice, for we think the court would have been justified in making the finding referred to upon the instruments themselves and proof that the payees did not accept the shares of stock mentioned in the writing in payment of the notes. Disregarding that portion of the testimony of Ostrom and Lindvall wherein they declare that they did not consent to the writing on the backs of the notes and did not at any time consider the proposition of accepting the shares of stock in payment of the notes, and viewing said writing as having been assented to by the payees, the most that can be said of it is that, if anything at all, it constituted, in legal effect, only a mere offer or option tendered by the defendant to Ostrom and Lindvall to accept the number of shares of stock in said mining corporation mentioned in the writing in payment of the notes in lieu of their payment in gold coin, as called for by the notes. This writing could no more affect or change the nature or effect of the face of the instruments than if it had been committed to different pieces of paper, unconnected with the notes themselves. The election of the payees to enforce payment of the notes according to the tenor of the face thereof would in either case amount to a rejection of the option to take the stock or a refusal by the payees to exercise their right to do so. And, in this case, even viewing the writings on both sides of the instruments as constituting one entire contract, said instruments, upon the refusal of the payees to take the stock, would at once become what, upon their face, they purport to be and are—unconditional promises to pay the sums of money specified therein in gold coin.

[5] According to the undisputed testimony, the payees had never received any shares of stock in the mining corporation, and therefore they had nothing to surrender, as a condition precedent to their right to enforce payment of the notes in gold coin, except the bare right or option to take or acquire the stock. This right they surrendered the moment they instituted an action for a recovery upon the notes. In other words, the commencement of the action amounted to an election to reject the option and to require the payment of the notes according to the terms of the face thereof. And it was undoubtedly upon the theory as thus stated that the court found that the written matter on the backs of the notes was "surplusage"—that is, immaterial—which finding, under the view we take of the legal effect and scope of said written matter, is strictly true, since, upon the election of the payees to reject the offer thereby tendered by the defendant, said writing became, ipso facto, nugatory or of no effect.

We can perceive no reason for disturbing the order, and it is therefore affirmed.

We concur: **CHIPMAN, P. J.; BURNETT, J.**

(18 Cal. App. 174)

SAN FRANCISCO MERCANTILE UNION v. MULLER. (Civ. 900.)

(District Court of Appeal, First District, California. Feb. 8, 1912.)

1. Bills and Notes (§ 92*)—Consideration—Evidence—Sufficiency.

Release or compromise of a doubtful claim, such as uncertain liability on a bond, is sufficient consideration to sustain a note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 166–173, 175–212; Dec. Dig. § 92.*]

2. Contracts (§ 338*)—Action—Fraud—Necessity of Pleading.

To be available as a defense in an action on a contract, fraud must be specially pleaded.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1691, 1692, 1695, 1698–1705; Dec. Dig. § 338.*]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by the San Francisco Mercantile Union against J. H. W. Muller. Judgment for defendant, and plaintiff appeals. Reversed.

Maurice R. Carey, for appellant. William J. Herrin, for respondent.

HALL, J. This is an appeal by plaintiff from a judgment in favor of defendant. Plaintiff sued on a promissory note executed by defendant to one Jacob Gorfinkel and by him assigned to plaintiff. Defendant admitted the execution of the note, denied the assignment to plaintiff, and pleaded that there was no consideration for the note. The court found in favor of plaintiff as to the assignment, but found that defendant received no consideration for the execution and delivery of said note, and for that reason gave judgment for defendant.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] It is insisted by appellant that the evidence does not support the finding that defendant received no consideration for the execution and delivery of the nôte, and this presents the only matter to be determined upon this appeal. We think the contention of appellant must be sustained. It is shown without dispute that one Lena Sander Hare let a contract to one Bell, whereby he agreed to erect a building for her for the sum of $5,450. This contract was dated October 29, 1908, on which day it was filed in the office of the county recorder. The said Bell, as principal, and said defendant Muller and one Smith, as sureties, executed to said Lena Sander Hare a bond for the faithful performance of said contract, whereby they bound themselves unto Lena Sander Hare as owner and sole obligee in the sum of $1,350—that said Bell would construct and complete said building in accordance with the terms of said contract, and would deliver said building to said Lena Sander Hare free from all liens, claims, or other incumbrances for which said Bell might be responsible. Bell commenced the construction of the building under the contract, but, after receiving payments under his contract to the amount of $2,000, he abandoned the same. Lena Sander Hare, through her attorney, Maurice Carey, immediately notified defendant of the abandonment of the contract by Bell, and Muller for a time considered the proposition of completing the building himself, but in the meantime mechanics' liens under the Hare-Bell contract, aggregating close to $1,700, were filed for record in the office of the county recorder. This fact was also communicated to Mr. Muller. Finally Mr. Carey, as the attorney for Mrs. Hare, sent Jacob Gorfinkel, who was connected with the office of Mr. Carey, to effect a settlement with Mr. Muller of his liability upon the bond. Gorfinkel called upon Muller, informed him that the liens against the building amounted to $1,600, and some odd dollars, and that he and the other bondsman were "stuck" for it. Gorfinkel pressed for a settlement of the matter, and finally (and this is from Muller's own testimony) Muller said: "I will compromise with $600." Accordingly defendant gave to Gorfinkel the note in suit, and took from him the following: "Fitchburg, Cal., June 10, '09. Received of J. H. W. Muller his promissory note for six hundred dollars in full payment and release of his obligation on that certain bond signed by him and Frank Smith jointly as surety for the performance of contract entered into between William Bell and Lena Sander Hare, building contract No. J 19250, filed October 29, 1908. Maurice R. Carey, attorney for Lena Sander Hare, by Jacob Gorfinkel." There being some doubt as to the authority of Gorfinkel, it was agreed that the settlement was to be subject to the approval of the real party in interest. Subsequently she ratified the settlement as follows: "San Francisco, Cal. August 18, 1909. Mr. Maurice Carey, City—Dear Sir: You are hereby permitted to accept for me the note of J. H. W. Muller, as given to Jacob Gorfinkel on June 10, 1909, the same to be a full release of Mr. Muller's obligation to me on the bond for the construction of Bell-Hare contract; and if you see fit to take the same, in accordance with your wishes, I hereby sell, assign and transfer all my interest in said note to the San Francisco Mercantile Union, a corporation. Very truly yours, Lena Sander Hare." Mr. Muller was notified by Mr. Carey, as the attorney for Lena Sander Hare, of her ratification of the settlement. Lena Sander Hare succeeded in letting another contract for the completion of the building for the sum of $2,950, which, added to the sum of $2,000 paid Bell, the original contractor, made the sum of $4,950, which was $500 less than the original contract price. She also succeeded finally, but not until six months after the date of the note in suit, in effecting a compromise and settlement of the claims of lien filed under the Hare-Bell contract for $500. It thus appears that the building finally cost her no more than the original contract price, and it seems to be for this reason that respondent claims that the note in suit was without consideration.

But the note was given in settement of respondent's obligation upon the bond. As consideration for the execution of the note respondent was given a release of his obligation under the bond, and at the time of the giving of the note it was uncertain what respondent's liability upon the bond might be. The note was given and received in compromise of a doubtful claim. The compromise of a doubtful claim is a valid consideration for a promise or new contract. Witmar Bros. v. Weid, 108 Cal. 569, 41 Pac. 491; Racouillat v. Sansevain, 32 Cal. 376; Swem v. Green, 9 Colo. 358, 12 Pac. 202; Denney v. Parker, 10 Wash. 218, 38 Pac. 1018; White v. Pacific States S. L. & B. Co., 21 Utah, 23, 59 Pac. 527; Schmidt v. Demple, 7 Kan. App. 811, 52 Pac. 906. In the case at bar the settlement and compromise was effected at a time when respondent's liability under the bond was undetermined. The settlement was ratified by Lena Sander Hare, and she became bound thereby. Denney v. Parker, supra. The subsequent settlement of the claims of lien for a sum which enabled her to secure the completion of the building at a cost not exceeding the original contract price does not establish that there was no consideration for the note. See cases above cited.

[2] Some suggestion is made in respondent's brief to the effect that the note was procured by fraud. It is sufficient to say that no such defense was pleaded. One relying upon the defense of fraud in the procurement of a contract must specially plead the fraud. Witmer Bros. Co. v. Weid, 108 Cal. 569, 41 Pac. 491; Cal. Steam Nav. Co. v. Wright, 8 Cal. 585; McCreary v. Marston, 56 Cal. 403. Neither is there anything in the record to support the theory that the bond was originally absolutely void, as one given under section 1203, Code of Civil Procedure. The bond is clearly a common-law bond given for the protection of the owner.

As the finding that the respondent received no consideration for the execution of the note is not supported by the evidence, the judgment must be reversed; and it is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

18 Cal. App. 178

WAGY v. ATKINSON. (Civ. 856.)

(District Court of Appeal, Second District, California. Feb. 8, 1912.)

1. TRIAL (§ 404*) — FINDINGS — CONCLUSIVENESS.

Any presumption that stock deposited as collateral was sold at the same market value as it had been given is overcome by a finding that it was sold for a certain fixed sum, which was the highest obtainable price.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 957-962; Dec. Dig. § 404.*]

2. JUDGMENT (§ 256*)—FINDINGS—SUFFICIENCY TO SUPPORT JUDGMENT.

A general finding that all the allegations of a complaint in an action on a note were true, and that all the allegations in the answer and cross-complaint were untrue, is sufficient to support a judgment for plaintiff.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 446-454; Dec. Dig. § 256.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by A. C. Wagy against Robert Atkinson. Judgment for plaintiff, and defendant appeals. Affirmed.

F. E. Davis and J. W. Cochrane, for appellant. Isadore B. Dockweiler, for respondent.

ALLEN, P. J. Action upon a promissory note. The complaint alleged the execution by defendant to plaintiff of a promissory note set out in the complaint, attached to which note was an agreement in substance to the effect that 5,000 shares of mining stock, "the market value of which is now $650," had been deposited with plaintiff as collateral security for said note, that the right reposed in plaintiff to call for additional security, and that failure to respond forthwith to such call matured the obligation, and, on the nonpayment of the note when due, authority was given plaintiff to sell any securities so held as collateral, without demand, advertisement, or notice, and the plaintiff was authorized to buy the same and, after deducting legal costs and expenses of collection, was required to apply the proceeds of such sales to the amount due on the obligation, and the maker of the note agreed to pay the holder any deficiency upon demand. It is alleged that, after the maturity of the note, plaintiff sold 13,000 shares of mining stock for $104, the same being held as collateral for such obligation; that no part of the interest on said note had been paid, and, after applying the credit of $104, there remained unpaid the sum of $496, the balance of the principal of said note, payment of which had been demanded before suit was brought. Judgment was prayed accordingly. The answer denied the execution of the note; denied any consideration therefor; alleged that the whole transaction was a gambling transaction; denied that the stock was sold for $104; denied that the sale was bona fide or for the value thereof, alleging it was an illegal and fraudulent transaction; and denied that there was anything unpaid upon the note. By way of cross-complaint, defendant sets up facts tending to show a conversion of the 13,000 shares of mining stock, and he asks judgment for the value thereof. There was an answer filed to this cross-complaint, denying all of the allegations thereof. Upon the trial the court found that every allegation contained in plaintiff's complaint was true, and that each and every denial contained in the answer of defendant, and in the separate answer and cross-complaint filed by defendant, is untrue and incorrect. Judgment was accordingly rendered for plaintiff. From this judgment defendant appeals.

[1] Appellant contends that the collateral contract shows that the stock was of the value of 13 cents a share when deposited, and that the presumption of law is that the stock was sold at the same market value as that given it by the contract. Whatever presumption may attach, the same is overcome by the finding of the court, presumably upon competent testimony, that the stock was sold for a certain fixed sum, and that the sale was bona fide and for an adequate and highest obtainable price. This finding the court makes in response to the allegations of the answer. The complaint was sufficient to state a cause of action.

[2] The general finding that all of its allegations were true, and that all of the allegations of the answer and cross-complaint were untrue, were and are sufficient to support the judgment.

We see no merit in the appeal, and the judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(18 Cal. App. 166)

Ex parte GIANNINI. (Cr. 228.)

(District Court of Appeal, Second District, California. Feb. 8, 1912.)

1. CRIMINAL LAW (§ 982*)—SENTENCE—SUSPENDED SENTENCE.

Under Pen. Code, § 1203, amended by Act April 6, 1911 (St. 1911, p. 689), providing that the court may suspend the imposing or execution of sentence for a period of time not exceeding the maximum possible limit of sentence, upon terms and conditions as it shall determine, one convicted of a misdemeanor, the maximum possible sentence for which is six months, and whose suspended sentence was 90 days, may at any time during the six months be committed under the sentence for the full period thereof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.*]

2. CRIMINAL LAW (§ 982*)—SENTENCE—SUSPENDED SENTENCE—PROBATION.

The provision of such statute that the court, on suspension of the sentence, shall place the prisoner under the charge and supervision of the probation officer is not mandatory, as the court has an absolute power of suspension of sentence; and a failure to place the person released in charge of a probation officer does not invalidate the suspension.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.*]

3. CRIMINAL LAW (§ 982*)—SENTENCE—SUSPENSION—EFFECT.

Where the trial court by its judgment suspended execution of sentence, such judgment is effective until revoked or modified; and until revoked or modified it is improper to issue a commitment for the person convicted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.*]

4. CRIMINAL LAW (§ 259*)—JURISDICTION—APPEARANCE BY RECORD.

No intendments being in favor of the judgment of a justice, his authority to issue a commitment must affirmatively appear; and so, where the record shows that the justice suspended a sentence, but does not disclose any modification or revocation of the suspension, an order of commitment under the suspended sentence is invalid.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 562–566; Dec. Dig. § 259.*]

5. CONSTITUTIONAL LAW (§ 74*)—JUDICIAL POWER—ENCROACHMENT ON EXECUTIVE.

Pen. Code, § 1203, amended by Act April 6, 1911 (St. 1911, p. 689), authorizing the court, judge, or justice to suspend sentence during good behavior, is not invalid as an encroachment on the functions and duties of the chief executive of the state.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 124; Dec. Dig. § 74.*]

In the matter of the application of Francisco Giannini for writ of habeas corpus, directed against the sheriff of Tulare county. The writ issued, and petitioner discharged.

Flint, Gray & Barker, H. B. McClure, H. T. Miller, and G. W. Zartman, for petitioner. Frank Lamberson, Dist. Atty., and James M. Burke, Deputy Dist. Atty., for respondent.

PER CURIAM. Petitioner, on the 10th day of June, 1911, entered a plea of guilty to the charge of unlawfully selling intoxicating liquor, contrary to the provisions of an ordinance of Tulare county. The court thereupon adjudged that, as punishment for the offense committed, "the said defendant, Francisco Giannini, do pay a fine of $75, and, in case said fine is not paid within one hour from the time of rendering judgment, that you, Francisco Giannini, defendant, be imprisoned in the county jail of the county of Tulare, state of California, until the fine be duly satisfied, in proportion of one day's imprisonment for every dollar of the fine, or until lawful payment shall have been made of such proportion of said fine as shall not have been satisfied by imprisonment, at the rate above prescribed. And it is further ordered by this court that the defendant, Francisco Giannini, be imprisoned in the county jail of the county of Tulare, state of California, for the term of 90 days, and this latter sentence is suspended during the good behavior of defendant, Francisco Giannini, and on any violation made by defendant in future, commitment will issue for this imprisonment. Done in open court this 10th day of June, 1911." Thereafter, on the 28th day of November, 1911, the justice of the peace issued a commitment, commanding the sheriff forthwith "to take, arrest, and safely keep and imprison the within-named Francisco Giannini in the county jail of said county of Tulare until said judgment shall have been satisfied as therein prescribed." Petitioner was thereupon taken into custody upon said commitment, and he seeks a discharge from such custody by reason thereof. The return of the officer justifies the detention of petitioner, based upon the commitment so issued.

[1] The question presented upon this application is as to the validity of such commitment. Petitioner's chief contention is that, under the provisions of section 1203, Penal Code, as amended April 6, 1911 (Stats. 1911, p. 689), the power of the court to suspend sentence, or to revoke probation and execute the original sentence, cannot extend beyond the period of time fixed by the court as the sentence; and that, more than 90 days having elapsed between the date of the sentence and the issuance of the commitment herein, the court no longer possessed power to direct the commitment of petitioner. With the general proposition, that the power of the court to issue a commitment cannot extend beyond the time of the sentence fixed by the court, we do not agree. Section 1203, Penal Code, as so amended, provides: "The court, judge or justice thereof, may suspend the imposing, or the execution of sentence, and may direct that such suspension may continue for such period of time, not exceeding the maximum possible term of such sentence, and upon such terms and conditions as it shall determine, which terms and conditions may include, in the discretion of the

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

court, the requirement of bonds for the appearance of the person released upon probation before the court, at any time that the court may require such appearance in the investigation of any alleged violation of said terms and conditions of probation, and such bonds may be at any time by the court exonerated without affecting any of the other terms or conditions of such probation; and in case of such suspension of imposition or execution of sentence, the court shall place such person on probation and under the charge and supervision of the probation officer of said court, during such suspension, or under the charge and supervision of the probation officer of the county in which such probationer is by the court permitted to reside." The offense with which petitioner was charged being a misdemeanor, as declared by the ordinance, the possible maximum term of sentence, assuming that section 19 of the Penal Code applies to the violation of an ordinance, is six months imprisonment. That, in our opinion, is the maximum possible term of sentence; that it is competent for a court to impose any sentence of imprisonment less than this maximum term, and, notwithstanding such fixation, to place the defendant upon probation for the full maximum term; and that when a defendant is placed on probation without limitation of time the same extends to such maximum term of sentence, and no longer. It follows, then, that if all other proceedings of the justice were regular, he possessed authority under the law to place petitioner upon probation for the full period of six months.

[2] Respondent's contention, however, is that the court possessed no power under the statute to place a party upon probation, except in instances where the party is placed in the hands of a probation officer, and that the order of the court should so specify; in other words, that the mode prescribed by the statute is the measure of the power of the court. We think a proper construction of the statute is that absolute power of suspending sentence is given by this section, and that where a court acts under the statute, within the limits thereof, such order of suspension is not invalidated because the court omits a duty imposed by law upon it, namely, to place the party in charge of a probation officer. The functions of the probation officer are not to hold the defendant in custody, but to exercise a supervisory control over his conduct as an arm or instrument of the court. The legislative intent that no part of the sentence is included within the period of the probation officer's surveillance is apparent, when it is considered that upon revocation of the original order of suspension the law permits defendant's commitment for the full term of the sentence as originally pronounced.

[3, 4] The court having by its judgment suspended the execution of this sentence under the statute, and having jurisdiction so to do, the same became an operative judgment of court, and so remains until revoked or modified by an order regularly made. This statute confers the power of revocation and modification upon the court for any cause which to the court is good and sufficient; but that a court should possess the power to issue a commitment for one whose sentence had theretofore been suspended, a revocation or modification of the order of suspension is an essential prerequisite. No intendments being in favor of the judgment of a justice, his authority to issue a commitment must affirmatively appear. The record does not disclose that any such modification or revocation was ever made by the justice in the case of petitioner, and the commitment was therefore, in our opinion, issued without authority of law, and the prisoner's detention thereunder unlawful.

We think it unnecessary to distinguish the cases of In re Collins, 8 Cal. App. 367, 97 Pac. 188, and In re Moore, 12 Cal. App. 161, 107 Pac. 129. These cases, and those of the Supreme Court upon which they are based, were all constructions of section 1203 of the Penal Code prior to the amendment of 1911, before which date no power of suspension of sentence after judgment was given the court; hence it followed that an attempt at suspension was void, and the defendant was properly treated as an escape, or as one having consented to a delay in the issuance of the execution. Since the adoption of the amendment, above cited, the power of a court to suspend sentence after judgment cannot be questioned.

[5] We are not of opinion that section 1203, Penal Code, as now existing, interferes in any way with the functions and duties of the chief executive of the state. We think it competent for the Legislature, and an exceedingly wise provision, to confer upon the courts this power of suspension of sentence to be exercised in proper instances, and that its enactment in no wise impairs the functions of a co-ordinate branch of the government. Many other points are presented; but, entertaining the views hereinbefore expressed, a discussion thereof is unnecessary.

No authority for the issuance of the commitment appearing, the same in invalid, and the prisoner is ordered discharged from custody.

(18 Cal. App. 159)

KELLEY v. LONG. (Civ. 896.)

(District Court of Appeal, Third District, California. Feb. 7, 1912.)

1. LANDLORD AND TENANT (§ 172*)—CONSTRUCTIVE "EVICTION"—REQUISITES.

While actual ouster of a tenant is not required to constitute an "eviction," which results from any act of the lessor in depriving the tenant of the beneficial enjoyment of the premises, there must be a substantial interference with the tenant's enjoyment.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 695–703; Dec. Dig. § 172.*

For other definitions, see Words and Phrases, vol. 3, pp. 2517–2521.]

2. LANDLORD AND TENANT (§ 172*) — CONSTRUCTIVE EVICTION—WATER RIGHTS.

The lessee of a ranch was not constructively evicted by the lessor's act in permitting a third person to use water rights appurtenant to the premises without the tenant's consent, where the interference with the latter's rights was brief and insignificant.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 695–703; Dec. Dig. § 172.*]

3. LANDLORD AND TENANT (§ 172*) — CONSTRUCTIVE EVICTION—TRESPASS.

Mere trespass committed or permitted by the landlord does not constitute eviction.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 695–703; Dec. Dig. § 172.*]

4. LANDLORD AND TENANT (§ 186*)—RENT—ENJOYMENT OF PREMISES.

A lessee of lands may be found to have had sole and exclusive possession, so as to be liable for rent, notwithstanding a brief and insignificant trespass upon water rights appurtenant to the lands.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 755–762; Dec. Dig. § 186.*]

Appeal from Superior Court, Lassen County; J. O. Moncur, Judge.

Action by Emily B. Kelley against H. C. Long. Judgment for plaintiff, and defendant appeals. Affirmed.

Grover C. Julian, for appellant. F. A. Kelley, for respondent.

HART, J. This is an action for the recovery of rent, alleged to be due the plaintiff from the defendant under the terms of a certain lease executed by the plaintiff and one E. A. Kelley of a tract of land, known as the "Kelley Ranch," and situated in Lassen county. (E. A. Kelley, subsequently to the execution of said lease, conveyed and transferred to plaintiff all his interest in the demised premises.)

The complaint prayed for judgment in the sum of $454.34, but the court, by which the action was tried, a jury having been waived by the parties, awarded judgment in the sum of $414.34. This appeal is prosecuted by the defendant from the judgment, supported by a bill of exceptions.

By the lease, the lessors demised to the defendant the land therein described, together with the appurtenances thereto, for the term of five years, commencing on the 1st day of March, 1908, at the yearly rental of $500 in United States gold coin, to be paid as follows: Two hundred and fifty dollars on or before the 1st day of March, and $250 on or before the 1st day of October, of each and every year "during the five-year term of this lease, as aforesaid." The gravamen of the complaint is that the defendant has paid the sum of $45.66 only on account of said rent for the year commencing on the 1st day of March, 1909; and that there is therefore a balance due and owing plaintiff from defendant on account of the rent for said year the sum for which plaintiff prays judgment.

Among other covenants of said lease is the following: "That the said second party, paying the said rent and performing said covenants and promises, shall and may at all times peaceably have, hold and enjoy the said premises, without any manner of let, suit, trouble or hindrance of or from the said first parties or any other person whomsoever."

The answer admits the execution of the lease as alleged in the complaint, denies that any balance is due plaintiff from defendant on account of the rent referred to in the complaint, and then, as a special defense, and upon which a counterclaim in the sum of $717.80 is set up, the answer, in substance, alleges: That, in connection with the demised land, there are certain water rights and ditches from Susan river, which said water rights are exclusive to the use of said real property and under the ownership and control of the lessors; that the land in question is suitable for and adaptable to agricultural purposes when properly irrigated and watered by means of the water rights and ditches in connection therewith; that defendant entered into the possession and occupancy of said land and the water rights appurtenant thereto, "believing that he had the sole and exclusive right to use such water and water rights for the purposes of irrigation on the said Kelley ranch; that he thereupon planted crops on said premises and property, and prepared to irrigate and cultivate and properly harvest the same;" that about the 1st day of April, 1909, one F. H. Shanks, then in possession of and occupying a portion of the Kelley ranch, known as the "Frank Kelley Place," without the consent of the defendant, "and with the knowledge and consent of the plaintiff herein, took the possession and control of all the water and water rights appurtenant to and connected with said leased premises and interfered with defendant's use of the same, and hindered and prevented said defendant from using the said water for irrigation purposes on said leased premises;" that thereafter, and during the irrigating season of 1909, said Shanks, "without the consent of defendant, and with the full knowledge and consent of the plaintiff herein, notwithstanding the covenants and agreements on the part of plaintiff in said lease contained, was permitted and allowed by said plaintiff to continue in the possession of said water and water rights, and to use the same in such manner as to hinder and prevent said defendant from harvesting his crops, or from making proper or any use of said water upon said leased premises." It is then alleged that the damage to the defendant by reason of the aforesaid acts of said Shanks, with the knowledge and consent of the plaintiff, amounted to the said sum of $717.80.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The court found that the defendant, on the 1st day of March, 1908, by virtue of the lease referred to by the complaint, went into the possession and occupancy of the demised premises, and "he ever since has been and still is in possession and occupancy of the same as such lessee, together with the water and water rights appurtenant thereto and used in connection therewith; that during all of said time said defendant had the sole and exclusive possession and right of possession of said premises and water rights, and had the sole and exclusive right to use such water and water rights for irrigation purposes on said Kelley ranch;" but the court found further that about the 1st day of April, 1909, F. H. Shanks did interfere with the defendant's use of a portion of the water and water rights referred to in the answer, and that such interference was with the knowledge and consent of the plaintiff, and resulted in damage to the defendant in the sum of $40. The court, however, found that said water and water rights were not interfered with by Shanks, with the knowledge and consent of plaintiff, subsequent to the 1st day of April, 1909, as charged in the answer, and that the defendant did not suffer damage in the sum of $717.80, as alleged by him. The court concluded, as a matter of law, that the plaintiff was entitled to judgment in the sum sued for, minus the sum of $40, found to be the extent of the damage sustained by the defendant by the acts of Shanks with the consent of the plaintiff.

[1, 2] The main contention of the appellant is that the act of the plaintiff in consenting to the use of the water and water rights appurtenant to the demised premises by Shanks and the latter's use thereof or interference therewith, with plaintiff's consent, amounted to an eviction of plaintiff from the demised premises, and therefore destroyed the right of plaintiff to the rent reserved by the lease. The rule invoked and sought to be applied in this case by appellant is thus stated in the syllabus in the case of Skaggs v. Emerson, 50 Cal. 3: "If a tenant is forcibly evicted from a *substantial* part of the demised premises by the landlord, and the lease is not terminated, but the tenant still continues to occupy, under the lease, the part of which he retains possession, the tenant cannot be compelled to pay the rent reserved; for, in such case, there can be no apportionment of rent." And it is not necessary that there should be an actual ouster to constitute an eviction; for any act of the lessor which results *in depriving the lessee of the beneficial enjoyment of the premises* will constitute an eviction. Agar v. Winslow, 123 Cal. 587, 593, 56 Pac. 422, 69 Am. St. Rep. 84; Camarillo v. Fenlon, 49 Cal. 202; Skaggs v. Emerson, supra; Levitzky v. Canning, 33 Cal. 299.

But we think the rule as stated does not apply where it does not appear that the interference has resulted in depriving the lessee of a *substantial*, as distinguished from an insignificant or inconsequential, portion of the demised premises; or, in other words, in depriving him of the beneficial enjoyment of a *substantial* portion of the premises. In nearly all the cases cited by appellant, and to which we have referred, it will be found that the interference by the lessor resulted in depriving the lessee of the right to collect and receive the rents from subtenants before the termination of the lease. Such an act would, of course, amount to an eviction, and the rule relied upon by appellant would apply.

[3] But, in the present case, the lessee was at all times in possession and occupancy of the premises and the water rights appurtenant thereto, except, according to the findings, a comparatively small portion of the water, which, it was found, was wrongfully taken, with the knowledge and consent of the lessor, by Shanks on one particular occasion during the year 1909, on or about April 1st of that year. That the *portion* of the water and water rights with which Shanks wrongfully interfered was inconsequential, and did not disturb the defendant's beneficial enjoyment of a substantial portion of the demised premises, is shown by the finding that the damage to the defendant resulting from such interference, measured in money, amounted to the sum of $40 only. Obviously, if the interference with defendant's possession was no more serious than that finding indicates (and the sufficiency of the evidence to justify the findings is not challenged here), the act of Shanks can amount to no more than a mere trespass. And it is the settled rule that no acts of "molestation, even if committed by the landlord himself, or by a servant at his command, amount to a breach of the covenant, unless they are more than a mere trespass." Taylor's Landlord and Tenant (9th Ed.) § 309, and cases cited. The defendant at all times enjoyed possession and occupancy of these premises, including the water rights, and had and exercised full and exclusive use of the water, except the trifling portion of which he was deprived by the act of Shanks on a single occasion. It most certainly cannot be justly said that this act amounted to an eviction of the defendant from a substantial portion of the demised premises, and should therefore operate as a suspension or extinguishment of the rent. Taylor's Landlord and Tenant, § 309; Ogilvie v. Hull, 5 Hill (N. Y.) 54. A mere passing trespass cannot operate to so oust a tenant of his possession as to amount to an eviction or dispossession.

[4] The foregoing views constitute, we think, a sufficient answer to the further contention of the appellant that the findings are

inconsistent and contradictory, in that finding 3, by which the court finds that the defendant had the sole and exclusive possession and occupancy of the premises and water rights appurtenant thereto, is in direct conflict with finding 7, whereby the court finds that Shanks, with the knowledge and consent of plaintiff, interfered with said water rights to the detriment of the defendant. If, as we have held, the act of Shanks, with the consent of the plaintiff, as found by finding 7, was a mere trespass, then the finding that the defendant had the "sole and exclusive possession of the premises" at all times is strictly true.

Counsel for the respondent insists that there is no evidence which justifies the finding of the court that the defendant was damaged in the sum of $40, and asks that the judgment be so modified as that the plaintiff may be awarded the full amount sued for. While there is evidence in the record from which, apparently, the court would have been justified in deducing a finding that the defendant accepted the lease with a full understanding that Shanks had always used some of the water from the ditches, and would be entitled to a certain share thereof during the defendant's term, still we cannot say that there is not some evidence that supports the finding which, in effect, declares that he was not authorized or entitled to use any portion of said water. It is, of course, an obvious proposition that a court of review cannot change a finding of a trial court, where there is any evidence that justifies and supports it. Moreover, not having taken an appeal, the plaintiff is not in a position to ask for such relief.

So far as we are able to judge from the record before us, the judgment was legally awarded, is just, and should not, therefore, be disturbed. It is accordingly affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(16 Cal. App. 589)

JOHN BOLLMAN CO. v. S. BACHMAN & CO. et al. (Civ. 819.)

(District Court of Appeal, First District, California. July 15, 1911.)

Appeal and Error (§ 839*)—Review—Failure to Appeal.

Where no appeal was taken from the judgment against the copartnership, in an action against a firm and another, the appellate court should not consider the effect of the judgment against the copartnership.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2915, 3279–3300; Dec. Dig. § 839.*]

On petition for rehearing. Petition denied. For former opinion, see 117 Pac. 690.

PER CURIAM. The petition for a rehearing is denied; but in thus denying the petition it is proper to say that nothing in the former opinion should be construed as indicating our views as to whether or not the judgment entered against the copartnership may or may not be enforced against the individual property of the member of the copartnership served with the summons issued on the original complaint. As indicated in the original opinion, section 388, Code of Civil Procedure, as it existed when the action was brought, provided only that the judgment should bind the joint property of the associates; while the same section, as amended before judgment was rendered, provides that the judgment shall also bind the property of the member served with process. As no appeal was taken from the judgment against the copartnership, we do not consider it either necessary or proper to determine its scope and effect.

(18 Cal. App. 171)

PEOPLE v. WRIGHT. (Cr. 232.)

(District Court of Appeal, Second District, California. Feb. 8, 1912.)

1. Seduction (§ 34*)—Promise of Marriage.

Under Pen. Code, § 268, providing that every person who under promise of marriage seduces a female of previous chaste character is guilty of a felony, reliance by the female on the promise of marriage is an essential to the crime, but if she knew her seducer to be married she is not justified in relying on his promise of marriage conditioned upon the divorce or death of his spouse, and hence he is not guilty.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 58–60; Dec. Dig. § 34.*]

2. Criminal Law (§ 815*)—Instructions.

In a prosecution for seduction where the evidence was conflicting as to whether the prosecutrix knew that her seducer was married, a failure to instruct that reliance on the promise of marriage by a man already married is insufficient to constitute the crime was prejudicial error in withdrawing from the jury an issue which might have produced an acquittal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1922, 1986; Dec. Dig. § 815.*]

Appeal from Superior Court, Los Angeles County; Henry C. Gesford, Judge.

Noel Wright was convicted of seduction, and he appeals. Reversed and remanded.

Lewis H. Smith, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

JAMES, J. [1] Defendant was convicted of the crime of seduction and sentenced to serve a term of imprisonment in the state penitentiary. He appeals from that judgment and from an order made by the trial court denying his motion for a new trial. At the time of the commission of the alleged offense, defendant was a married man and the prosecutrix was a young woman who had theretofore resided with her father near Sanger in the county of Fresno. The father of the prosecutrix, before the alleged seduction of his daughter had been accomplished by defendant, received information that defendant was a married man and so informed the daughter.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

At the trial the young woman testified that, notwithstanding the fact that she had been assured by her parent that defendant was a married man and had been forbidden to keep company with him, she had failed to obey the injunction of her father and had later submitted to an act of sexual intercourse with the defendant because the latter assured her that, while he had been previously married, a divorce had been granted to him and that he would marry the prosecutrix on a very early day. Defendant testified that he had always told the prosecutrix that he was married, but that he intended to get a divorce from his wife, whom he claimed had deserted him. It was clear from the evidence that the relations of defendant with the prosecutrix had been illicit, and it was further made clear by the testimony that the defendant prior to the time when the first improper act was committed between the two had promised to marry the young woman. On his part it was asserted that this promise was made upon the condition that it would be fulfilled when he secured a divorce from his wife, and upon the part of the prosecutrix it was affirmed by her in testimony that, notwithstanding the reports made to her that defendant was then a married man, she had relied upon his declaration expressed to her that he was not then married but had already been divorced, and that in submitting herself to his embraces she relied upon his promise that he would and could immediately thereafter enter into an engagement of marriage with her. Under this state of the evidence the defendant asked the court to charge the jury that, if the prosecutrix knew at the time of her alleged intercourse with defendant that defendant was a married man, she was not justified in relying upon the promise of marriage as an inducement persuading her to submit herself to him. This instruction was offered in several forms, and the trial judge refused to give it in any of those forms, and failed to give any other instruction covering the same matter to the jury. While the court permitted evidence to be introduced on both sides of the question as to whether or not at the time of the alleged seduction the prosecutrix knew defendant to be a married man, the jury was left wholly without any direction as to the responsibility of defendant to the law as dependent upon the finding that it might make upon that particular question of fact. Before the crime of seduction, as defined by section 268 of the Penal Code, is made out, it must appear that the prosecutrix has relied upon the promise of the accused that he will marry her; if such prosecutrix at the time knows that the promise so made cannot be carried out, as that the accused is a married man, then she is not warranted in relying upon such a representation.

As was said in the case of People v. Kehoe, 123 Cal. 224, 55 Pac. 911, 69 Am. St. Rep. 52: "Thus, if a married man seduces a woman under promise of marriage, she not knowing that he has a wife, his promise is illegal and invalid, but this fact does not excuse him. The woman, in ignorance of the fact, was justified in relying upon that promise; but if, at the time of giving her consent, she knew the fact to be that the man was married, and that therefore the promise was necessarily conditional upon the death or the putting away of his present wife, so base a contract would not excuse her in law for the surrender of her chastity. The contract itself would be void as against public policy, and the woman's reliance upon it could not be extenuated or excused." Under the entire charge as given by the court to the jury in this case, the latter might well assume that the defendant could be properly convicted notwithstanding the fact that the prosecutrix may have known at the time of the alleged seduction that defendant was a married man.

[2] By the failure of the court to declare the law as embodied in the instructions offered by the defendant on this subject, there was withdrawn from the jury an issue of fact vital to a determination of the charge against the defendant and which might have, under the testimony, produced a verdict in his favor. Upon this state of the case, it is very clear to us that the error was such as has resulted in a miscarriage of justice.

The judgment and order are reversed.

We concur: ALLEN, P. J.; SHAW, J.

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18 Cal. App. 135

ERVING v. NAPA VALLEY BREWING CO. (CHURCHILL et al., Interveners).

(Civ. 871.)

(District Court of Appeal, Third District, California. Feb. 1, 1912.)

1. Appeal and Error (§ 907*)—Judgment—Validity—Presumptions.

The court, on appeal from a judgment on the judgment roll alone, must, where the findings support the judgment, make all intendments in support of the judgment, and all proceedings necessary to its validity will be presumed to have been regularly taken; and any matters which would have authorized the judgment will be presumed to have been presented, in the absence of anything in the record to the contrary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911-2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.*]

2. Appeal and Error (§ 907*)—Judgment—Validity—Presumptions.

Where the record on appeal from the judgment on the judgment roll alone did not show that the intervener, appealing from a judgment for plaintiff, offered any evidence in support of his complaint in intervention, the court, on appeal, must presume that no evidence was presented at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911-2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. APPEAL AND ERROR (§ 931*)—JUDGMENT—VALIDITY—PRESUMPTIONS.

The court, on appeal from a judgment on the judgment roll alone, will presume, in the absence of a contrary showing, that appellant, complaining of the absence of findings on issues raised by his pleadings, waived findings as to such issues, though findings of fact were filed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762–3771; Dec. Dig. § 931.*]

4. APPEAL AND ERROR (§ 931*) — FINDINGS—PRESUMPTIONS.

Where the trial court in its conclusions of law stated that the relief sought by intervener should be denied, and the record on appeal did not show that intervener offered any evidence in support of his complaint, or that he did not waive findings on issues raised thereby, the conclusion of law will be presumed to have sufficiently determined the case of the intervener.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762–3771; Dec. Dig. § 931.*]

Appeal from Superior Court, Napa County; H. C. Gesford, Judge.

Action by W. F. Erving against the Napa Valley Brewing Company in which E. W. Churchill and another intervene. From a judgment for plaintiff, intervener E. W. Churchill appeals. Affirmed.

See, also, 119 Pac. 940.

Coombs & Coombs and John T. York, for appellant. F. E., H. L. & L. E. Johnston, for respondent. F. L. Coombs, for intervener.

HART, J. The plaintiff instituted this action in claim and delivery against the defendant for the recovery of the possession of certain personal property described in the complaint, and alleged to be of the value of $6,000. Said property was situated in a certain building in the city of Napa and consists of certain machinery and mechanical equipments which were used by the defendant in the manufacture of beer. The complaint alleges that on the 17th day of September, 1910, and at the time of the filing of the complaint, the plaintiff was the owner and entitled to the possession of said personal property; alleges the wrongful possession and the wrongful withholding of the possession of said property by defendant from plaintiff; that, prior to the commencement of this action, the plaintiff demanded the return of the possession of said property, but that said "defendant refused, and still refuses, to deliver said personal property, or any part thereof, to this plaintiff." Plaintiff asks that he be awarded judgment restoring to him the possession of said property, or for the sum of $6,000, the alleged value thereof, in case delivery cannot be had.

The defendant, by its answer, denies that the personal property described in the complaint is of the value of $6,000, but alleges that the value of said property did not, at the times mentioned in the complaint, or at any other time, exceed the sum of $500; denies that it "unlawfully withholds and detains," etc., said property from the possession of the plaintiff; alleges, on information and belief, that the property referred to in the complaint "does not belong, did not at the time of the commencement of the action belong, and never has belonged, to plaintiff, and that plaintiff has never been the owner thereof; that the rightful and lawful owner of said property is the Jas. H. Goodman & Co. Bank, a banking corporation, * * * having its principal place of business in the city of Napa, said state."

Churchill, by permission of the court, filed a complaint in intervention, wherein he alleges that the building in which the personal property described in the complaint is situated was, together with the land upon which it is located, the property of the Napa Ice & Cold Storage Company, a corporation; that on the 16th day of January, 1906, said corporation executed its promissory note for the sum of $12,500 in favor of and payable to one E. H. Tryon, and that, contemporaneously with the execution and delivery of said note, made and executed, in favor of said Tryon, and as security for the payment of said note, a mortgage upon said real property —the land and the building in which the alleged personal property sued for is situated; that said mortgage was duly recorded, and that no part of said promissory note has been paid; that on the 16th day of January, 1908, the date of the maturity of said note, it having been made payable on or before two years after its date, said note and mortgage were regularly assigned by said Tryon to Churchill. It is further alleged by this intervener, upon information and belief, that, at the time of the execution of said note and mortgage to said Tryon, the property described in the complaint was owned by the said Napa Ice & Cold Storage Company; that it was, and "ever since has been, and now is, attached to and made a part of the said real property"; and that said mortgage, "was, ever since has been, and now is, a valid and subsisting lien upon said property, described as personal property" in said complaint. It is averred, on information and belief, that the property described as "personal property" in the complaint "cannot be detached from said premises, or taken away, without injury to the freehold, and without decreasing the value of the said lands against which intervener has his lien, as aforesaid." The tenth paragraph of Churchill's complaint in intervention declares, upon information and belief, that the property mentioned in the complaint "belongs to and is owned by the Jas. H. Goodman & Co. Bank, * * * and does not belong to plaintiff, and that plaintiff has no interest in the same."

The Jas. H. Goodman & Co. Bank, a corporation, also filed a complaint in intervention, in which it sets up ownership of the property described in plaintiff's complaint, and denies plaintiff's alleged ownership thereof and his alleged right to the possession of the same, and alleges that the "defendant is in lawful possession and entitled to the possession thereof."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The court found that the plaintiff "was, on the 17th day of September, 1910, ever since then continuously has been, and is now, the owner and entitled to the possession of all that certain personal property," describing the property mentioned in the complaint; that the value of said property was and is $1,750; that the defendant, Napa Valley Brewing Company, unlawfully withholds and detains the possession of said property from the plaintiff; that said Jas. H. Goodman & Co. Bank, intervener, is not and was never the owner or entitled to the possession of said personal property. As conclusions of law, the court finds that the plaintiff is entitled to the possession of said personal property, or, in default of delivery thereof to plaintiff by defendant, that the former recover from the latter the sum of $1,750, the value of said property; that "the intervener E. W. Churchill is not entitled to take anything by reason of his complaint in intervention herein." Judgment was given and entered accordingly.

The appeal now before us is by the intervener Churchill from the judgment on the judgment roll alone. The defendant, Napa Valley Brewing Company, appealed from said judgment; but said appeal was, on motion, dismissed by this court on the 18th day of April, 1911. Erving v. Napa Valley Brewing Co., 116 Pac. 331.

The court made no finding of fact, based upon the allegations of appellant's complaint in intervention. The only reference to the allegations of said complaint is to be found in the conclusions of law, as above noted, and in the judgment, as follows: "That the relief sought by the complaint in intervention filed herein by E. W. Churchill be, and the same is hereby, denied and that said intervener take nothing by his said complaint in intervention." The contention of appellant is that he is entitled to have his "claim disposed of one way or the other," and that the failure of the court to make a finding in relation thereto constitutes a defect in the findings fatal to the judgment. This contention presents the single question submitted for decision by this appeal.

[1] We think that the point advanced by appellant is destitute of merit. The rule in this state, as announced and affirmed and confirmed by a long and unbroken line of decisions, is that, where the appeal is from the judgment on the judgment roll alone, and where the findings support the judgment, "all intendments will be made in support of the judgment, and *all* proceedings necessary to its validity will be presumed to have been regularly taken; and any matters which might have been presented to the court below which would have authorized the judgment will be presumed to have been thus presented, if the record shows nothing to the contrary." Von Schmidt v. Von Schmidt, 104 Cal. 550, 38 Pac. 361; Johnston v. Callahan, 146 Cal. 214, 79 Pac. 870; Galvin v. Palmer, 134 Cal. 427, 66 Pac. 572; Butler v. Soule, 124 Cal. 73, 56 Pac. 601; In re Eichhoff, 101 Cal. 605, 36 Pac. 11; Eichhoff v. Eichhoff, 107 Cal. 42, 40 Pac. 24, 48 Am. St. Rep. 110; Sichler v. Look, 93 Cal. 601, 29 Pac. 34; Segerstrom v. Scott, 116 Pac. 690.

There can, of course, be no doubt, and, indeed, none is expressed, that the findings support the judgment. The sole complaint is, as stated, that the appellant was entitled to a finding or to findings upon the issues presented by his pleading.

[2, 3] But there is no showing by the record that the appellant offered any evidence in support of the averments of his complaint; and the presumption is and must be indulged, in the absence of such a showing, that none was presented at the trial. Himmelman v. Henry, 84 Cal. 104, 23 Pac. 1098; Kaiser v. Dalto, 140 Cal. 170, 73 Pac. 828; Gregory v. Gregory, 102 Cal. 52, 36 Pac. 364. If, however, appellant claims that, whether evidence was or was not presented in support of the averments of his complaint, it was nevertheless the duty of the court to make findings upon the issue submitted by his pleading, the reply is that the presumption is, in the absence of a contradictory showing, that he waived findings as to that issue. Mulcahy v. Glazier et al., 51 Cal. 626; Campbell v. Coburn, 77 Cal. 36, 18 Pac. 860; Kritzer v. Tracy Engineering Co., 116 Pac. 700. There is nothing in the record indicating or showing that the appellant did not waive findings.

[4] But counsel for the appellant seems to contend that, since findings of fact were filed, it must be inferred that findings as to the issues submitted by the complaint in intervention were not waived. We do not see how we can so infer or presume without destroying or rendering nugatory that other presumption to which we have referred, and which must be indulged where there is no bill of exceptions or other properly authenticated record of the evidence, that all intendments must be made in support of the judgment, and all proceedings necessary to its validity be deemed to have been regularly taken. For aught that we can know to the contrary, the appellant might, ex industria, have abandoned his affirmative resistance to plaintiff's action. Indeed, upon the presumption that he offered no evidence in support of the claims of his complaint, we have a right to so assume. And, so assuming, why should the court be required to make a finding upon a deserted issue, even if it could justly be concluded that findings are not, under the circumstances, to be deemed to have been waived by appellant? We think that the disposition by the court of appellant's case, as made solely by his complaint, in its conclusions of law was sufficient under

the circumstances. In other words, the conclusion of the court, as a matter of law, as to the point raised by appellant's complaint, could have been neither more nor less than as it here appears from a finding which, presumptively, the court must have made, had it made any at all, in relation to the issue submitted by his pleading.

The cases of Emeric v. Alvarado, 64 Cal. 603, 2 Pac. 418, Kirman v. Hunnewill, 93 Cal. 519, 29 Pac. 124, and Savings & L. Soc. v. Burnett, 106 Cal. 539, 39 Pac. 922, cited by appellant, are not in point here. In each of those cases, the appeal was supported by a bill of exceptions or a statement, and, of course, under such circumstances, a court of review is able to determine whether all the proceedings culminating in the findings and conclusions of law are regular and support the judgment, or whether the court was justified in making its findings, or whether it omitted to make a finding upon a material issue which the evidence warranted and required it to make.

For the reasons herein given, the judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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18 Cal. App. 58

PEOPLE v. MERRITT. (Cr. 340.)

(District Court of Appeal, First District, California. Jan. 22, 1912. Rehearing Denied by Supreme Court March 22, 1912.)

1. Criminal Law (§§ 1134, 1023*)—Appeal—Appealable Orders.

Under Pen. Code, § 1237, which provides that a defendant may appeal from a final judgment of conviction, an order denying a motion for new trial, or from any order after judgment affecting his substantial rights, an order denying a motion for arrest of judgment is not appealable, but may be reviewed upon an appeal from the judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2587, 2653, 2986–2998, 3056, 3067–3071, 2583–2598; Dec. Dig. §§ 1134, 1023.*]

2. Statutes (§ 105*)—Subject and Titles—Constitutional Provision—Construction.

The insufficiency of the title of a statute to express its subject-matter will not invalidate it where Const. 1849, art. 4, § 25, in force when it was enacted, requiring the subject to be expressed in the title, was construed to be directory only, though a similar provision of the present Constitution, art. 4, § 24, is mandatory.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 117, 118; Dec. Dig. § 105.*]

3. Statutes (§ 105*)—Construction—Title.

Where the original statute was not invalid for the insufficiency of its title, act March 22, 1905 (St. 1905, p. 786), whose title stated that it was "An act to amend 'An act to protect stockholders and persons dealing with corporations in this state' approved March 29, 1878, and all acts amendatory thereof," etc., is valid under Const. art. 4, § 24, which provides that every enactment of the Legislature shall embrace but one subject which shall be expressed in its title, as there is no requirement that the subject shall be more fully stated than in the valid statute amended.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 117, 118; Dec. Dig. § 105.*]

4. Statutes (§ 118*)—Construction—Title—Sufficiency.

Act March 22, 1905 (St. 1905, p. 786), which denounces enumerated acts of officers, etc., of corporations that may result in deceiving, to their injury, stockholders and others, is sufficiently described by the title "An act to protect stockholders and persons dealing with corporations in this state," within the requirements of Const. art. 4, § 24.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 158–160; Dec. Dig. § 118.*]

5. Corporations (§ 324*)—Officers—Criminal Liability—Fraudulent Prospectus—Evidence.

In a prosecution for the publication of an untrue and willfully exaggerated prospectus by a secretary and manager of a corporation for the purpose of deceiving the public, the prospectus itself was properly introduced in evidence in connection with evidence of the falsity of its statements to show that by its attractive form such statements were published with intent to defraud investors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1441; Dec. Dig. § 324.*]

6. Corporations (§ 324*)—Officers—Criminal Liability—Fraudulent Prospectus—Evidence.

In a prosecution of an officer of a corporation for publishing a fraudulent prospectus, which contained the statement that "this land is made up of more certain indications of oil than any other field in California," affidavits made by the defendant in support of applications to purchase from the state portions of the land described, to the effect that the lands were principally adapted to grazing purposes, were admissible as tending to prove his knowledge of the falsity of the statement.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1441; Dec. Dig. § 324.*]

7. Corporations (§ 324*)—Officers—Criminal Liability—Fraudulent Prospectus—Evidence.

And the applications to purchase themselves were admissible as giving character to the affidavits and showing that the statements of the defendant were not founded on an extrajudicial oath, but were statements of material matters made upon an oath authorized and required by law.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1441; Dec. Dig. § 324.*]

8. Criminal Law (§ 1163*)—Appeal—Substantial Injury—Constitutional Provision.

To render applicable Const. art. 6, § 4½, as added by St. 1911, p. 1798, which provides that no judgment shall be set aside or new trial granted in a criminal cause on the ground of misdirection, the improper admission, or rejection of evidence or error in pleading or procedure, unless on the examination of the entire cause the court shall be of the opinion that there has been a miscarriage of justice, it must affirmatively appear that the defendant has been substantially injured by error complained of, and no presumption of injury will arise from the mere fact of error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3090–3099; Dec. Dig. § 1163.*]

9. Criminal Law (§ 1170½*) — Appeal — Harmless Error.

Though in a prosecution of an officer of a corporation for making fraudulent representations in a prospectus as to its condition the defendant was compelled to testify on cross-examination that he and his associates had made locations on some of the lands included in the prospectus, the title to which it was admitted was in the United States government, a matter not touched in chief, where the matter was pursued no further, the evidence was merely fragmentary and harmless and will not be ground for reversal.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3135; Dec. Dig. § 1170½.*]

10. CRIMINAL LAW (§ 1170½*) — APPEAL — HARMLESS ERROR.

And cross-examination as to whether he had done development work other than that testified to in chief could not have harmed the defendant, where the title to the 6,080 acres claimed by the prospectus to be owned by the company was admitted to have been in the government, and the only development work testified to was as to the drilling of two wells which would protect but 320 acres.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3135; Dec. Dig. § 1170½.*]

11. CRIMINAL LAW (§ 1170½*) — APPEAL — HARMLESS ERROR.

Cross-examination of a defendant in a prosecution for fraudulent representations in a prospectus which he issued as manager and secretary of a corporation, as to whether he made an affidavit about which he had not been examined in chief, is harmless where the affidavit was in evidence and the fact of its making by the defendant had been established beyond controversy.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3135; Dec. Dig. § 1170½.*]

12. WITNESSES (§ 275*) — EVIDENCE — RES GESTÆ.

Where, in a prosecution for fraudulent representations in a prospectus issued by the defendant as manager and secretary of a corporation, the defendant had testified that a certain letter in evidence had been given him by the person signing it, and the cross-examination developed that immediately after signing the letter the writer, desiring to make changes, dictated another letter to the defendant substantially the same as the first, the latter is admissible as part of the res gestæ.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 924, 926, 967-975; Dec. Dig. § 275.*]

13. CRIMINAL LAW (§ 829*) — INSTRUCTIONS COVERED BY CHARGE GIVEN.

The refusal of a requested instruction as to the presumption of innocence in a prosecution for fraudulent representations in a prospectus issued by the defendant as manager and secretary of a corporation was not error, where the subject was sufficiently covered in instructions given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

14. CORPORATIONS (§ 324*)—TRIAL—INSTRUCTIONS.

The right of an officer of a corporation to make affidavits that certain lands were adapted for grazing purposes depends on whether he believed such statements in good faith to be true, so that where such affidavits were put in evidence in his prosecution for falsely making statements in a prospectus that the lands in question were made up of "more certain indications of oil than any other field in California" in order to show that the statements of the prospectus were false, a requested instruction submitting the fact of the making of the affidavits was properly modified by striking a portion to the effect that the defendant had a right to make them though he believed that there was oil and minerals on such lands, if they had not actually been discovered.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1441; Dec. Dig. § 324.*]

15. CRIMINAL LAW (§ 814*)—TRIAL—INSTRUCTIONS—CONFORMITY TO PLEADINGS.

In a prosecution of a manager and secretary of a corporation for uttering a fraudulent prospectus, an instruction submitting that, though the defendant had made affidavits that certain lands were principally adapted to grazing purposes, he would still have a right "to subscribe, verify, and publish a prospectus containing the statement that such lands contained oil and formations indicating oil" was properly modified by striking the quoted portion, where the statement complained of as false was that "this land is made up of more certain indications of oil than any other field in California."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 814.*]

16. CRIMINAL LAW (§ 807*)—TRIAL—INSTRUCTION—ARGUMENTATIVENESS.

A portion of a requested charge in a prosecution for uttering a fraudulent prospectus while secretary and manager of a corporation, which submitted the effect of affidavits of the defendant to the effect that lands dealt with in the prospectus were principally adapted for grazing purposes, and which stated that "if the defendant did in fact believe that there was oil and oil formations in said land, but there had been no mineral discovery actually made thereon, he * * * had a legal right to make an affidavit that such land was principally adapted to grazing purposes, yet under such circumstances he would have a legal right to subscribe, verify, and publish a prospectus containing the statement that such lands contained oil and formations indicating oil, was properly stricken as argumentative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1805, 1959, 1960; Dec. Dig. § 807.*]

17. CRIMINAL LAW (§§ 763, 764*)—TRIAL—INSTRUCTIONS — PROVINCE OF COURT AND JURY.

And such instruction was improper as trenching on the right of the jury to determine all questions of fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748, 1752, 1768, 1770; Dec. Dig. §§ 763, 764.*]

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

C. Howard Merritt was convicted of fraudulently issuing an exaggerated prospectus of the condition of a corporation, and appeals. Affirmed.

Rehearing denied by Supreme Court, 122 Pac. 844.

A. L. Frick, for appellant. Attorney General Webb, for the People.

HALL, J. [1] This is an appeal from a judgment and order denying defendant's motion for a new trial. Defendant also, in form, took an appeal from the order of the court denying his motion in arrest of judgment. Such order is not appealable (Pen.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Code, § 1237), but may be reviewed upon the appeal from the judgment.

The defendant was charged with violating the provisions of an act of the Legislature of this state, approved March 22, 1905, entitled, "An act to amend an act entitled 'An act to protect stockholders and persons dealing with corporations in this state,' approved March 29, 1878, and all acts amendatory thereof, and to repeal all acts in conflict therewith." St. 1905, p. 786.

The act (of 1905) consists of two sections as follows:

"Section 1. Any superintendent, director, secretary, manager, agent or other officer, of any corporation formed or existing under the laws of this state, or transacting business in the same, and any person pretending or holding himself out as such superintendent, director, secretary, manager or other officer, who shall willfully subscribe, sign, indorse, verify, or otherwise assent to the publication, either generally or privately, to the stockholders or other persons dealing with such corporation, or its stock, any untrue or willfully and fraudulently exaggerated report, prospectus, account, statement of operations, values, business, profits, expenditures or prospects, or other paper or document intended to produce or give, or having a tendency to produce or give, to the shares of stock in such corporation a greater or less apparent or market value than they really possess, or with the intention of defrauding any particular person or persons, or the public, or persons generally, shall be deemed guilty of a felony, and on conviction thereof shall be punished by imprisonment in the state prison or in a county jail not exceeding two years, or by fine not exceeding five thousand dollars, or by both.

"Sec. 2. All acts and parts of acts in conflict with this act are hereby repealed."

It is claimed that the statute is void in that the subject thereof is not sufficiently indicated in the title (section 24, art. 4, Const. Cal.) in that the body of the act is wholly penal in its provisions, which it is urged are not germane to the subject of protecting stockholders and persons dealing with corporations.

[2, 3] If the statute is invalid for the reason assigned, the information drawn under the same states no offense, and the court should have granted the motion in arrest of judgment. We do not think that the statute is invalid for the reason suggested or for any other.

The objection made to the title of the act is really directed to the title of the original act of 1878 (St. 1877–78, p. 695). When this act was enacted, the provision of our then Constitution relating to the title of acts of the Legislature was held to be directory only. In other words, whether or not the act of 1878, if enacted now, would be invalid because of insufficiency of its title to express the subject, it was valid when adopted, and remained a valid law until amended in 1905. The title of the amendatory act of 1905 recites the title of the act of which it is amendatory, and re-enacts the act as amended in full. This is a sufficient compliance with the Constitution, both as to the title of the amendatory act and as to the manner of amending the original act.

In People v. Parvin, 74 Cal. 549, 16 Pac. 490, the validity of an act entitled, "An act to amend section 3481 of the Political Code," was attacked for the reason that the title of the act did not indicate the subject thereof. It was there held that in the case of an amendment to a valid law it was not necessary to more fully state the subject of the amendatory act than it is stated in the valid statute amended. The court in this regard said: "If it be said that the title of the amendatory act of April 15, 1880 (St. 1880, p. 61), does not express the subject, the reply is that the Constitution does not require, in case of an amendment, that the subject shall be any more fully stated than it is stated in the valid statute amended." This case upon this point has been cited and approved in Francais v. Somps, 92 Cal. 505, 28 Pac. 592; Beach v. Von Detten, 139 Cal. 462, 73 Pac. 187; People v. Oates, 142 Cal. 12, 75 Pac. 337. It is decisive of the point raised as to the validity of the act now in question.

[4] Furthermore, we think that an act that provides for the punishment as a crime of enumerated acts that may result in deceiving to their injury stockholders and others dealing with the corporation comes within the general scope of the title "An act to protect stockholders and persons dealing with corporations in this state." In this respect the sufficiency of the title is fully supported by the case of Gieseke v. County of San Joaquin, 109 Cal. 489, 42 Pac. 446. See, also, Ex parte Kohler, 74 Cal. 38, 15 Pac. 436.

The act is not invalid for any defect in its title, and the court did not err in denying appellant's motion in arrest of judgment.

We now come to the consideration of alleged errors claimed to have been committed by the court during the trial.

The defendant was charged with having on or about November 4, 1910, as secretary and manager of the Haiwee Pacific Oil Company, a corporation, with the intention of defrauding the public and persons generally, willfully subscribed, indorsed, verified, and assented to the publication of a certain untrue and willfully exaggerated report, prospectus, account, and statement of the operations, values, business, profits, expenditures, and prospects of said Haiwee Pacific Oil Company.

The prospectus is set forth in full in the information; and among other things it contains the following statements: "Five years ago we acquired 2,560 acres of land in Owens valley, Inyo county, Cal. We have since added to our holdings until we now own 6,080 acres located about 10 miles south of Owens Lake." "This land is made up of more certain indications of oil than any other field in California, comprising geological formations such as shale, gypsum, conglomerate formations, chalk, lime, magnesia, sulphur, fossils, and dark green oil sand." "We struck oil in well No. 1 at a depth of 1,503 feet."

By apt and appropriate language the statements above set forth are alleged to be false and untrue. No point is made that the verdict is not supported by the evidence. Appellant relies for a reversal upon alleged errors committed during the trial.

[5] The court, over the objection of defendant, allowed the entire prospectus to be introduced in evidence, and this action of the court is claimed by defendant to be error. We do not think so. In accordance with the statute it was charged that the false prospectus was published with intent to defraud the public and persons generally. The prospectus is set forth in full in the information, and covers 11 pages of the record, and contains many statements that are not alleged to be false. But in its intent it was well calculated to induce persons who might read it to purchase stock in the company. In attractive form it presented to the reader the advantages and large profits to be realized by investors in the stock of such a company as this was represented to be. The entire prospectus was an appeal to the public to purchase stock in this company. It was thus clearly evidence which, taken in connection with evidence of the falsity of the matters contained therein alleged to be untrue, tended to show that the false portions thereof were published with intent to defraud the public and persons who might be induced thereby to invest in the stock of the company.

[6] Complaint is made of the action of the court in permitting the prosecution to introduce in evidence certain applications made by two witnesses to purchase from the state portions of the land described in the prospectus as belonging to said company, and in connection therewith affidavits made by defendant to the effect that the lands described in the applications were principally adapted to grazing purposes. These affidavits were made by defendant prior to the publication of the prospectus, and tended to prove knowledge on the part of defendant that the statement in the prospectus as to the indications of the land containing oil was not true. It was stated in the prospectus that "this land is made up of more certain indications of oil than any other field in California." It is improbable that this could be true if the land was principally adapted to grazing purposes.

The rule laid down in Miller v. Chrisman, 140 Cal. 446, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63, to the effect that title to land located as oil land is not perfected until discovery of oil in paying quantities is actually made, does not affect the question as to the evidential character of the affidavits in question. The statement in the affidavits that the land was principally adapted to grazing purposes was either false or true. If true, it tended to contradict a vital statement published by defendant in the prospectus.

[7] The affidavits being admissible in evidence, we think it follows that the applications in support of which they were made were also admissible. The applications were part of the res gestæ of the making of the affidavits. They gave character to the affidavits, and showed that they were not idle and vain things, but were made deliberately in support of a claim of legal right. The applications showed that the matters stated by defendant in the affidavits were not founded upon an extrajudicial oath, but were statements of material matters made upon an oath authorized and required by law.

It cannot be doubted that any statement made by defendant, contradictory of the statement made by him in the prospectus, would be admissible as evidence against him upon this charge. If perchance such statement had been made under oath in a judicial proceeding, such fact would likewise be admissible in evidence. The same principle is applicable to the affidavits and applications to purchase land. The court therefore did not err in admitting the evidence in question.

[8] It is next urged that the court, over the objection of defendant, compelled him to answer questions upon cross-examination concerning matters about which he had not been examined in chief, and that he was thus compelled to be a witness against himself, in violation of section 13 of article 1 of the Constitution.

In this connection we have been favored by very able arguments by counsel for both appellant and respondent as to the meaning and effect of the recently adopted amendment to the Constitution designated as section 4½ of article 6, as added by St. 1911, p. 1798, and which is as follows: "No judgment shall be set aside or new trial granted in any criminal case on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

That amendment certainly requires at least that it appear to the court affirmatively that defendant has been injured in a substantial manner by the error complained of. Under the amendment to the Constitution in question, no presumption of injury can arise from the mere fact of error. Substantial injury as well as the error must be made affirmatively to appear. The amendment certainly goes this far.

[9] And, construing it as requiring an affirmative showing both of error and substantial injury resulting therefrom, we do not think the matters complained of as to the rulings on cross-examination would justify a reversal of the judgment or order denying the motion for a new trial.

It was stated in the prospectus that the Haiwee Pacific Oil Company owned 6,080 acres of land located about 10 miles south of Owens Lake. It was admitted that the title to all this land remained in the United States government.

In order to justify the statement in the prospectus that the company owned 6,080 acres of said land, the defendant upon direct examination gave evidence of the making of various locations under the mineral land laws of the United States. Some of these locations were made in 1907 and some in 1909, but all had been made more than one year prior to the publication of the prospectus. Defendant also gave testimony as to the doing of certain development work, consisting of the sinking of wells 1 and 2 upon two certain locations. The various locators had conveyed whatever rights they had acquired under the locations testified to by defendant to the said company.

Upon cross-examination, over proper objections of defendant, he was compelled to testify that in 1905 he and some associates had made locations upon some of the same land located in 1909. He had not been questioned in chief as to any such locations, and the questions in relation thereto were probably not proper cross-examination. But the matter as to these prior locations was pursued no further than to show the fact that he had made such locations. This was but a bit of isolated, fragmentary evidence that could not have had any effect upon the case. Unless these prior locations had been followed by development work within the year, all rights thereunder failed at the expiration of the first year. Miller v. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63. No evidence of any such work was given, and the claims were therefore open to subsequent location. Miller v. Chrisman, supra. The evidence as to the prior locations was in no way discreditable to defendant, and was as to such an utterly immaterial and harmless matter that defendant could not have been injured thereby.

[10] The only development work testified to in chief by defendant was as to the sinking of the two wells. Upon cross-examination he was asked if any other development work had been done, and upon objection being made and overruled he testified that some other development work had been done upon some of the locations consisting of the sinking or digging of pits in the earth. It is impossible for us to see how defendant could have been injured by this evidence. It was important for defendant to show the doing of as much work upon the various claims as possible. Any given piece of work can protect no more than one claim, which cannot in any case exceed 160 acres. Miller v. Chrisman, supra. The evidence as to the sinking of the two wells tended to show some justification for a claim of ownership in not more than two claims of 160 acres each. The evidence brought out by the challenged cross-examination, as to the doing of other work, was favorable to defendant, for it showed some additional effort on the part of the company to perfect its claim to the land. This was important in view of the admission that title to all the land was in the United States. It is urged that the effect of the evidence as to the doing of this additional work was to show the limit of such work, which was wholly inadequate to protect the claim of the company to any considerable portion of the land referred to in the prospectus. In answer to this it must be said, we think, that in the absence of evidence of this additional work it would have been inevitably assumed from the evidence then before the court that the only work done in protection of the various locations was that relating to the sinking of the two wells.

It is clear, we think, that defendant could not have been injured by the evidence which he gave over objection as to the additional work.

[11] Over the objection of defendant he was compelled to testify that he made a certain affidavit, about which he had not been examined in chief. But this affidavit had already been introduced in evidence, and it had been shown beyond controversy that it had been made by defendant. It was one of the affidavits in which he made oath that the land therein referred to was principally adapted to grazing purposes. It is impossible to see what additional force or effect could be given to the affidavit by defendant's statement that he made it, which was a fact already established beyond controversy. The defendant was therefore not injured by the ruling of the court in overruling his objection to the question.

[12] Defendant also complains of the action of the court in overruling his objection to the introduction as part of his cross-examination of a letter signed by one Youle. We think the introduction of this letter and the question asked in relation thereto were proper cross-examination.

Defendant had testified that a certain letter, written and signed by said Youle, had been given him by Youle. It was introduced in evidence. Youle had knowledge and some experience as to oil lands, and this letter was commendatory of the oil prospects on the lands referred to in the prospectus. The cross-examination developed that immediately after signing said letter Youle stated to defendant that he wished to make some corrections therein, and at once dictated to defendant such letter as corrected. Defendant took it down in typewriting and Youle at once signed it. It was thus a part of the res gestæ of the original letter, and was intended as a substitute therefor. Both letters were commendatory of the lands as probably oil bearing, and were substantially to the same effect. The difference in their contents is quite insignificant. The court did not err in its ruling admitting in evidence the letter as thus corrected. This disposes of all the points made as to the cross-examination of defendant.

Complaint is also made that the district attorney was guilty of misconduct. It is sufficient upon this point to say that we have examined the matters called to our attention in this connection, but find nothing that would justify a new trial or that merits any detailed discussion of the point.

[13] Complaint is also made that the court refused to give an instruction requested by defendant as to the presumption of innocence that attends a person on trial for crime. We think, however, the subject was sufficiently covered in instructions that were given by the court.

[14] The defendant requested an instruction as to the purpose for which certain affidavits in evidence, and made by defendant, might be considered. These affidavits contained the statement that the lands referred to therein were principally adapted for grazing purposes. The court gave the instruction as requested, save that it struck out the concluding sentence thereof, which was as follows: "If the defendant did in fact believe that there was oil and oil formations in said land, but there had been no mineral discovery actually made thereon, he, notwithstanding such belief, had a legal right to make an affidavit that such land was principally adapted to grazing purposes, yet under such circumstances, he would have a legal right to subscribe, verify, and publish a prospectus containing the statement that such lands contained oil and formations indicating oil."

We do not think that the court erred in striking out the above sentence. This instruction makes the right to make the statement of fact as to the purpose for which the land was principally adapted depend upon whether or not any mineral discovery had been actually made thereon. The right to make the particular statement depended upon whether or not it was true or defendant in good faith believed it to be true.

[15] The concluding portion of the sentence is misleading and confusing as indicating that the prosecution was in part at least founded upon a statement in the prospectus simply to the effect that the lands contained oil and formations indicating oil. The statement complained of went much farther than this. It was that "this land is made up of more certain indications of oil than any other field in California."

[16,17] The portion of the requested instruction stricken out was argumentative, and trenched upon the right of the jury to determine all questions of fact.

The court did not err in refusing the rejected portion of the instruction. We have considered and disposed of all points urged for a reversal.

The judgment and order are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

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18 Cal. App. 58

PEOPLE v. MERRITT. (Cr. 1,731.)

(Supreme Court of California. March 22, 1912.)

In Bank. C. Howard Merritt was convicted of fraudulently issuing an exaggerated prospectus of the condition of a corporation, and appeals. Affirmed.

For opinion of District court of appeal, see 122 Pac. 839.

PER CURIAM. The petition for rehearing is denied.

We do not think the case, as stated in the opinion of the district court of appeal, required any discussion or statement of the effect of the recently adopted section 4½ of article 6 of the Constitution as added by St. 1911, p. 1798. The errors complained of, as stated by that court in its opinion, were not of a character to work substantial injury, and they would not have required a reversal under section 1258 of the Penal Code nor under the rules of this court established long prior to the adoption of said section of the Constitution. We express no opinion as to that part of the opinion referring to said amendment.

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162 Cal. 324

In re MOORE'S ESTATE. (S. F. 6,007.)

(Supreme Court of California. March 16, 1912. Rehearing Denied April 12, 1912.)

1. APPEAL AND ERROR (§ 1011*)—FINDINGS—CONCLUSIVENESS.

The rule that the Supreme Court will not disturb a finding on conflicting evidence is a rule of law vesting in every litigant the right to insist that a verdict or finding of the trial court shall be absolutely controlling when based on sufficient evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

2. APPEAL AND ERROR (§ 987*)—FINDINGS—CONCLUSIVENESS.

The Supreme Court on the question of law whether the evidence supports the verdict or finding will examine the evidence only to determine whether substantial evidence supporting the verdict or finding exists.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3896; Dec. Dig. § 987.*]

3. DESCENT AND DISTRIBUTION (§ 33*)—NIECES AND NEPHEWS—SECOND COUSINS.

Under Civ. Code, § 1386, subd. 5, providing that the estate of a decedent, leaving neither issue, husband, wife, father, mother, brother, nor sister, must go to the next of kin, and section 1393 declaring that in the collateral line the degrees are counted by generations, etc., the nieces and nephews of a decedent leaving no issue, husband, wife, father, mother, brother, or sister, took his estate to the exclusion of a second cousin.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 93–96; Dec. Dig. § 33.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Petition by Margaret Kane and another for the distribution to them of the estate of Susannah Moore, also called Susan A. Moore, also called Miss Susan A. Moore, deceased. From a judgment for petitioners, Peter E. Moore appeals. Affirmed.

Edward J. Parker and J. L. Geary, Jr., for appellant. F. H. Merzbach and David Livingston Levy, for respondents.

HENSHAW, J. The petition of Margaret Kane and Mary Huner that the residue of the estate of Susannah Moore, deceased, be distributed to them in equal shares as the nieces and next of kin of deceased coming on to be heard, contest was instituted by appellant herein, Peter E. Moore, who it is stipulated is a second cousin of Susannah Moore, deceased. The court in probate found and decreed petitioners Margaret Kane and Mary Huner to be the nieces and next of kin of deceased and granted them distribution as prayed. Peter E. Moore appeals, and contends that the evidence fails to establish the kinship of the respondents, and that, even if it does so establish it, he is entitled as being of equal kindred to share in the distribution under the provisions of section 1386, subd. 5, of the Civil Code.

As to the evidence it is sufficient to say that, notwithstanding certain inconsistencies and discrepancies in minor matters, it is abundant to sustain the determination of the court.

[1] Appellant insists that we should review this evidence as triers of fact because it was presented to the court in probate upon deposition, and he argues that, as the credibility of the witnesses is not involved when the testimony is given by deposition, the rule of this court that it will not disturb a finding based upon conflict of evidence does not obtain. But this rule is not a court-created rule and is not based upon the fact that the trial court or trial jury has had the witnesses before it. This fact is but one of the reasons for the existence of the rule which itself is created by the law. This court sits to review errors of law. It is powerless under its organization to make findings of fact. That power is vested exclusively in the trial court, and every litigant has the right to insist that the verdict of the jury or the finding of the trial court, when based upon sufficient evidence, shall be absolutely controlling without interference or attempted interference by this court.

[2] It is only when the question is presented to this court as one of law under the contention that the evidence is insufficient to support the verdict or finding that this court will examine the evidence to this sole end, and, when it is satisfied that substantial evidence exists to support the verdict or finding, its examination ceases at once. The matter is elaborately considered in Reay v. Butler, 95 Cal. 206, 30 Pac. 208, and nothing further should be necessary than a reference to that case and to such later cases as Knox v. Moses, 104 Cal. 502, 38 Pac. 318, and Bradley v. Davis, 156 Cal. 267, 104 Pac. 302.

[3] Section 1386, subd. 5, of the Civil Code, dealing with succession, reads as follows: "If the decedent leaves neither issue, husband, wife, father, mother, brother, nor sister, the estate must go to the next of kin, in equal degree, excepting that, when there are two or more collateral kindred, in equal degree, but claiming through different ancestors those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote." Section 1393 in exposition of the rule pronounced in section 1386 declares as follows: "In the collateral line the degrees are counted by generations, from one of the relations up to the common ancestor, and from the common ancestor to the other relations. In such computation the decedent is excluded, the relative included, and the ancestor counted but once. Thus, brothers are related in the second degree; uncle and nephew in the third degree; cousins german in the fourth, and so on."

We confess ourselves unable to follow the argument of the appellant by which he reaches the conclusion that a cousin of the deceased once removed stands in the same degree of kinship as the nephews and nieces of such deceased. However, the sections of the Code above quoted afford a complete answer to and refutation of the argument.

Wherefore the decree appealed from is affirmed.

We concur: LORIGAN, J.; MELVIN, J.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

162 Cal. 347

PEOPLE v. SCHLOTT. (Cr. 1,680.)

(Supreme Court of California. March 22, 1912. Rehearing Denied April 13, 1912.)

1. Parent and Child (§ 17*)—Support of Child—Criminal Prosecution.

Where a father failed to comply with a divorce decree requiring him to contribute to the support of a minor child whose custody was awarded to the mother, he was chargeable with willfully omitting without lawful excuse to provide his minor child with necessary clothing, shelter, and medical attendance, in violation of Pen. Code, § 270.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 176–181; Dec. Dig. § 17.*]

2. Divorce (§ 306*) — Decree — Support of Children.

Under Civ. Code, § 139, providing that where a divorce decree is granted for an offense of the husband he may be compelled to provide for the maintenance of the children of the marriage, the court may require a father to support his minor children after being deprived of their custody.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 798; Dec. Dig. § 306.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Herman F. Schlott was convicted of unlawfully omitting to provide for his minor child, and he appeals. Affirmed.

Frank J. Burke, for appellant. U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., C. M. Fickert, Dist. Atty., and Fred L. Berry, Asst. Dist. Atty., for the People.

BEATTY, C. J. The defendant was charged under section 270 of the Penal Code with willfully omitting, without lawful excuse, to furnish his minor child with necessary food, clothing, shelter, and medical attendance, he having the ability so to do. Upon his trial he was found guilty, his motion for a new trial was overruled, and a sentence of fine and imprisonment imposed. This judgment and order were affirmed by the district court of appeal. One of the grounds upon which a reversal of the judgment had been claimed was the fact that the custody of the child had been awarded to its mother in a divorce proceeding whereby it was contended the defendant had been relieved of all obligation to provide for its support. This point, however, was found to be unsupported by the record, which contained no evidence of the divorce, and for that reason alone its legal sufficiency was left undecided. Subsequently, upon petition of the defendant and consent of the Attorney General to a correction of the record, a rehearing was granted by the district court of appeal, where on April 10, 1911, the judgment and order of the superior court were reversed upon the sole ground that the care and custody of the child having been awarded to the mother by the decree of divorce the defendant was no longer under any obligation to provide for its support. The Attorney General thereupon petitioned this court for a rehearing, which was granted for the sole purpose of further considering the effect of the decree of divorce; the court being entirely satisfied with the opinion of the district court of appeal as to other assignments of error.

The defendant, in support of his contention as to the effect of the decree awarding the custody of his child exclusively to its mother, relies principally upon section 196 of the Civil Code, and upon the construction which he claims was given it by the court in Selfridge v. Paxton, 145 Cal. 713, 79 Pac. 425, and it is upon the supposed authority of that case that the decision of the district court of appeal sustaining his contention is placed.

It is true that Justice McFarland, delivering the opinion of the court in Selfridge v. Paxton, says that the "Civil Code, commencing with section 193 under the caption of 'Parent and Child,' clearly 'establishes the law' respecting the rights, duties, and liabilities which arise out of that relation, and the law touching the question involved in the case at bar is found in sections 196 and 207." He then quotes those sections and proceeds to say: "By these sections the duty to support a child and the liability to the third person for necessaries furnished to it are clearly confined to the parent entitled to the custody of the child and having it 'under his charge,' and no such liability attaches to a parent who has been deprived of such custody and charge." All of this was a perfectly true statement of the law "touching the question involved in the case at bar," but is entirely too broad a statement for application to this case. The case of Selfridge v. Paxton was this: Paxton and wife had been divorced, the custody of their little daughter had been awarded to the mother, the decree contained no provision requiring Paxton to support his daughter or contribute to her support, probably because he had agreed with his wife to pay liberally for her support, an agreement which he had faithfully observed. Selfridge had rendered valuable medical service to the daughter at the request of the mother and with knowledge of the terms of the decree. This being the case it was true that the rights of the parties were defined and limited by sections 196 and 207 of the Civil Code which read as follows: "(196) The parent entitled to the custody of a child must give him support and education suitable to his circumstances. If the support and education which the father of a legitimate child is able to give are inadequate, the mother must assist him to the extent of her ability." "(207) If a parent neglects to provide articles necessary for his child who is under his charge, according to his circumstances a third person may in good faith supply such necessaries, and recover the reasonable value thereof from the parent."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1, 2] There is, however, a wide difference between this case and Selfridge v. Paxton. This defendant, by the decree divorcing his wife, was required to pay her $50 a month for the support of herself and their child, and this he has willfully and without lawful excuse omitted to do, in consequence of which the mother has been without means to provide necessary food, clothing, etc., for the child, of whose custody he has been deprived, presumably for good cause. If, then, the provision of the decree requiring the payment of this alimony, partly for the support of the child, is valid, we have a case in which a parent is not freed from the obligation to support his child by being deprived of its custody and charge. That this provision of the decree is valid cannot be doubted. It is directly authorized by section 139 of the Civil Code, and needs no other authority. If it did, authority could be found in the opinion of the court in Ex parte Miller, 109 Cal. 644, 42 Pac. 428, in which Justice McFarland concurred, and in the concurring opinion of Justice Temple which he quotes with approval in Selfridge v. Paxton. In Ex parte Miller, the court was overruling what was decided in Hunt's Case, 103 Cal. 355, 37 Pac. 206, where it was declared that a parent could not be deprived of the custody of his child for abuse of parental authority by a summary proceeding, but only in a civil action as prescribed by section 203 of the Civil Code. Much that was said in the main opinion in Ex parte Miller by Justice Harrison, and all that was said in the concurring opinion by Justice Temple, was for the purpose of confuting the opinion in the Hunt Case as to the intention of the Legislature in adopting said section 203. To do this they each contended, and the court held, that the only, or at least the main, purpose of that section was to give a right of action by which a child might be emancipated from the control of his parent and at the same time enforce the obligation of the parent to support him, contrary to the implication of section 196. The passage in Justice Temple's opinion peculiarly applicable to this case, is the following: "In cases of divorce and in controversies between the parents in regard to the custody of children, other sections provide for the support of the children (Civ. Code, §§ 137, 199), but in no other case except as provided in section 203 has the court the power to deprive the parent of his authority and yet hold him liable for the maintenance of his child according to his condition."

This paragraph in Judge Temple's opinion contains a plain declaration that section 137 of the Civil Code (mistakenly cited or printed when section 139 was intended) does empower the courts in cases of divorce to compel a parent to support his children after being deprived of their custody. The passage quoted by Justice McFarland in Selfridge v. Paxton applied to the case then before the court—a case in which the parent had been deprived of the custody of his child in a *summary proceeding* in which the court had no power to compel him to continue to support her—and it was aptly cited in support of the judgment in a case where the trial court, having the discretion to order a continuance of support by the father, had found no occasion to do so. It is utterly foreign to a case like this in which the decree of divorce contains a valid provision requiring the father to continue to *contribute* to the support of a child whose custody is awarded to the mother.

The judgment and order of the superior court are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

162 Cal. 318

SEYMOUR v. OELRICHS et al.

(S. F. 5,664.)

(Supreme Court of California. March 9, 1912. Rehearing Denied April 8, 1912.)

1. DAMAGES (§ 68*)—INTEREST—UNLIQUIDATED CLAIMS.

In recovering for breach of a contract of employment, plaintiff was entitled to interest only from the date of the judgment and not from the date of the filing of the complaint, where the amount of his probable earnings after the date of his discharge, as an item reducing his damages, was uncertain.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 141-143; Dec. Dig. § 68.*]

2. PRINCIPAL AND AGENT (§ 97*)—POWER OF ATTORNEY—CONSTRUCTION—EXTENT OF AUTHORITY.

Powers of attorney to receive distributive shares of a large estate, to lease, sell, convey, and mortgage lands, and to execute such other instruments as may be necessary or proper in the premises, etc., authorized the attorney in fact to employ some one to superintend and conserve the holdings involved.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 344-376; Dec. Dig. § 97.*]

3. MASTER AND SERVANT (§ 39*)—EMPLOYMENT CONTRACTS—EVIDENCE.

In an action by a servant for wrongful discharge, evidence *held* to sustain allegations of the complaint as to the services required.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 12, 45, 46; Dec. Dig. § 39.*]

4. APPEAL AND ERROR (§ 631*)—RECORD—REQUISITES.

Code Civ. Proc. § 953c, which provides that a record on appeal shall be filed and that no transcript thereof need be printed, is permissive and does not prevent filing of a printed and certified copy of the transcript in lieu of the original.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2766-2770; Dec. Dig. § 631.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by John Seymour against Theresa

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

A. Oelrichs and others. Judgment for plaintiff, and defendants appeal. Modified and affirmed.

Tobin & Tobin, for appellants. Peter F. Dunne and C. W. Durbrow, for respondent.

MELVIN, J. This is the second appeal in this case. The action was for the breach of a contract of employment, and although this court held that the conduct of the defendants was such as to estop them from availing themselves of the statute of frauds in defense of the oral contract, provided Herman Oelrichs had written authority to bind his wife, Theresa A. Oelrichs, and her sister, Virginia Vanderbilt, the judgment in favor of the plaintiff was reversed because the record did not disclose such power. Seymour v. Oelrichs, 156 Cal. 782, 106 Pac. 88. On the second trial powers of attorney given by Mrs. Oelrichs and her sister to Herman Oelrichs were introduced in evidence, and again plaintiff prevailed, the judgment being for $11,100, with interest at the rate of 7 per cent. per annum from November 17, 1904, the date of the commencement of the action, together with the costs of suit. From this judgment defendants Theresa A. Oelrichs and Virginia Vanderbilt appeal.

[1] Appellants call our attention first to the asserted error in granting a judgment for interest from the date of the filing of the complaint. It is conceded that plaintiff's right to recover damages vested in him on the day of his discharge from the service of appellants, but appellants contend that at no time prior to the judgment were these damages certain or capable of being made certain by calculation; that therefore section 3287 of the Civil Code does not apply; and that no interest should have been awarded except from the date of the judgment (citing Brady v. Wilcoxson, 44 Cal. 239; Selleck v. French, 1 Conn. 32, 6 Am. Dec. 195; Excelsior Co. v. Harde, 181 N. Y. 11, 73 N. E. 494, 106 Am. St. Rep. 493; White v. Miller, 78 N. Y. 393, 34 Am. Rep. 544; Sloan v. Baird, 12 App. Div. 481, 42 N. Y. Supp. 38; Mansfield v. N. Y. C. & Hudson R. R. Co., 114 N. Y. 331, 21 N. E. 735, 1037, 4 L. R. A. 566; Crawford v. Mail & Express Co., 22 App. Div. 56, 47 N. Y. Supp. 747; Cox v. McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164; Coburn v. Goodall, 72 Cal. 498, 14 Pac. 190, 1 Am. St. Rep. 75; Swinnerton v. Argonaut L. & D. Co., 112 Cal. 375, 44 Pac. 719; Ryland v. Heney, 130 Cal. 426, 62 Pac. 616; Cutting F. P. Co. v. Canty, 141 Cal. 692, 75 Pac. 564; Ferrea v. Chabot, 121 Cal. 233, 53 Pac. 689, 1092; Easterbrook v. Farquharson, 110 Cal. 311, 42 Pac. 811.

In the opinion filed in this case on the former appeal, the measure of damages used by the court below was approved. This court said: "It appears that the plaintiff, some eight months after his employment under the contract with defendants was discontinued, secured a position with Wells Fargo & Co. at a monthly salary of $200. The court based its award of damages on the aggregate salary to which plaintiff would have been entitled for the unexpired portion of the contract period of 10 years with defendants, deducting therefrom, however, the amount earned by plaintiff in his employment with Wells Fargo & Co. up to the time of the trial, together with the amount which he would earn during the remainder of the 10 years at the salary of $200 a month, the amount paid him by Wells Fargo & Co., assuming that he would retain his employment and salary with Wells Fargo & Co. during all of the unexpired portion of the stipulated 10 years." Obviously such measure of damages is neither certain nor capable of being made certain by calculation until a finding by the court of the facts regarding the plaintiff's employment and the assumption as to his probable future earnings. Indeed, in commenting upon the rule adopted, we said: "Nor is the rule disturbed by the argument advanced by the appellants that it is impossible to determine with accuracy what damage plaintiff would actually suffer during the remainder of the unexpired term. It is to be conceded that the question of the extent of the future damage which a complaining party in a case like the one at bar would suffer is fraught with some difficulty. Yet it hardly rests with the defendants to complain of such difficulty, since it arises only through the wrongful act of the defendants themselves." Respondent cites Lane v. Turner, 114 Cal. 400, 46 Pac. 290, and Pacific Mutual Life Ins. Co. v. Fisher, 106 Cal. 233, 39 Pac. 758, but neither of these cases is in point. In both, the claims under discussion were capable of being made certain by adjustment and were not unliquidated like the claim of the payment in this action which involved, as one of its essential elements, the amount of the probable earnings of Captain Seymour after the date of his discharge. There is no merit in respondent's contention that because interest was allowed in the original judgment and the measure of damages adopted by the court has been approved, that therefore the right of the court to declare interest due from the date of the filing of the complaint is "the law of the case." On the former appeal the element of interest as a part of the judgment was not considered. We are of the opinion that interest from the date of the filing of the complaint was erroneously allowed.

[2] Appellants assert that the powers of attorney are not sufficient to authorize such a contract of employment as respondent pleaded and sought to prove. The appellants seek to apply to the two powers of attorney here (which by the way are practically identical in form) the rule laid down in such cases as Quay v. Presidio & Ferries R. R. Co., 82 Cal. 1, 22 Pac. 925, that where special au-

thority to do certain designated things is given by a power of attorney, followed by words of general authorization, the general are limited by the special terms. An inspection of these instruments, however, convinces us that they do not come within the rule announced above. In each Mr. Oelrichs was authorized (1) to ask, demand, and receive from the estate of James G. Fair and from the executors of his will all the distributive share of the daughter of James G. Fair appointing said attorney in fact, whether as heir at law or as testamentary beneficiary, and to receipt for and take possession of all such property, both real and personal; (2) to transact with the Nevada Bank every and all kinds of business in which she was jointly or severally or in any manner interested; (3) to pay off or otherwise settle any indebtedness with said Nevada Bank which she might personally or jointly owe upon such terms as to the attorney in fact might seem meet, to arrange for the transfer of the obligations to the bank by an assignment from the bank to any other person, to transact any business with reference to a memorandum of agreement made between appellants and the bank on a certain specified date, and to give the bank any such receipt of discharge in law as the attorney in fact might deem necessary in the premises.

Thus far the power of attorney dealt with the settlement of the Fair estate and matters between the Nevada Bank and the heirs of James G. Fair, but the language following is too comprehensive in its scope to bring it within the limits of the rule for which appellants contend. The powers granted are too broad to be deemed merely a part of the authorization of Mr. Oelrichs to collect the proceeds of the administration of the estate of Fair and to settle with the Nevada Bank for (to quote directly from the document) he was given power to "ask, demand, sue for, recover, collect, and receive all such sums of money, debts, dues, accounts, legacies, bequests, interest, dividends, annuities and demands whatsoever, as are now or shall hereafter become due, owing, payable, or belonging to me; * * * to bargain, contract, agree for, purchase, receive and take lands, tenements and hereditaments; * * * and to lease, let, demise, bargain, sell, remise, release, convey, mortgage and hypothecate lands, tenements and hereditaments, upon such terms and conditions and under such covenants, as he shall think fit; * * * and to make, do and transact all and every kind of business of what nature and kind soever; and, also, for me and in my name, and as my act and deed, to sign, seal, execute, deliver and acknowledge such deeds, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, bonds, notes, receipts, evidences of debt, releases and satisfaction of mortgage, judgment and other debts, *and such other instruments in writing, of whatsoever kind and nature, as may be necessary or proper in the premises.*" This is the form of power of attorney much in use in this state and as was said by this court in Moore v. Gould, 151 Cal. 727, 91 Pac. 618, it authorized the attorney in fact to perform any of a great variety of acts which "include almost every conceivable mode of dealing with real and personal, tangible and intangible, property." Under such a power of attorney giving him dominion so extensive over a large amount of property, undoubtedly Mr. Oelrichs was authorized to employ some one to superintend and conserve the holdings of Mrs. Oelrichs and Mrs. Vanderbilt. The hiring of such a person would be natural and proper, and the right to secure the services of such a functionary is implied from the extensive and almost unrestricted delegation to Mr. Oelrichs of the owners' control over and power of disposition of their property. Muth v. Goddard, 28 Mont. 237, 72 Pac. 621, 98 Am. St. Rep. 553.

[3] There is no merit in appellants' statement that the proof does not sustain the allegations of the complaint with reference to the kind of contract therein set forth. Plaintiff testified that he was employed by the heirs of the estate of Fair for the period of 10 years at a certain salary; that he had charge of the buildings and performed other services. This was equivalent to saying that he was hired to take charge of the buildings and to perform the other services which he detailed, and brought the proof sufficiently within the allegations of the complaint. Both appellants knew the sort of work Captain Seymour was to do and the salary he was to receive, and there never was any question relating to the terms of his contract of employment except in regard to its period of duration.

[4] This appeal was taken under the provisions of section 953a et seq., Code of Civil Procedure. The original transcript of the reporter's notes as approved by the judge was not sent here, but a printed and certified copy thereof was filed. Respondent asserts that this is not a record which we may notice. We cannot agree with this view of the law. The language of section 953c, Code of Civil Procedure, that "said record shall be filed with the clerk of the court to which the appeal is taken and no transcript thereof need be printed" is permissive. It is not only allowable, but desirable, that a printed and duly authenticated copy of the transcript should be filed here in lieu of the original. Waterbury v. Temescal Water Co., 11 Cal. App. 632, 105 Pac. 940.

Let the judgment be amended by striking therefrom that part of it which provides for interest at the rate of 7 per cent. per annum from November 17, 1904, the date of the commencement of this action. In all other respects the judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J

162 Cal. 358

MERCED OIL MINING CO. et al. v. PATTERSON et al. (S. F. 5,746.)

(Supreme Court of California. March 22, 1912.)

1. APPEAL AND ERROR (§ 1195*)—LAW OF THE CASE.

A decision of the Supreme Court on appeal is the law of the case on a retrial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661–4665; Dec. Dig. § 1195.*]

2. COURTS (§ 93*) — DECISIONS—RULES OF PROPERTY.

The rule that several persons, who as associates enter on and locate a tract of vacant mineral lands of the United States under the placer mining laws, and marking the boundaries of a consolidated claim, may before any discovery join in conveying a specific part of the consolidated claim to a third person who may prosecute the work of discovery on the part so conveyed to operate for the benefit of the part remaining in the possession of the associates is a rule of property from which a departure should not be made.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 336–339; Dec. Dig. § 93.*]

3. MINES AND MINERALS (§ 17*)—LOCATION—CONVEYANCES—EFFECT.

Eight persons as associates entered on and located a tract of 160 acres of vacant mineral lands of the United States under the placer mining laws and marked the boundaries of the consolidated claim. Before discovery they conveyed a specific part to a third person and associates who should organize a corporation to which the part should be conveyed, and the corporation would immediately occupy the part and proceed diligently with the work of exploration, and the labor done should operate for the benefit of the remaining land and of subsequent grantees thereof. The corporation subsequently formed obtained the part conveyed and performed labor and made a discovery pursuant to the understanding of all the parties. *Held*, that the discovery inured to the benefit of the part not conveyed, and the eight persons as associates obtained rights thereto as against a subsequent locator.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 24–28; Dec. Dig. § 17.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. Mines and Minerals (§ 17*)—Location by Associates—Effect.

A location by an association of persons is but a single location and not separate locations of each, and will be treated as an entirety under one location for all purposes of marking boundaries, doing assessment work, expenditure for patent, and discovery of mineral, and a single discovery is all that is required to support it, and the associates may maintain such condition of entirety, though they conveyed a specified part in consideration of the undertaking by the grantee to do discovery work for the benefit of the associates.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 24-28; Dec. Dig. § 17.*]

In Bank. Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by the Merced Oil Mining Company and others against R. L. Patterson and others. From a judgment for plaintiff, C. H. Castle, defendants appeal. Affirmed.

N. C. Coldwell and E. A. Williams, for appellants. Frank H. Short and F. E. Cook, for respondent.

ANGELLOTTI, J. This is an appeal by defendants, upon the judgment roll, from a judgment in favor of plaintiff C. H. Castle against the defendants, adjudging him to be the owner and entitled to the possession of 40 acres of mineral land (the mineral being oil), being the south half of the north half of the southeast quarter of section 22, Tp. 19 S., R. 15 E., M. D. B. & M. The case was before us on a former appeal involving a judgment against defendants in favor of Castle for said land, and also in favor of the Merced Oil Mining Company for the north half of the south half of said southeast quarter of said section, the action having been dismissed as to the Great Northern Oil Company. The judgment was affirmed as to said Merced Oil Mining Company, and reversed as to Castle. Merced Oil Mining Co. v. Patterson et al., 153 Cal. 624, 96 Pac. 90. The action was thus terminated as to said company. A retrial was had between plaintiff Castle and the defendants, resulting in the judgment appealed from.

A very general statement of the material facts appearing on the former appeal is essential to a proper understanding of the question presented. In May, 1899, one Spinks and seven associates had entered upon and located under the placer mining laws for the purpose of exploring for oil the whole of the southeast quarter of said section 22, the same being vacant, unoccupied mineral lands of the United States, complying with all the requirements of the law in regard to the making of such selection, and thenceforth proceeding with the work of development. In January, 1900, they conveyed in severalty to the Merced Oil Mining Company the portion claimed by such company. In February, 1900, they conveyed in severalty to Castle the portion claimed by him. The Merced, etc., Company duly prosecuted the work of discovery on the portion conveyed to it, and in September or October, 1900, made a sufficient discovery of oil. This was the first and only discovery ever made on said southeast quarter. The defendants claimed under an entry and attempted location of said southeast quarter made in 1904, Castle never having taken possession of the part conveyed to him or done any development work thereon. This action was commenced June 24, 1904.

[1] The case thus presented, as to both plaintiffs then before the court, the question of the effect of a conveyance of all the interest of eight associates, who had made a consolidated location of 160 acres as an oil claim, and who were in possession thereof, and engaged in the work of development to discover oil thereon in a certain designated and described portion thereof, by such associates to an outsider, before the location had been perfected by a discovery of oil. It was squarely held that such a conveyance is operative to give to the grantee all of the rights which the grantors formerly held in the land covered thereby. This much, of course, was essential to the adjudication in favor of the Merced Oil Mining Company, which had taken possession of the 40 acres covered by the conveyance to it, and thenceforth had prosecuted development work thereon to a discovery. The court said: "No doubt may be entertained that a conveyance such as this may be made, and that the effect of such conveyance, if such be its expressed intent, is to surrender to the grantee all of the rights which the grantors formerly enjoyed"—that is, the right to possession against all illegal intrusions—while he is in possession diligently prosecuting his work of discovery, and the right to obtain a perfected location by a sufficient discovery while so continuing in possession. Such a conveyance before discovery is not an abandonment of the claim as to the portion conveyed, in the sense that such portion is removed from the protection of the original location as a source of the right to possession. The portion so conveyed is not by force of the conveyance rendered vacant and unoccupied mineral land open for a new entry. To this extent certainly the law of the case is established by the decision on the prior appeal, not only as to the Merced Oil Mining Company, but also as to Castle, for the question involved is one of the questions necessarily presented as to both of said plaintiffs. The opinion determines this question in favor of both said plaintiffs in the manner we have indicated, and the views expressed thereon at that time thus became the law of the case, binding on the lower court on the retrial, and binding upon us upon this appeal.

[2] Were the question an open one, however, we see no good reason warranting us

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

in declaring a different rule. The decision was in line with the earlier case of Miller v. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63. The latter case, it is true, was limited to the effect of conveyances of undivided interests among the associates themselves. But, so far as this matter is concerned, we see no difference in principle between such conveyances and a conveyance by the associates to an outsider of either an undivided interest or a segregated portion. Such objections as may be made on the score of public policy or the policy of the mining laws of the United States would appear to apply equally to either. It was said in Miller v. Chrisman, supra: "We cannot perceive why these rights (the rights of associates in possession under such a claim) may not in good faith be made the subject of conveyance by the associates as well before as after discovery. There is certainly nothing in the expressed law upon the subject to lead to the view that this cannot be done, and there is much to give countenance to the contrary conviction." Whatever argument may be made against this view, we are satisfied that, so far as the courts of this state are concerned, it must be held to be a rule of property from which a departure should not now be made. This was fully recognized by Chief Justice Beatty (who dissented in Miller v. Chrisman, supra) by his concurrence in the opinion filed on the former appeal in this case. It is likewise to be noted that in affirming the judgment of this court in Miller v. Chrisman, supra, the Supreme Court of the United States said nothing inconsistent with what had been said by this court on this question. Chrisman v. Miller, 197 U. S. 313, 25 Sup. Ct. 468, 49 L. Ed. 770.

Upon the former appeal the record did not show anything in regard to the conveyance to the Merced, etc., Company, other than that it was an absolute conveyance of a segregated portion for a money consideration. It was held that, nothing else appearing, the segregated portion conveyed must thenceforth be held to be a separate and independent claim, without further connection in any way with the remaining portion, with the result that a subsequent discovery upon the portion conveyed would not redound to the benefit of such remaining portion and thus be sufficient to validate and perfect the location of the owners thereof, and that work done and money expended upon the portion conveyed would not be a sufficient compliance with the laws of the United States requiring the performance annually of work of a certain value, as to the remaining land. But the court, for the purposes of the new trial ordered, was very clear in its statement of the circumstances under which a different conclusion would be required.

After saying that the conclusion reached expressed the condition that must obtain where "the agreement of the parties goes no further than to a bare conveyance of the grantor's possessory rights," the court said: "But, upon the other hand, by convention and agreement of the parties, a radically different result may be legally accomplished. No one would question but that the associates might authorize a stranger to their interests to enter upon their land and sink a well, agreeing, in the event of a discovery of oil, to convey to such person any designated portion of the claim. In such case, clearly the work would be done for the benefit of all the associates and of the whole claim. It cannot make any difference that the conveyance to the party who is so to develop the land is made before or after discovery, provided that it be understood between them, as part of the consideration, that the work done and the discovery when made shall be for the benefit of the whole claim. As parol evidence is always received to show the true consideration of a contract, this part of the consideration may rest upon an oral agreement of the parties and need not therefore be embodied in the deed. * * * No reason is perceived why the parties may not make a conveyance of a divided as well as an undivided interest, to the end that the grantee may prosecute the work of discovery for the benefit of all. * * * Coming to apply this principle to the facts in this case, if as a part of the consideration of the deed to the Merced Oil Mining Company it was understood and agreed between the parties that the labor done and money expended upon the Merced Company's 40 acres should operate for the benefit of the land remaining in the possession of the associates, such effect would be legally given. And, in turn, the value of the work and the resulting discovery would redound to the benefit of all subsequent grantees of the associates."

[3] It cannot be seriously questioned that the findings of the trial court on the retrial clearly bring this case, as to the Castle 40 acres, within the rule thus declared. Some point is made of the fact found that the first conveyance by the associates was to one Harris, instead of to the Merced Oil, etc., Company and that such company which was the immediate grantee of Harris instead of the associates and which had not been organized at the time of the conveyance to Harris, never agreed to do the development work for the benefit of the associates, and that Harris never personally assumed any such undertaking, but only agreed that the company to be organized should do so. There is no force in this claim. The findings clearly show that it was agreed at and before the time of the conveyance to Harris, between the associates on the one side and Harris and four other persons (one of whom was Castle) on the other, as a part of the consideration for the execution and delivery of the deed, that Harris and his associates would organize such corporation; that Harris would

convey the property to the corporation immediately upon its organization; that such corporation would thereupon immediately occupy the land and proceed diligently with the work of exploration for oil thereon; that the labor done and money expended by it on such land should operate for the benefit of the remaining land and all subsequent grantees thereof; and that any discovery of oil thereon should operate to the benefit of the remaining land in the way of perfecting the location of the original associates and their subsequent grantees. They further show that the course of procedure thus agreed upon, to use the language of counsel for respondent, "was adopted, acted upon, and carried into execution in full compliance with the understanding and intention of all of the parties." Harris did exactly what he agreed to do as a part of the consideration for the deed, and the corporation subsequently organized has done exactly what he agreed, as a part of such consideration, that it would do in the matter of occupying, exploring for, and developing oil thereon. Regardless of all question whether the corporation was in any way bound by the undertaking of Harris to the associates, we have that undertaking fully satisfied, and the consideration agreed upon executed. In all other respects the findings on the retrial are the same as they were on the first trial.

Assuming, as contended by learned counsel for appellants, that what was said on the former appeal as to the effect of such an undertaking by the purchaser in part consideration of the sale is not the law of the case, we have upon this appeal simply the question whether we should adhere to the views thus expressed.

[4] It is the established rule, as declared in Miller v. Chrisman, supra, that a location made by an association of persons, being but a single location and not eight separate locations, is to be treated as an entirety under one location for all purposes of marking boundaries, doing assessment work, expenditure for patent, and discovery of oil, and that but a single discovery is all that is required to support it. We see no good reason why the associates may not maintain this condition of entirety *for such purposes*, for the benefit of themselves and their successors, notwithstanding their conveyance of a segregated portion under such circumstances as are disclosed by the findings in this case. The conveyance was made in consideration of the undertaking to do the discovery work for the benefit of the associates and their grantees. By reason of that undertaking, the grantee, while possessing all the rights of the associates as to the portion conveyed, was substantially and in effect the agent of the associates for the purpose of doing the necessary work and making such a discovery as would perfect the original location as an entirety. As was pointed out in the former opinion, the only difference between such a grantee and one to whom a conveyance of a segregated portion has been promised upon a discovery by him sufficient to perfect the location is that he has been paid his consideration in advance. In both cases the work is being done "for the benefit of all the associates and of the whole claim." For the purposes we have specified, it is the work of the associates. We are of the view that the former opinion correctly states the law on this question, and should be adhered to. We find nothing in McLemore v. Express Oil Co., 158 Cal. 559, 112 Pac. 59, that is at all inconsistent with either Miller v. Chrisman, supra, or our decision on the former appeal in this case, nor can we perceive that it involved any question material here.

As we have said, the defendants claim under an entry made in 1904. At that time, in view of what we have already said, the location had long since been perfected as to the entire 160 acres, including the portion conveyed to Castle by the associates, by a sufficient discovery of oil on the portion held by the Merced Company. We are not concerned here with any question as to the effect of Castle's lack of personal possession of the portion conveyed to him, pending such discovery, for there was no attempted entry by defendants during such period. After the entire location had been perfected by discovery, such actual possession was not essential to the protection of his rights. As we understand the record, it is not questioned that the necessary assessment work has been done on the Merced Company's portion of the 160 acres each year since the discovery of oil in 1900, to and including the year 1903.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.; SHAW, J.; MELVIN, J.

162 Cal. 352

In re WEST'S ESTATE. (S. F. 6,062.)

(Supreme Court of California. March 22, 1912.)

1. Executors and Administrators (§ 358*) —Orders Appealable — "Order Against Sale"—Vacating Confirmatory Order.

An order of the superior court, annulling and setting aside a former order confirming the sale of realty belonging to a decedent's estate, is an order "against directing a sale or conveyance" within Code Civ. Proc. § 963, subd. 3, so as to be appealable to the Supreme Court.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1469–1479; Dec. Dig. § 358.*]

2. Appeal and Error (§ 801*) — Review— Questions Considered.

On a motion to dismiss an appeal from an order vacating an order confirming the sale of realty on the ground that the vacating order was not appealable, the validity of the original order cannot be considered.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3161–3164; Dec. Dig. § 801.*]

3. Appeal and Error (§ 41*)—Orders Appealable.

The legal effect, and not the form, of an order should be considered in determining whether it be appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 127–155, 157, 158, 172, 178–184, 186–188, 190–194, 196, 197; Dec. Dig. § 41;* Action, Cent. Dig. § 116.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Samuel M. West, deceased. From an order vacating an order confirming the sale of realty, the O'Brien & Kiernan Realty Company appealed, and a motion was made to dismiss the appeal. Motion denied.

Joseph P. Lucey, for appellant. Cooper, Gray & Cooper, for appellee.

LORIGAN, J. On a sale and return and hearing thereon the superior court made an order on June 27, 1911, confirming the sale of certain real property of the estate to the O'Brien & Kiernan Realty Company.

On August 29, 1911, the court, after notice to the parties interested and a hearing, entered an order in which it recited that the return of sale of said property theretofore made by the executors showed that the said property was sold to one Frank M. Scoonover for the sum of $11,000, or for the sum of $7,000 cash, he to pay a mortgage of $4,000 and accrued interest amounting to the sum of $100 due to the French Savings Bank; that on the hearing on such return the court purported to make an order confirming the sale of said property to the O'Brien & Kiernan Realty Company for the sum of $11,800; that it now appeared, in making said order approving the sale to the O'Brien & Kiernan Realty Company, the court acted without its jurisdiction and without power for the reason that the bid of said Frank M. Scoonover was not raised 10 per cent. as required by law, and that the order of June 27, 1911, confirming the sale to said O'Brien & Kiernan Realty Company was in excess of the jurisdiction of the court. After making these recitals it was then "adjudged and decreed that the said order so made confirming the sale to said O'Brien & Kiernan Realty Company, a corporation, is void, and was at all times void and of no effect, and the same is hereby annulled and set aside."

[1] An appeal was taken by the O'Brien & Kiernan Realty Company to this court from said order, and the respondent moves to dismiss the appeal on the ground that the order appealed from is not one of the orders enumerated in subdivision 3 of section 963 from which an appeal may be taken.

The subdivision of that section provides that an appeal in probate proceedings may be taken from an order "against or in favor of directing the partition, sale, or conveyance of real property," and it is under this provision of the section that appellant bases his right to appeal.

The claim of the respondent is that the order from which the appeal is prosecuted is not an order directing the sale or conveyance of real property; that it is simply an order setting aside an order of confirmation of sale, and that an order setting aside an order is not one of the orders enumerated in the subdivision of the section from which an appeal may be taken.

Counsel for appellant, resisting the motion, relies on the cases of In re Pearsons, 98 Cal. 603, 33 Pac. 451, and Estate of Leonis, 138 Cal. 194, 71 Pac. 171, which he claims directly sustain his right of appeal. But these cases are not in point. In the Pearsons Case the appeal was directly from an order confirming a sale and directing a conveyance, and in the Leonis Case, while the point was made that an order setting aside an order of sale was not an appealable order, the court found it unnecessary to pass upon that question.

The exact point now made has never been heretofore directly presented for consideration, but we are satisfied that an order setting aside a prior order of confirmation is in clear legal effect an order against directing the sale or conveyance of property and appealable.

On this motion we have before us only the order of the court appealed from which, in terms, sets aside the order of confirmation of the sale to appellant. But the statute requires (section 1554, Code Civ. Proc.) that, in making the order confirming the sale, the court shall in the order also direct a conveyance to the purchaser, and it is to be presumed that the court followed the law, and in addition to confirmation expressly directed the conveyance to the appellant. However, for present purposes, whether there was an express direction for a conveyance or not is not of particular importance; there was an order of confirmation which necessitated a conveyance to the appellant as the result of confirmation, and which the order appealed from attempted to set aside.

[2] Under this order the appellant acquired an absolute right, if the order was valid (and of course on this motion we cannot consider that question) to a conveyance from the executors. If the order had directed the sale and conveyance in the proceedings for confirmation to any other bidder for the property than appellant, the latter would have had a right to appeal from it as an or-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

der against directing a conveyance in its favor or in favor of the other bidder. After having made an order for a sale and conveyance in favor of appellant, the court makes a subsequent order vacating such former order. If this latter order is not one against directing a sale and conveyance to appellant, what was its substantial effect? It is of no consequence that this order is in form an order setting aside an order of confirmation.

[3] The question as affecting a right of appeal is not what the form of the order may be, but what is its legal effect. The plain legal effect of the order involved here is a determination against the right of the appellant to an order directing a sale and conveyance to it, and, as this is clearly its legal effect, the right to appeal therefrom is secured under the subdivision and section of the Code relied on by appellant.

Counsel for respondent, while conceding that the point raised now has not been heretofore directly decided by this court, claims that under the decisions respecting analogous orders a right of appeal from an order such as is involved here is denied. He cites Estate of Johnson v. Tyson, 45 Cal. 257; Estate of Calahan, 60 Cal. 233; Estate of Hickey, 121 Cal. 378, 53 Pac. 818, and others, but, as these cases directly referred to are claimed by him to be more particularly in point, they alone will be considered and discussed.

In the Tyson Case the widow of the deceased filed a petition to have a homestead set apart to her. Before any order was made respecting the homestead, the probate court entered an order dismissing all the proceedings subsequent to the filing of the petition. The widow appealed from this order, basing her right of appeal on the provisions of the then Probate Act (section 297), which allowed an appeal from an order "for or against setting apart property," etc., for the widow. The appeal was dismissed, this court holding that the order complained of did not amount to an order either "for or against setting apart property"; that the proceedings were still pending before the probate court on the petition for a homestead. This case has no application here because here an order directing a sale and conveyance had been made, and, if that order was valid, there was nothing pending before the court when the subsequent order was made setting aside the previous order.

The other two cases cited relate to, in one case, an appeal from an order vacating a decree of distribution and settlement of a final account, and the other vacating a prior order settling a final account, and it was held that these orders were not appealable because not one of the orders enumerated in the Code from which an appeal could be taken. As to appeals in those matters, the Code provided that they might be taken from orders "settling an account" or "refusing, allowing, or directing distribution," and it was held that an order vacating an order was not enumerated in the subdivision of the section as an order from which an appeal could be taken. But neither do either of these two cases dispose adversely of a right to appeal from the order here in question. While it is not an answer to the claim of respondent now made, it may be said that no criticism could be placed on the rulings in the above cases because, in holding that an appeal from an order setting aside an order in these particular probate matters, the appellant attempting to prosecute them suffered in no substantial respect. Notwithstanding a court may set aside an order of distribution or an order settling a final account, and there may be no provision for appeal, this is only a temporary delay of relief. Final accounts must be ultimately settled and distribution ultimately ordered, and, if a party is still aggrieved, he can appeal from the order as finally made and obtain the same relief that he could have secured had an appeal from the order setting aside the order been allowed him. We do not, however, pretend to sustain our conclusion that the order from which this appeal is taken is an appealable order by an attempt to differentiate the orders in the cases cited from the order at bar on any such ground. The cases cited, in our judgment, simply have no application whatever. The rulings in them are based upon the fact that the Code prescribed specifically the orders from which the appeal might be taken, and that no provision was made for an appeal from an order setting aside an order settling accounts or ordering distribution.

But the question here is not whether there is any express provision for an appeal from an order setting aside an order, but what was the character of the order from which the appeal is taken. It was certainly an order setting aside an order, but the question is, while such in form, What was its legal effect? No appeal is allowed in terms from an order confirming or refusing to confirm a sale. The subdivision says nothing about confirmation. The right of appeal which is given is from an order in favor of or against directing a sale or conveyance which in probate proceedings follows on a hearing for confirmation of a sale. But confirmation of a sale is not mentioned, and hence the fact that an order is in form an order setting aside an order of confirmation of a sale is immaterial. The right to appeal is determined by the legal effect of the order, not its form, and, as the order here in question is in legal effect an order against directing a sale and conveyance to appellant, it had a right to appeal therefrom.

In addition to the authorities cited, counsel for respondent claims that the only effect of the order setting aside the prior order of confirmation in favor of the appellant was to allow further proceedings to be taken by the court, and that, when subsequently the court again proceeded in the matter and made an order directing a sale and conveyance to Frank M. Scoonover, the appellant could appeal from that order as a final order in the confirmation proceeding, and under such appeal obtain all the relief he claims under the appeal here taken. But there is nothing in the record as to any subsequent action of the court after it set aside the order of sale in favor of the appellant, and it would not affect the present question if there was. If the original order directing a sale and conveyance to the appellant was valid, the appellant had acquired a vested right to a conveyance, and the court could make no subsequent order which would defeat that right.

Nor can appellant's right of appeal from the order in question be made to depend upon any subsequent act of the court in the matter. No further proceedings upon the return of sale under which confirmation in behalf of the appellant was made might ever be taken. The executors and Scoonover might have abandoned further proceedings under it or the court have directed another sale. If, on the other hand, subsequent proceedings were had, and a sale of the property confirmed to Scoonover or to any one else, the right of appellant to appeal from that subsequent order would not afford it the same relief as could be obtained on an appeal from the order setting aside the prior order directing a sale and conveyance to it. An appeal from the order setting aside the sale and conveyance to it, from which this appeal is taken, would determine directly the right of the appellant to a conveyance under the original order in the confirmation proceeding. If it was relegated to an appeal from a subsequent order which might direct a sale and conveyance to Scoonover or some one else, if such an appeal were successfully maintained, it would determine only that the order directing a sale to Scoonover or some other person was invalid. It would not determine directly the question that the confirmation to appellant which the court attempted to set aside was valid, and it is the right to have that question determined directly which is given under the subdivision of the section when the order setting aside an order of confirmation is in legal effect an order "against directing * * * a sale or conveyance" in its favor.

The motion to dismiss the appeal is denied.

We concur: BEATTY, C. J.; HENSHAW, J.; MELVIN, J.

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162 Cal. 343

BOUST et al. v. SUPERIOR COURT OF KERN COUNTY (two cases).

(S. F. 6,086, 6,087.)

(Supreme Court of California. March 21, 1912.)

1. Appeal and Error (§ 440*) — Effect — Power of Lower Court to Amend Judgment.

The trial court may, either before or after an appeal has been finally determined, amend an entry of judgment so as to make it accurately express the judgment declared providing the amendment consists merely in rectifying a clerical mistake apparent on the face of the record, and does not affect the substantial rights of defendants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2198–2201; Dec. Dig. § 440.*]

2. Mandamus (§ 52*) — Decree — Correction of Judgment.

Where the entry of a judgment refers in its title to the defendants by the name of one "et al.," and in its body does not designate them by their names, the Supreme Court will in mandamus proceedings require it to be corrected so as to conform to the facts.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 101; Dec. Dig. § 52.*]

3. Mandamus (§ 176*)—Correction of Judgment—Scope of Relief.

Since a judgment, general in its nature, designating the defendants by the name of one "et al." is sufficiently general in its terms to include all the defendants before the court, the court in mandamus to compel correction of the judgment will require that it designate all the defendants by name, and it is immaterial that the demurrers filed by two of the defendants had not been decided, or that attorneys representing the defendants generally had withdrawn their names as representatives of certain defendants.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 392–394; Dec. Dig. § 176.*]

4. Judgment (§ 497*)—Collateral Attack.

Where a judgment recited that certain things were "ordered, adjudged, and decreed," it could not be collaterally attacked on the ground that it was not made in open court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 937, 938; Dec. Dig. § 497.*]

In Bank. Two petitions for writs of mandamus by E. J. Boust and others against the Superior Court of the County of Kern. Petitions granted.

Jas. W. Bell and Bell & Ingalls, for petitioners. W. E. So Relle and C. L. Claflin, for respondent.

MELVIN, J. These are two petitions for writs of mandamus in cases so similar that we need discuss only one of them, applying our reasoning to both. In case "S. F. No. 6,087" there is an application for mandate to be directed to the superior court of Kern county for the insertion nunc pro tunc as of September 28, 1911, in the caption and in the body of a certain judgment of the names of a number of defendants, and commanding that an alias writ of restitution issue in accordance with such amended judgment.

The action in which the above-mentioned

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

judgment was issued was one in forcible entry and detainer. A demurrer in the names of all of the defendants was filed, and after its amendment was overruled. Subsequently P. Katz and Julia Miller, who had been served with summons under fictitious names, filed a demurrer signed by one of the attorneys who had theretofore appeared for the defendants. This demurrer was never formally heard by the court. The defendants answered, entitling their pleading "E. J. Boust et al. v. W. E. So Relle, C. A. Stubblefield et al.," and later, without leave of court, left with the clerk a so-called amended answer. They then sought the court's permission regularly to file this amended pleading, but their motion in that behalf was never finally disposed of. After the overruling of the amended demurrer, the attorneys who had appeared at the argument thereof withdrew, under the court's permission, from the representation of several defendants. The plaintiffs in the action (petitioners here) moved for a judgment on the pleadings, and after a hearing of their motion the court granted it. The judgment which followed was entitled in the abbreviated form, referring to defendants as "C. A. Stubblefield et al." In the body of the judgment as entered, the defendants were not designated by their names. From this judgment an appeal was taken. The notice of appeal named a number of defendants, including four of those whom the attorneys had theretofore declared that they had ceased to represent. In the body of the document was a recital that "the defendants in the above-entitled action" and also certain defendants who had been served with summons under fictitious names (including Miller and Katz whose demurrer remained undecided) appealed from the judgment. This appeal was dismissed by written consent of an attorney of record for defendants on November 20, 1911. On November 27, 1911, these petitioners made a motion in the superior court of Kern county that the judgment as entered should be amended by inserting the names of the defendants against whom, in truth and in fact, the judgment was ordered, and that said names should be placed in the record nunc pro tunc as of September 28, 1911, the date of the granting of the motion for judgment on the pleadings. This motion was denied. The clerk of the court refused to issue a writ of restitution except in a form following the judgment as entered. Such writ was issued.

[1, 2] Petitioners contend that the failure to insert the names of the defendants in full in the judgment was a clerical misprision which the court was bound to correct upon proper application. It was held many years ago by this court that where a judgment as first entered failed to name the defendants who were personally liable for a debt, but the record did not show who they were, the court might at any time amend the judgment in such manner that it should properly designate such defendants. Leviston v. Swan, 33 Cal. 484. We know of no departure from the principle of that decision. Indeed, this court has always displayed the utmost liberality in permitting such amendments in the furtherance of justice, and will of course require them to be made for like purpose when the superior court has refused to perform a plain duty. The power of the court to correct an entry of judgment so that it may accurately express the judgment declared by the court may be exercised either before or after an appeal has been finally determined, provided, of course, that the amendment does not affect substantial rights of the defendant, but consists in the rectifying of a clerical mistake appearing on the face of the record. City and County of San Francisco v. Brown, 153 Cal. 651, 96 Pac. 281; Fallon v. Brittan, 84 Cal. 514, 24 Pac. 381; Fay v. Stubenrauch, 141 Cal. 575, 75 Pac. 174; Bolling & Son v. Speller, 96 Ala. 271, 11 South. 300. That the court below should be required by mandamus to correct the entry of judgment so that it may conform with the facts admits of little doubt. The only question remaining is whether or not such correction should include all of the names of original defendants that are proposed by petitioners.

[3] The attorneys for respondent contend that, in any event, the judgment should not include the names of Katz and Miller, whose demurrer was never decided, and those of the parties whom they had ceased to represent at the proceedings in the lower court. The obvious answer to this is that all of these parties were before the court, no matter who represented them, and the general judgment operated against all of them. The entry of judgment against the two demurrants before decision of the demurrer could in no event be more than mere error, and, as they were parties to the appeal which was dismissed by their consent, they cannot be heard to complain because the corrected entry of judgment shall contain their names. If the unrepresented defendants were improperly included in the judgment by reason of lack of notice or other cause, that was error which might have been corrected on appeal, or perhaps set right by appropriate proceeding in equity. They were before the court, and the judgment, general in its terms, applied to them. The judgment should be corrected by inserting in the caption and the body thereof the names of those defendants who appeared by demurrer as shown in the record before us. The judgment, as we have said, was sufficiently general in its terms to include all of these parties. Indeed, all but three or four of them formally appealed from it and through their attorney consented to the dismissal of the appeal.

Respondent complains that the proposed form of the new entry of judgment which in the petition we are asked to adopt differs in phraseology from the original, and that it contains names not warranted by the record. We find no material variation in the language between this and the original entry, and the names that the petitioners ask to have inserted are those of parties who formally appeared at some stage of the case prior to the entry of judgment. We do not think that the proposed form is essentially different from one that the court might draft of its own motion upon inspection of the records. Gay v. Torrance, 145 Cal. 153, 78 Pac. 540, cited in behalf of respondent, is not at all in point. In that case the writ was refused because part of the relief desired was the adoption of an offered bill of exceptions containing some relevant affidavits and others which were wholly improper.

[4] There is no force in the argument that because, according to the answer, the judgment was not made in open court, it cannot now be corrected. The judgment as entered recites that certain things were "ordered, adjudged, and decreed"—words appropriate to a judgment duly given by proper authority at the proper place. Upon its face it was duly made, and it cannot now be successfully attacked collaterally. In Norwood v. Kenfield, 34 Cal. 331, and Carpenter v. Nutter, 127 Cal. 64, 59 Pac. 301, cited by respondent the matter of the proper place of transacting judicial business was directly involved in the appeals. Those cases are therefore not authority for respondent's position here.

A number of other arguments are made by respondent which might have been available by the defendants in the discussion of their case on appeal, but these have no place in this proceeding.

Our attention is called to an alleged discrepancy between the area of land mentioned in one of the complaints and that set forth in the judgment in said case; but this matter is not in issue as it appears neither in the petition for the writ nor the answer thereto.

What has been said in this opinion applies also to case "S. F. No. 6,086."

Let the writs issue as prayed.

We concur: LORIGAN, J.; ANGELLOTTI, J.; HENSHAW, J.; SHAW, J.

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162 Cal. 334

RIGBY v. SUPERIOR COURT OF MARIN COUNTY. (S. F. 5,894.)

(Supreme Court of California. March 18, 1912.)

1. Justices of the Peace (§ 159*)—Appeal—Undertaking—Time of Filing.

Code Civ. Proc. § 974, permitted appeals from police judges' or justices' judgments to be taken any time within 30 days after rendition, and section 978 provided for an undertaking on appeal with sureties, and for exceptions to the sureties, etc. St. 1909, pp. 1064, 1065, amended section 978 by omitting the provisions relating to exceptions, and added section 978a providing that an undertaking on appeal must be filed within five days after the filing of the notice of appeal and notice of the filing of the undertaking be given to respondent, and that the adverse party may except to the sureties within five days after the filing of the undertaking, and, unless the sureties justify within five days thereafter, the appeal must be regarded as if no undertaking were given. *Held* that, after the enactment of section 978a, the time for filing the undertaking on appeal began to run only after the filing of the notice of appeal, and the undertaking could be filed more than 30 days after judgment.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 544, 550–578; Dec. Dig. § 159.*]

2. Justices of the Peace (§ 159*)—Appeal—Notice of Final Undertaking—Necessity.

Code Civ. Proc. § 974, providing the manner of appeal from a justice's judgment, does not provide for filing of an undertaking; section 978, as amended by St. 1909, p. 1064, provides that an undertaking on appeal must be filed and, unless filed, is not "effectual for any purpose"; but section 978a, as added by St. 1909, p. 1065, merely provides that notice of the filing of the undertaking must be given to respondent, without specifying when it must be given or the manner of giving it. *Held*, that the statutes did not make the notice of filing the undertaking jurisdictional, so that failure to file notice was not ground for dismissing the appeal.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 544, 550–578; Dec. Dig. § 159.*]

3. Statutes (§ 243*)—Construction—Remedial Statutes.

The law does not favor forfeitures, and the statutes giving a right of appeal and prescribing the appellate procedure are remedial, and should not be construed with undue strictness so as to make appellate jurisdiction doubtful.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 324; Dec. Dig. § 243.*]

In Bank. Application for a writ of review by William Rigby, Jr., against the Superior Court of Marin County, to review an order setting aside a judgment. Order annulled.

Wal. J. Tuska, for petitioner. George H. Harlan, for respondent.

SHAW, J. On August 31, 1910, the Mill Valley Rochdale Company recovered a judgment against L. T. Parker in the superior court of Marin county. The action was begun in the recorder's court of the town of Mill Valley, a town of the sixth class, and that court had given judgment for Parker. The Rochdale Company appealed to the superior court. On April 22, 1911, L. T. Parker served and filed a notice of motion to set aside the judgment on the ground that the appeal from the recorder's court was not properly taken, and that therefore the superior court was without jurisdiction of the case. The motion was granted, and on April 29, 1911, the superior court made an order setting aside its former judgment and dismissing the action for lack of jurisdiction. Rigby, the plaintiff in the present proceeding, is the assignee of the Mill Valley Rochdale Company. More than six months had passed after the rendition of the judgment before the application to set it aside was made. Therefore, unless the judgment was void for lack of jurisdiction of the cause, the superior court had no jurisdiction to make the order setting it aside. Asserting that the judgment was not void, this proceeding in certiorari was begun by Rigby to annul the order on the ground that the superior court had lost power over the case, and could not make a valid order setting the judgment aside.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The judgment in the recorder's court was rendered on July 8, 1910. The notice of appeal therefrom to the superior court was served on August 3, 1910, and filed in the recorder's court on August 5, 1910. The undertaking on said appeal was not filed until August 10, 1910, and no notice thereof was given to Parker or his attorney until August 12, 1910. It is claimed that the appeal was ineffectual to vest jurisdiction of the cause in the superior court for two reasons: (1) That the undertaking, although filed within five days after the filing of the notice of appeal, was filed more than 30 days after the rendition of the judgment; (2) that the giving of a notice of the filing of the undertaking is necessary to perfect the appeal, and that it was given too late to be of any effect.

The validity of the appeal depends upon the meaning and effect of the amendment of 1909 to the provisions of the Code on the subject. These provisions apply to recorder's courts. Stats. 1905, p. 73. Prior to 1909, section 974 of the Code of Civil Procedure provided that such appeals could be taken at any time within 30 days after the rendition of the judgment appealed from, by filing a notice of appeal with the justice and serving a copy thereof on the adverse party, and section 978 provided that such appeal would not be effectual for any purpose unless an undertaking on appeal with two or more sureties be filed. These provisions were not changed by the amendment. It will be noted that the time within which the undertaking must be filed was not fixed by the terms of the Code. It was silent on that point. Nevertheless, in a series of decisions it had been established that the undertaking must be filed within 30 days, or the appeal would be ineffectual and void. Coker v. Superior Court, 58 Cal. 178; Dalzell v. Superior Court, 67 Cal. 454, 7 Pac. 910; Hall v. Superior Court, 68 Cal. 25, 8 Pac. 509; Duterte v. Superior Court, 84 Cal. 536, 24 Pac. 284; McKeen v. Naughton, 88 Cal. 466, 26 Pac. 354.

The Legislature of 1909 amended section 978 and added a new section, numbered 978a to the Code of Civil Procedure. The only material amendment of 978 consisted of the omission of the final sentence relating to the subject of exceptions to the sureties and the justification of sureties. This sentence, with some important additions on which the decision of this case depends, was re-enacted as section 978a. It reads as follows: "The undertaking on appeal must be filed within five days after the filing of the notice of appeal, and notice of the filing of the undertaking must be given to the respondent. The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or judge within five days thereafter, upon notice to the adverse party to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given."

[1] 1. The main argument in support of the first objection is that the clause of section 978a, declaring that the undertaking "must be filed within five days after the filing of the notice of appeal," does not enlarge the time for filing such undertaking as fixed by the decisions above cited, that it must be filed within the 30 days, as before, regardless of the time of filing the notice of appeal. That is to say, applying this theory to the present case, as the 30 days from July 8th expired on August 7th, the filing of the notice of appeal on August 5th, two days before the expiration of the period, did not extend the time for filing the undertaking to August 10th, but that it still remained necessary to file it on or before August 7th, notwithstanding the clause quoted.

We cannot agree to this proposition. The decisions above cited were made when the Code contained no provision as to the time for filing the undertaking. It then provided only that the appeal must be taken "within 30 days after the rendition of the judgment," that an appeal "is taken by filing a notice of appeal" and serving the same (section 974), but that such appeal would be ineffectual unless the undertaking was filed. Section 978. As the appeal must be taken within 30 days, and could not be effectively taken without filing an undertaking, and no time was expressly fixed within which the latter must be filed, it followed as a fair inference, from the provision as a whole, that the undertaking must be filed within the period fixed for the taking of the appeal. This, at least, was a permissible construction of an ambiguous statute. But if the Code at that time had contained an express provision stating the period within which the undertaking "must be filed," as it now does, it cannot be doubted that the court would have followed the express and clear language, as it was bound to do, and would not have resorted to inferences contrary to that provision. The omission is now supplied, the time is stated clearly and unequivocally, and it is not for the court to enlarge or curtail it by unnecessary construction.

The time for filing the undertaking does not begin to run, as before it was construed to begin, at the time of the rendition of the judgment. Another event, the filing of the notice of appeal, now fixes the beginning of the period. There being nothing to the contrary in the Code, it necessarily follows that the time does not stop with the 30 days, but in all cases it continues for 5 days after the filing of the notice of appeal, whenever that may be, notwithstanding the fact that this may in some cases permit the filing of the undertaking as much as 5 days after the 30-day period has elapsed. The filing of the undertaking was not then, and is not now, made a part of the process of taking the appeal. That process was complete when the notice of appeal was served and filed. But it was subject to lapse, and became null unless the condition subsequent occurred within the time prescribed. A similar lapse may occur now, but the time for the happening of the condition subsequent depends upon a different event, an event which may extend it for five days after the expiration of the time fixed for the serving and filing of the notice of appeal. This, we think, is the clear meaning and effect of the present provisions of the Code on the subject.

It is further argued that a consideration of the evils which the amendment was intended to cure shows that there was no intention to change the established rule that all the steps in the proceeding to perfect the appeal must be taken within the 30 days. Under the law as it was, the order of the several steps and the time that separated them was immaterial, provided they all occurred within the 30 days. A party might file his notice of appeal on the day of the judgment and delay the filing of the undertaking until the thirtieth day. The adverse party would have to be in frequent communication with the justice during these 30 days to see that the 5 days for excepting to the sureties did not elapse, if he would avoid having a straw bond imposed upon him. Doubtless the removal of this evil was one of the objects sought, and perhaps the principal one. But we do not see how this fact can have the effect of shortening the time allowed by the amendment for the filing of the undertaking. It is a matter to be fixed by the Legislature, and, when it has done so in clear language, the necessity for interpretation by the courts ceases. The Code now prevents a delay of more than five days after the filing of the notice of appeal. This evidently was the evil to be obviated. The decision of the district court of appeal of the First district in Regan v. Superior Court, 14 Cal. App. 572, 114 Pac. 53, 72, is contrary to the views here expressed on this point, and it is to be considered as overruled.

[2] 2. The notice of the filing of the undertaking cannot be held to be jurisdictional, unless the statute so declares, either expressly or by reasonable implication. Section 974 declares how an appeal is to be taken. Notice of the filing of the undertaking is no part of the process there prescribed. Section 978 provides that an undertaking on appeal must be filed, and that, unless it is filed, the appeal is "not effectual for any purpose." Section 978a provides that "notice of the filing of the undertaking must be given to respondent." It does not specify whether such notice is to be given before the filing or after the filing, nor within what time, nor whether it is to be written or oral. No action by respondent is made to depend upon or follow the giving of this notice. The exception to the sureties seems to have no direct relation to or connection with this notice. It may be taken before or after any formal notice of the filing of the undertaking, provided it is taken within five days after such filing. There is no declaration that the failure to give this notice will render the appeal ineffectual, or that it will affect the appeal in any manner. The right of appeal is clearly given, and the mode of taking it is clearly fixed, by section 974. In view of the express declaration of section 978 that if the undertaking is not filed the appeal becomes ineffectual for any purpose, the absence of any such provision with respect to the failure to give notice of such filing is significant, and it indicates that there was no intention to make such notice necessary to the validity of the appeal. It is true the last clause of section 978a provides that if sureties fail to justify after exception taken, the appeal shall thereupon be forfeited.

[3] Forfeitures are not favored, and the provisions conferring the right of appeal and prescribing the procedure are remedial and should not be unduly hampered with constructive restrictions which will cast doubt upon the jurisdiction of the appellate court. For these reasons we conclude tht the giving of this notice is not jurisdictional. The district court of appeal of the Second district, in a well-considered opinion, hold to the same view. Jeffries v. Superior Court, 13 Cal. App. 193, 109 Pac. 147. We approve the reasoning of that opinion.

It follows that the superior court had jurisdiction of the cause on appeal, that its judgment for the plaintiff was not void, and, consequently, that the order setting aside that judgment was beyond the power of that court and is itself void.

It is therefore ordered that the order of the superior court of Marin county, made on April 29, 1911, purporting to set aside its judgment rendered on August 31, 1910, in the action of Mill Valley Rochdale Company v. L. T. Parker, be, and the same is hereby, annulled.

We concur: BEATTY, C. J.; HENSHAW, J.; MELVIN, J.

162 Cal. 331

Ex Parte GALIVAN. (Cr. 1,715.)

(Supreme Court of California. March 16, 1912.)

1. RAILROADS (§ 230*)—OPERATION—"COACH"—"CAR."

Under Act Feb. 20, 1911 (St. 1911, p. 65) § 1, requiring common carriers to provide two brakemen on passenger trains consisting of four or more passenger coaches or cars, two brakemen are not required on passenger trains of four or more cars where less than four are passenger coaches or passenger cars, the word "passenger" in the statute qualifying "cars" as well as "coaches"; the words "coaches," and "cars" including all cars used for transportation of passengers.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 744; Dec. Dig. § 230.*

For other definitions, see Words and Phrases, vol. 1, pp. 969–970; vol. 8, p. 7596; vol. 2, p. 1236.]

2. STATUTES (§ 188*)—CONSTRUCTION—MEANING OF WORDS.

Unless the context of a statute indicates that the words used are to be taken in a technical or arbitrary sense, they should be given their ordinary meaning.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 266, 267, 276; Dec. Dig. § 188.*]

3. STATUTES (§ 178*)—PENAL STATUTES—CONSTRUCTION.

The rule expressly provided by Pen. Code, § 4, that the provisions of that Code shall be construed according to the fair import of their terms with a view to effecting its objects and promoting justice, applies to penal laws not included in the Penal Code.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 257; Dec. Dig. § 178.*]

In Bank. Original petition by J. B. Galivan for a writ of habeas corpus against John C. Ralphs, Sheriff of the County of San Bernardino. Petitioner discharged.

See, also, 120 Pac. 1123.

E. W. Camp, U. T. Clotfelter, and M. W. Reed, for petitioner. R. B. Goodcell, for respondent.

SHAW, J. The petitioner asks to be discharged from custody on the ground that the complaint upon which he was arrested does not charge a public offense.

The complaint attempts to state a violation of section 1 of the act of February 20, 1911, prescribing the number of persons to be employed in the operation of certain kinds of railroad trains. Stats. 1911, p. 65. The section is as follows: "Section 1. It shall be unlawful for any common carrier by railroad in the state of California operating more than four trains each way per day of twenty-four hours on any main track or branch line of railroad within this state to run, or permit to be run, any passenger, mail or express train propelled or drawn by steam locomotive that has not at least the following named employees thereon: One engineer, one fireman, one conductor, one brakeman, one baggageman; provided, that on any such train upon which baggage is not hauled a baggageman need not be employed; provided, further, that on any such train where four passenger coaches or cars exclusive of railroad officers' private cars, or more than four passenger coaches or cars are hauled, two brakemen instead of one shall be employed." The Atchison, Topeka & Santa Fé Company operates a railroad between the cities of San Bernardino and Los Angeles, and runs more than four trains a day each way thereon. The charge against Galivan is that he was the trainmaster of said company, and that, as such, he did on August 2, 1911, willfully and unlawfully aid and abet said company in running over said railroad a passenger train drawn by a steam locomotive, which train was composed of one locomotive, one baggage car, and three passenger coaches, and had only one brakeman employed thereon.

[1] The theory upon which this charge was made is that section 1 of the statute makes it a misdemeanor for a common carrier of the class there described to run a passenger train of four cars without two brakemen, although only three of such cars are passenger coaches or passenger cars and the other is a baggage car, mail car, or express car. It is claimed that in the clause of the last proviso reading as follows: "Where four passenger coaches or cars exclusive of railroad officers' private cars, or more than four passenger coaches or cars are hauled," the word "passenger" qualifies the word "coaches," but does not qualify the word "cars"; that the word "car" was added to designate any vehicle attached to the train not embraced in the term "passenger coach." We cannot agree with this proposition.

[2] The words of a statute are to be taken in their usual, ordinary, and popular sense, unless the context shows that they are used in a technical or arbitrary sense. People v. Eddy, 43 Cal. 337, 13 Am. Rep. 143.

[3] The provisions of the Penal Code are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice. Pen. Code, § 4. This act is not a part of the Penal Code, but it may be admitted that it is governed by the same rule. According to the usual rules of grammatical construction, and in the ordinary use of the language, the two words, "coaches" and "cars," in the clause quoted, would be understood to designate and include all ordinary railroad carriages used for the transportation of passengers. The argument that this construction would have the bad effect of sanctioning the running of a train having one brakeman, with three passenger cars, and a large number of baggage, mail, and express cars attached, has little force. Such trains are seldom used. The law itself permits the far more frequent occurrence of a train with eight or more cars carrying passengers and several baggage, mail or express cars, with only two brake-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

men, in which case the danger to human life, and the number exposed thereto, would be much greater. A passenger train with only three cars carrying passengers is not often accompanied by many baggage, mail, or express cars; usually with but one or two. It is to be presumed that the Legislature had in mind the usual and ordinary mode of operation, and not infrequent and occasional instances. The title of the act declares that its purpose was to promote the safety of employés and travelers upon railroads. The subsequent sections, 2 and 3, relate to trains other than passenger trains. They are evidently directed especially to the safety of the employés. Section 1 relates only to passenger, mail, and express trains, and its main object would seem to be to promote the safety of travelers. Whether the word "cars" has a broader signification than the word "coach" or not, the plain meaning of the passage quoted would confine it to cars carrying passengers, excepting officers' private cars. We see nothing in the context of the statute, or in its purpose and object, that requires the clause to be given an extraordinary, unusual, or technical meaning. It permits a train of three cars carrying passengers to be operated with only one brakeman, although a baggage car may also be attached thereto. The facts charged against the petitioner do not constitute a public offense within the statute.

Let the petitioner be discharged.

We concur: ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.

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162 Cal. 327

REYNOLDS v. LOS ANGELES GAS & ELECTRIC CO. (L. A. 2,751.)

(Supreme Court of California. March 16, 1912.)

1. NEGLIGENCE (§ 136*)—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

Whether an injured person was guilty of negligence in failing to observe the danger is usually a question for the jury to determine under the particular facts of the case.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277–353; Dec. Dig. § 136.*]

2. NEGLIGENCE (§ 66*)—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

Where an old woman in a fit of abstraction, though knowing of the presence of an open ditch near her house, stepped into it on her return from an errand, she was guilty of contributory negligence as a matter of law; it appearing that no extraordinary circumstance existed to cause her forgetfulness, and that her faculties were in no way impaired.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 86–89; Dec. Dig. § 66.*]

Department 2. Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by Euretta Reynolds against the Los Angeles Gas & Electric Company. From a judgment for plaintiff and an order denying its motion for new trial, defendant appeals. Reversed and remanded.

Wm. A. Cheney and Le Roy M. Edwards, for appellant. Morton, Riddle & Hollzer, for respondent.

HENSHAW, J. This is an action for personal injuries. From the judgment following the verdict of the jury in favor of the plaintiff, and from the order denying its motion for a new trial, defendant appeals.

Plaintiff was living as tenant in a small house situated about 10 feet from the sidewalk in the middle of a 60-foot lot. Across this lot and under the plaintiff's house running parallel to the street was a zanja owned by the city of Los Angeles. This zanja was leased to the defendant under a contract compelling defendant to keep it in repair. The old zanja pipe required renewal, and defendant undertook to replace it with a new concrete pipe. Defendant entered upon the premises with the express license of the owner thereof, and proceeded to dig a trench to uncover the old pipe from the southerly line of the lot to the house. This trench was so dug in the daytime, plaintiff having knowledge of the digging, and watching the men at work. The trench was about three feet wide and from one to three feet deep. The dirt removed in digging was thrown up along the street side. There was access to the rear of the house upon both sides of it, but the path habitually used extended along the south side where the trench had been dug. Such were the physical conditions.

Plaintiff was an elderly woman about 75 years of age, but physically vigorous. She raised and tended a flock of 50 or 60 chickens, took care of a cow, sold and herself distributed the milk, she cooked her own meals, did her own housework, and was a rapid and sure-footed walker. She had never been sick a day in her life, or, if so, it was so long ago that she had forgotten it. Such is her own testimony.

About 8 o'clock of the evening of the accident, it being then very dark, plaintiff left her residence by the back door to deliver milk to her neighbors. She first started to go around by the path on the south side of the house, but remembered the open ditch, and, not knowing in what condition it was left, turned about and walked with perfect safety around the north side of the house to the street. Upon returning home a few minutes later, plaintiff testified that she was in a hurry, and had forgotten entirely about the ditch. "It never entered my mind." "I never thought of it, until I fell into it." "I was in a hurry, and I walked right into it. That is the whole upshot of it. If I had thought of it, I would never have walked into it."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1, 2] Under this condition of the evidence, appellant contends that respondent as matter of law brought about her injury by her own contributory negligence, and is thus barred of a recovery. Respondent's position is that whether or not her temporary forgetfulness which led to and resulted in her injury constituted contributory negligence was a question of fact for the jury. Undoubtedly the general rule is as laid down in 29 Cyc. 641, as follows: "Whether an injured person was guilty of contributory negligence in failing to observe the danger is usually for the jury to determine under the particular facts of the case." And in support of this text decisions of this court are cited. It is true, also, that some courts have declared that under circumstances similar to those here presented the question should be referred to the jury. In other words, they have held that temporary forgetfulness of a known danger, even without some sudden or great disturbing cause, does not constitute negligence as matter of law. Of such cases are Kelly v. Town of Blackstone, 147 Mass. 448, 18 N. E. 217, 9 Am. St. Rep. 730, City of Meridian v. McBeath, 80 Miss. 485, 32 South. 52, and Collins v. City of Janesville, 111 Wis. 348, 87 N. W. 241. This last case, however, recognizes the conflict of authority which exists upon this proposition, saying: "Some courts have held that, if a person knows of a dangerous defect in a sidewalk, he is bound at his peril to remember it. Gilman v. Inhabitants of Deerfield, 15 Gray (Mass.) 577; Bruker v. Town of Covington, 69 Ind. 35 [35 Am. Rep. 202]." This is the view which has uniformly prevailed in this state. As it is contributory negligence as matter of law to approach a railroad crossing without stopping, or looking or listening, so it has been held that momentary forgetfulness of a danger, which forgetfulness is not induced by some sudden and adequate disturbing cause, is itself as matter of law contributory negligence barring a recovery. The question was first presented under circumstances very similar to those in the case at bar in Davis v. California Street R. R. Co., 105 Cal. 131, 38 Pac. 647. In the Davis Case defendant had placed an iron rail to be used in the construction of its street railway track in front of the house in which plaintiff lived. It had remained there about four weeks. An alarm of fire having been sounded in the nighttime, plaintiff came out of her house and started across the sidewalk to discover the whereabouts of the fire. She forgot the presence of the rail, tripped, fell, and was injured. This court said: "We quite agree with counsel for appellant that previous knowledge or familiarity with the dangerous place or obstruction on the highway was not per se conclusive evidence of contributory negligence in failing to avoid it. In this case if plaintiff's house had been falling, rendering great haste in escaping from imminent danger necessary, the haste, excitement, and fear might reasonably be held sufficient to obliterate all memory or thought of the presence of the obstruction on the sidewalk. But that is not this case. No danger could have been apprehended by Mrs. Davis from the fire after she reached the sidewalk, but mere curiosity induced her to start to go down the street to see where the fire was. That she forgot the presence of the rail is not disputed in the evidence, but that the circumstances justified her forgetfulness and consequent want of care cannot be conceded." Under this state of facts it was held that as matter of law plaintiff had been guilty of contributory negligence. In McGraw v. Friend, etc., Lumber Co., 120 Cal. 574, 52 Pac. 1004, a pedestrian walking on a dark night along a sidewalk in process of repair, and knowing it to be in a dangerous condition, sought to excuse himself from culpability for the injuries which he received by showing that at the moment of the injury his attention was distracted by an expiring street light. It was held that the question of contributory negligence under those circumstances was one of law for the court, and that as matter of law he was guilty of such negligence. These and other authorities are reviewed in Brett v. Frank & Co., 153 Cal. 274, 94 Pac. 1051, and the reasoning and doctrine upheld and applied to the case of an employé who momentarily forgot the existence of a shaft hole into which he fell and was injured. In the opinion in that case full recognition is given to the circumstances where preoccupation or forgetfulness do not bar a recovery, and it is said: "But there was no sudden emergency, no stress of peril, no haste in the performance of the work. The case does not belong to the exceptional class which we have considered."

The effort to distinguish the case at bar from these cases is hopeless. True, plaintiff was aged, but, if the effect of age was to impair her faculties in any respect, common prudence and the requirements of law demanded from her the exercise of care sufficient to make good these defects. City of Mt. Vernon v. Brooks, 39 Ill. App. 426; 16 Am. & Eng. Ency. 400. She was subjected to no peril, stress, or strain; no haste was imposed upon her; no excuse for her forgetfulness was shown.

The judgment and order are therefore reversed, and the cause remanded.

We concur: LORIGAN, J.; MELVIN, J.

(18 Cal. App. 212)

SAN FRANCISCO CREDIT CLEARING HOUSE v. MacDONALD. (Civ. 899.)

(District Court of Appeal, First District, California. Feb. 13, 1912. Rehearing Denied March 14, 1912.)

1. INSANE PERSONS (§ 73*)—CONTRACTS—VALIDITY.

Civ. Code, § 38, providing that a person entirely without understanding has no power to make a contract, was enacted for the benefit of the incompetent; and the fact alone that one was wholly insane when he compromised a claim and took the note of the other party in settlement is not a defense to the note.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 125, 133, 134, 136–138; Dec. Dig. § 73.*]

2. INSANE PERSONS (§ 79*)—ACTS OF AGENTS—RATIFICATION.

The termination of an agent's authority by the principal becoming totally insane is subject to the qualification that if, on the principal being restored to reason, he ratifies, or fails, after knowledge, to repudiate the acts of his agent during his insanity, as where he indorses and assigns for collection a note taken by his agent during his insanity in compromise of a claim, the agent's powers will be considered to have been merely suspended, and his acts then done will be deemed to have been assented to by the principal.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 138, 141; Dec. Dig. § 79.*]

3. INSANE PERSONS (§ 73*)—CONTRACTS—RIGHT TO AVOID.

Civ. Code, § 39, providing that a contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission, gives the right of rescission only to such person; and, till the right is exercised, the contract is binding on the other party.

[Ed. Note.—For other case, see Insane Persons, Cent. Dig. §§ 125, 133, 134, 136–138; Dec. Dig. § 73.*]

4. WITNESSES (§ 219*) — COMPETENCY—PHYSICIANS—WAIVER OF PRIVILEGE.

Code Civ. Proc. § 1881, subd. 4, declaring that a physician may not give in evidence any information concerning the ailment of his patient acquired in the course of his employment and necessary for the performance of his professional duties, merely confers a personal privilege on the patient, which may be expressly or impliedly waived by him, his attorney, or an agent, as one to whom he assigns a note for purpose of collection.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 769, 781, 782; Dec. Dig. § 219.*]

5. BILLS AND NOTES (§ 116*)—CONSTRUCTION—INTEREST—TIME OF PAYMENT—"PAYABLE AT THE RATE OF $50 A MONTH."

Under Code Civ. Proc. § 1864, providing that, when different constructions of a provision of a contract are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision is made, the concluding clause of a note for $4,000 in form a one-day note, providing for interest on the full amount thereof at 1 per cent. per annum till paid, that it was "payable at the rate of $50 a month," is to be construed, in favor of the payee, as not controlling the entire instrument, and so not limiting the payments to $50 a month, without payment at the same time of interest.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 116.*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by the San Francisco Credit Clearing House against L. D. MacDonald. Judgment for plaintiff, and defendant appeals. Affirmed.

James H. Boyer, for appellant. R. H. Cross, for respondent.

LENNON, P. J. This is an action upon a promissory note wherein the plaintiff, as the assignee of the payee for the purpose of collection only, recovered a judgment against the defendant in the sum of $1,546, from which an appeal has been taken upon the judgment roll and a bill of exceptions. Plaintiff's case rested upon proof of the execution of the note, the amount due and unpaid thereon, and its assignment to plaintiff for the purpose of collection. A reversal of the judgment is asked for because of an alleged error in the admission of evidence, and on the ground that the findings of the trial court are not supported by the evidence, and that the findings in turn do not support the judgment.

In substance, the undisputed facts of the case, as shown by the evidence and findings, are these: W. S. Gage, W. L. B. Mills, and L. D. MacDonald, the defendant in this action, at one time were copartners in the lumber business in the city of San Francisco under the firm name of Gage, Mills & Co. This copartnership was dissolved by mutual consent on November 20, 1904. At and prior to its dissolution the firm of Gage, Mills & Co. was indebted to W. S. Gage personally in the sum of $19,000, and some two years later Mills, as the attorney in fact for Gage, under a power of attorney executed 16 years before, effected a compromise of defendant MacDonald's share of the indebtedness due by the firm of Gage, Mills & Co. by accepting his promissory note to Gage dated and made April 10, 1906, for the sum of $4,000. Upon the making and delivery of this note by MacDonald to Mills, the latter, as the attorney in fact for Gage, made and delivered to MacDonald Gage's receipt in full of all demands. On March 15, 1906, Gage became, and for more than one year thereafter remained, an inmate of a private sanatorium conducted by Dr. A. M. Gardner at Belmont, Cal.

[1] The existence of a prior indebtedness and the execution of the note in settlement thereof were not denied by the defendant; but he pleaded as a defense to the note that the payee was so far mentally deranged prior to and at the time of the compromise was made and the note executed as to be absolutely incompetent and incapable of entering into a contract of any kind. It was the contention of the defendant in the lower court, and it is his contention here, that, when one of two parties to a contract is insane at the

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

time of its execution, there cannot be a concurrence of minds capable of contracting, and that, therefore, such a contract is void in law, and not enforceable against either party.

This contention cannot be sustained. Section 38 of the Civil Code, which declares that "a person entirely without understanding has no power to make a contract of any kind," was enacted for the benefit and protection of persons who are entirely devoid of capacity to comprehend the nature and subject of a contract, and it cannot be invoked by a person of sound mind in an attempted avoidance of a contract which he may have made with a person subsequently ascertained to be of unsound mind. Assuming, as the defendant claims, that the evidence conclusively and without conflict shows that the payee of the note in the case at bar was wholly insane at the time the compromise was effected and the note executed, that fact alone could not be properly pleaded and proven as a legal defense to the note. Caldwell v. Ruddy, 2 Idaho (Hasb.) 1, 1 Pac. 339; Allen v. Berryhill, 27 Iowa, 534, 1 Am. Rep. 309; Atwell v. Jenkins, 163 Mass. 362, 40 N. E. 178, 28 L. R. A. 694, 47 Am. St. Rep. 463; Wamsley v. Darragh, 12 Misc. Rep. 199, 33 N. Y. Supp. 274. The case of Allen v. Berryhill, supra, was also an action upon a promissory note. In its essential features that case was very similar to the case at bar. There, as here, the defense was that the payee was totally insane when the note was made, and wholly incapacitated to enter into a contract. In deciding that such a defense was not available to a person of sound mind the court said: "Where a person of unsound mind makes a contract which is beneficial to him, the law supplies or presumes the existence of the requisite capacity, or for his protection estops the other party to set up and sustain this objection. * * * It is the opinion of the court that justice and sound policy concur in requiring it to hold, as it does, that where a contract has been entered into (under circumstances which would ordinarily make it binding) by a sane person with one who is insane, and that contract has been adopted and is sought to be enforced by the representatives of the latter, it is no defense to the sane party merely to show that the other party was non compos mentis at the time that the contract was made."

[2] It was further pleaded, and it is now urged upon behalf of the defendant, that the insanity of the payee of the note at the time of its execution by operation of law terminated the powers of his attorney in fact, and thereby rendered nugatory the compromise and the note given in consideration thereof. It may be conceded that, if the payee at the time of the compromise was a person entirely without understanding within the meaning of section 38 of the Civil Code, the powers of his attorney in fact under the general power of attorney previously executed were terminated by operation of law as between the principal and agent, and as to every other person having notice of the principal's disability. Civ. Code, § 2356. The general rule of law, however, which terminates the agent's authority during the period of the principal's total insanity is subject to the qualification that if, upon his restoration to reason, the principal ratifies or fails, after knowledge, to repudiate the acts of his agent, the powers previously granted will be considered merely as suspended, and the acts done by the agent will be deemed assented to by the principal. Davis v. Lane, 10 N. H. 156; 1 Clark & Skyles on Agency, § 19, p. 44; Id. § 187, pp. 442, 443.

In the case at bar Gage, the alleged insane person and payee of the note in controversy, upon being restored to reason, indorsed and assigned the note to the plaintiff for the purpose of collection. This was undoubtedly an acceptance of the note and a ratification of the compromise from which the note emanated, and, upon the principle that "he who can and does not forbid that which is done in his behalf is deemed to have bidden it" (Civ. Code, § 3519), Gage would by the judgment here be forever estopped from claiming or suing upon the original preexisting indebtedness. However that may be, we are not now confronted with the case of a person known or judicially declared to be a person afflicted with a complete and permanent form of insanity.

The evidence upon the whole case by no means supports the defendant's assertion that the payee here was at the date of the note or at any other time wholly without understanding. The trial court found as a fact "that at the time said W. S. Gage entered said sanatorium his mental capacity had become greatly impaired and that he was afflicted with a mental disease known as and called melancholia; that he was then a person of unsound mind, but was not entirely without understanding, nor had his capacity been judicially determined; that at the time of the execution of said promissory note he had sufficient mental capacity to understand the nature and purpose of said transaction; that on or about the 17th day of September, 1907, and for a long time prior thereto, said W. S. Gage was of sound mind, and was so at the time he left said sanatorium, and ever since has been and now is of sound mind." In substance, it was further found as a fact that before the commencement of this action and in the year 1908 said W. S. Gage personally indorsed and assigned said promissory note to plaintiff as trustee for the purpose of collection. No claim is made that the latter finding is contrary to the evidence; and in our judgment the evidence upon the issue of the defendant's insanity is without conflict, and fully supports the findings of the trial court upon that phase of the case. True, all of the witnesses were agreed that Gage was insane from the time he entered the sanatorium until he was discharged as cured in September, 1907. No witness, however, either fact or expert, testified that Gage was so insane during this time as to be wholly without understanding in the sense required by section 38 of the Civil Code. On the other hand, the uncontradicted testimony of Dr. A. M. Gardner, called as a witness for the plaintiff, was to the effect that while under his care and observation Gage was undoubtedly insane, but that at no time was he so far mentally deranged as to be entirely incapable of knowing the nature and the purpose of the transaction in question; and that when discharged in September, 1907, Gage was completely cured and fully restored to the possession of his mental faculties.

[3] Obviously section 39 of the Civil Code cannot be invoked in aid of the defense pleaded here. That section provides that "a conveyance or other contract of a person of unsound mind but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission as provided in the chapter on rescission * * *"; and, like section 38 of the same Code, was enacted for the benefit and protection of incompetent persons. Manifestly the right to rescind a contract entered into with a person of sound mind is, by the provisions of section 39, conferred solely upon the incompetent or his representatives, and, until that right is exercised, the contract is binding upon the party of sound mind. A person of unsound mind whose incapacity has been judicially determined cannot make a contract nor delegate any power until his restoration to capacity (Civ. Code, § 40); but the contract of a person of unsound mind, although not entirely deprived of understanding nor judicially determined to be insane, is not void but merely voidable (More v. Calkins, 85 Cal. 177, 24 Pac. 729; Castro v. Geil, 110 Cal. 292, 42 Pac. 804, 52 Am. St. Rep. 84; Ripperdan v. Weldy, 149 Cal. 673, 87 Pac. 276).

It would seem, therefore, that a person may be insane in the general acceptation of the term, and yet his insanity may be of such a character as not to deprive him entirely of the power of knowing and understanding the nature of ordinary business transactions, and that such form of insanity, or rather unsoundness of mind, will not render a person legally incapable of entering into a valid contract. Motley v. Head, 43 Vt. 633; Dennett v. Dennett, 44 N. H. 531, 84 Am. Dec. 97. It follows that if Gage was not, as the trial court found, so far insane at the time of the compromise as to be considered a person entirely without understanding, he in person would have been legally capable of conducting and completing negotiations for the settlement of his claim against the defendant, and as a matter of course that which Gage could do in person might also be done by his agent and attorney in fact.

[4] The defendant objected to the testimony of Dr. Gardner upon the ground that the knowledge of the witness was acquired in the capacity of a physician in attendance upon a patient; and it is now insisted that the trial court's action in overuling the objection was error. The ruling, under the facts and circumstances of this case, was free from error. The general rule of law found in subdivision 4 of section 1881 of the Code of Civil Procedure, which, in effect, declares that a physician may not give in evidence any information concerning the ailment of his patient which was acquired in the course of his employment and necessary to the performance of his professional duties was created for the protection of the patient. It operates upon the physician alone, and confers a personal privilege on the patient, which may be expressly or impliedly waived by him in person or by an attorney or agent acting on his behalf. Lissak v. Crocker, 119 Cal. 445, 51 Pac. 688; Alberti v. N. Y., etc., Railway Co., 118 N. Y. 77, 23 N. E. 35, 6 L. R. A. 765. If Gage in person had sued upon the note in controversy, he would undoubtedly have waived the privilege which the law gives him of sealing the mouth of his physician by calling the latter to testify. The assignment of the note to plaintiff for the purposes of collection certainly made the plaintiff the agent of Gage and carried with it the implied consent to use such means and introduce such evidence upon the trial of the case as might be necessary to a recovery on the note, and therefore the act of plaintiff in calling and examining Dr. Gardner as a witness must be held to be Gage's act and Gage's waiver of the confidence reposed by him in his physician.

[5] The note in controversy was in the form of a one-day note, and provided for interest upon the full amount thereof at the rate of 1 per cent. per annum until paid, but the concluding clause of the note provided that it was "payable at the rate of $50 per month." The parties to the action proceeded to trial upon the theory that the note was payable in the installments specified, and the trial court accordingly rendered judgment for the principal sum of $1,200, which was the amount found to be due and unpaid at the commencement of the action, and, in addition, awarded interest thereon in the sum of $146.

The defendant now makes the point that the concluding clause of the note controlled the entire instrument, and must be construed to mean that the interest was not payable immediately, and that, therefore, the trial court could render judgment only for the balance due on the note to the date of the action.

The note in the particulars stated is ambiguous, and susceptible of two different constructions, either of which would be proper, and the trial court rightfully adopted that which was most favorable to the party in whose favor the note was made. Code Civ. Proc. § 1864; Balfour v. Fresno, 109 Cal. 221, 41 Pac. 876.

The judgment appealed from is affirmed.

We concur: HALL, J.; KERRIGAN, J.

18 Cal. App. 222

ROSS v. BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 919.)

(District Court of Appeal, First District, California. Feb. 13, 1912.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 63*)—BOARD OF EDUCATION—DISCHARGE OF EMPLOYÉ.

Pol. Code, § 1617, which provides a special rule for the contracts of a school board involving the tenure of a teacher's employment, but not for contracts with any other employés, does not authorize the board of education of a city to discharge during the month, without cause and without pay for the remainder of the month, one whom it has employed as storekeeper under a month to month contract at a fixed monthly salary.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 149–160; Dec. Dig. § 63.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 63*)—BOARD OF EDUCATION—DISCHARGE OF EMPLOYÉ—RIGHT OF ACTION.

The fact that one employed as a storekeeper by a board of education was discharged without cause before the expiration of his term of employment, and remained ready, willing, and able to comply with his contract, gave him a cause of action for breach of contract.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 149–160; Dec. Dig. § 63.*]

3. MANDAMUS (§ 3*) — GROUNDS—EXISTENCE OF OTHER REMEDY.

Since a discharged employé of a board of education, though entitled to his salary for the full term of his employment, could be paid under the law only by a demand or draft upon the school fund, signed and approved by the board, and since his remedy at law for breach of contract after the board's refusal to pay him did not enable him to compel the board to draw drafts for the money, the remedy at law was not equally convenient, beneficial, and effective, so as to supersede the remedy by mandamus.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 8, 10–34; Dec. Dig. § 3.*]

4. MANDAMUS (§ 3*) — GROUNDS—EXISTENCE OF OTHER REMEDY.

The general rule that mandamus will not lie where any other remedy is provided is subject to the qualification that mandamus may be invoked where there is no other remedy which is equally convenient, beneficial, and effective.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 8, 10–34; Dec. Dig. § 3.*]

Appeal from the Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Application for a writ of mandate by William J. Ross against the Board of Education of San Francisco and others, as members of the Board. From a judgment awarding plaintiff a peremptory writ, defendants appeal. Affirmed.

Percy V. Long, City Atty., and D. S. O'Brien, Asst. City Atty., for appellants. E. J. Lynch, for respondent.

LENNON, P. J. In this proceeding, the plaintiff was awarded a peremptory writ of mandate, commanding and compelling the defendants, in their official capacity as members of the board of education of the city and county of San Francisco, to approve his demand upon the common school fund of the school district of said city and county in the sum of $100, which, it was alleged, was the balance due him for salary under a previously existing contract, whereby the plaintiff was employed by the defendants as storekeeper for said board of education. In the court below, the defendants interposed a general demurrer to plaintiff's petition for a writ of mandate, specifying as ground of demurrer only the insufficiency of the facts stated to warrant the issuance of the writ. Upon the demurrer being overruled, the defendants filed an answer, which in effect admitted that all of the allegations of the plaintiff's petition were true. The case comes here upon an appeal from the judgment and upon the judgment roll alone.

The petition for the writ, after alleging the facts necessary to show the legal entity and powers of the defendants as an integral part of the state's educational system, pleaded the contract, whereby the plaintiff was employed by the defendants from month to month at a salary of $150, payable monthly on the 1st day of each and every month, and that thereafter in the month of September, 1909, and before the expiration of the month, the defendants, without cause, discharged the plaintiff from his position. Thereafter, the petition alleges, the defendants, upon presentation, approved plaintiff's demand against the common school fund of the school district of the city and county of San Francisco for the sum of $50 as salary for one-third of the month of September, 1909, but refused to approve said demand upon said fund for the $100 additional, claimed as the remainder of the salary due plaintiff under his contract for the balance of said month of September. No question of want of funds is involved in the defendants' refusal to approve plaintiff's demand.

Although the cause of action set out in the plaintiff's petition is founded upon the contract, the prayer of the petition is framed upon the theory that upon proof of the contract and its breach the defendants can be compelled by mandamus to honor plaintiff's demand, and upon that theory the case was tried and determined.

[1] The first point presented in support of

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the appeal involves the power of the defendants, as a board of education, to prematurely dismiss, without cause and without pay, an employé whose services were contracted for from month to month at a fixed monthly salary. It was the contention of the plaintiff, concurred in apparently by the trial court, that the employment of plaintiff could be terminated without cause and his salary suspended only upon the expiration of the term for which he was employed. It is not disputed by the defendants that ordinarily an employé employed by the month is entitled to his salary for the full month, when he is discharged, without cause, before the expiration of the month; but it is insisted that section 1617 of the Political Code creates a different rule in the case of employés of a school district, and must control and conclude the rights of the parties here. That section, in substance, defines and fixes the rights and duties of boards of education in many matters, including the power to employ janitors and other employés, and to fix and order paid their compensation. There is nothing, however, in this section—and we have not been cited to any other provision of either the general or the school law of this state—which exempts the contracts of a school board, other than those involving the tenure of a teacher's employment, from the application and operation of the rules of law which ordinarily obtain in the interpretation and enforcement of contracts of employment generally.

[2] The fact that the plaintiff was discharged, without cause, before the expiration of his term of employment, and has been at all times, as is admitted by the pleadings, ready, willing, and able to perform his duty in compliance with his contract undoubtedly gave him a cause of action upon and for breach of the contract; and if the case had been tried and determined solely upon that theory a judgment for damages for the breach would be sustained. Stone v. Bancroft, 112 Cal. 652, 44 Pac. 1069; Id., 139 Cal. 78, 70 Pac. 1017, 72 Pac. 717; Hancock v. Bd. of Education, 140 Cal. 554, 74 Pac. 44.

[3, 4] The defendants on this appeal also contend that, if the plaintiff could have maintained an action for damages for breach of the contract, then such action would have afforded plaintiff a plain, speedy, and adequate remedy; and consequently the remedy by mandamus is not available. Ordinarily this would be so; but the general rule that mandamus will not lie where any other remedy is provided is subject to the qualification that mandamus may be invoked in those cases where the remedy by any other form of action or proceeding would not be equally as convenient, beneficial, and effective. In other words, the remedy by mandamus will be denied only when the party seeking relief has a plain remedy at law which is not only speedy, but adequate, in the sense that in and of itself it is capable of directly affording and enforcing the relief sought; and if it be found that the remedy at law, although it could and might result in a judgment for plaintiff, is nevertheless inherently incapable of compelling the performance of the specific act which forms the subject-matter of an application in mandamus, it cannot be said that the remedy at law is equally convenient, beneficial, and effective to the extent that it will supersede the remedy by mandamus. Fremont v. Crippen, 10 Cal. 215, 70 Am. Dec. 711; Babcock v. Goodrich, 47 Cal. 488; Raisch v. Board of Education, 81 Cal. 546, 22 Pac. 890; Robertson v. Trustees, 136 Cal. 405, 69 Pac. 88.

It was upon this interpretation of the rule which governs in mandamus that the Supreme Court, in Raisch v. Board of Education, supra, held that mandamus was the proper and only adequate remedy to compel a board of education to draw a draft for supplies furnished pursuant to a contract made with the board. In the case at bar, the defendants were undoubtedly authorized to enter into the contract in suit; and if the plaintiff had not been discharged, and had continued in the service of the defendants until the end of the month, it would not be disputed that he would be entitled to the full salary due him under the contract. Having performed all of the conditions required of him by the contract, he could not rightfully be discharged without cause, and thereby deprived of the balance of the salary due him under the contract. In legal effect, therefore, his position with reference to the payment of the salary contracted for was the same as if he had not been discharged. In either event, he would be entitled to the full salary; but he could be paid under the law only by a demand upon the school fund, signed and approved by the defendants. This being so, the contract must be construed "to be one to draw drafts, and not to pay money directly." It follows that no ordinary action which the plaintiff might have had against the defendants individually or as a board for breach of the contract would be "equally convenient, beneficial, and effective as the proceeding by mandamus, since it would not have compelled the board to do what it had contracted to do, and what official duty required them to do." Raisch v. Board of Education, supra; Apgar v. Trustees, 34 N. J. Law, 308; Merrill on Mandamus, §§ 109 and 115, pp. 130 and 140.

The rule declared in Raisch v. Board of Education, supra, has never been reversed or doubted in any subsequent opinion of the Supreme Court; and we are unable to discern any material distinction between that case and the case at bar. In effect, both cases are founded upon a violation of official duty amounting to a breach of contract; and, with the single exception that in the present case the plaintiff's contract was for services, rather than merchandise, both cases are identical in point of fact and in the nature of the relief prayed for. If in the cited case last referred to mandamus had been sought to compel the payment of the contract price of personal services, instead of supplies furnished, we apprehend that the decision would have been the same.

Mandamus being the only adequate remedy available to plaintiff, the question as to whether or not he was discharged without cause, and in violation of the contract, was properly tried and determined in the court below. See Code Civ. Proc. § 1090; Raisch v. Board of Education, supra; Bannerman v. Boyle, 116 Pac. 732.

The judgment appealed from is affirmed.

We concur: HALL, J.; KERRIGAN, J.

(18 Cal. App. 220)

KNOX v. SCHRAG et al. (Civ. 912.)

(District Court of Appeal, First District, California. Feb. 13, 1912.)

APPEAL AND ERROR (§ 616*)—RECORD—AUTHENTICATION OF RECORD—REQUISITES.

A record on appeal from an order granting a change of venue, authenticated only by a certificate of the clerk printed in the transcript that the transcript contains full and true copies of the bill of exceptions and notice of appeal and all papers used in motion on file in court, is insufficient as a basis for a review of the order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2714–2718; Dec. Dig. § 616.*]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by John S. Knox against Henry Schrag and another. From an order granting a change of the place of trial, plaintiff appeals. Affirmed.

Langan & Mendenhall, for appellant. Lloyd S. Ackerman, Snyder & Snyder, and John Hancock, for respondents.

HALL, J. This is an appeal from an order granting the motion of defendants for a change of the place of trial from Alameda county to Calaveras county. Respondents object to the hearing of the appeal upon its merits, and ask this court to dismiss the appeal because, as it is claimed, no properly authenticated record has been filed in this court. The transcript filed in this court is entitled "Bill of Exceptions," and consists of various documents, including, among others, various affidavits, notice of motion for change of venue, demand for such change, amended complaint, demurrer to amended complaint, order of court granting motion, and notice of appeal. No bill of exceptions was ever settled by the judge as required by rule 29 (119 Pac. xiv), and no attempt was made to follow the procedure authorized by sections 953a, 953b, and 953c, Code of Civil Procedure.

The only authentication of the record is that contained in a certificate of the clerk printed in the transcript, to the effect that the transcript "contains full and true copies of the bill of exceptions and notice of appeal from order, and all papers used in motion for change of venue, now on file in said court and cause." A record so authenticated is wholly insufficient as a basis for this court to review the order appealed from. Harrison v. Cousins, 117 Pac. 564; Hibernia Sav. & Loan Soc. v. Doran, 118 Pac. 526; Hershey v. Bristol, 121 Pac. 371, decided January 29, 1912 (Supreme Court). In Harrison v. Cousins, supra, this court granted a motion to dismiss the appeal, but in Hibernia Savings & Loan Society v. Doran, supra, it is pointed out by the Supreme Court that the more appropriate order is an affirmance of the order appealed from.

The order appealed from is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(18 Cal. App. 209)

PEOPLE v. MORAN. (Cr. 365.)

(District Court of Appeal, First District, California. Feb. 13, 1912.)

1. ROBBERY (§ 12*)—ATTEMPT—OVERT ACT.

For one to push open, and partly enter through, the swinging doors of a saloon, for the purpose and with the intent to enter and rob the inmates, from which he desists on seeing the large number present, constitutes an overt act amounting to an attempt to commit robbery, and not a mere act of preparation.

[Ed. Note.—For other cases, see Robbery, Dec. Dig. § 12.*]

2. CRIMINAL LAW (§ 59*)—PERSONS LIABLE—ACTS OF CO-CONSPIRATORS.

Where two persons are acting in concert and as confederates, each is responsible for the criminal acts of the other committed in furtherance of their joint enterprise, so that it is immaterial, as regards the guilt of one of an attempt to commit the crime, that the other does the overt act constituting the attempt.

[Ed. Note.—For other cases, see Criminal Law, Cent.Dig. §§ 71–74, 76–81; Dec.Dig. § 59.*]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Andrew Moran appeals from a conviction. Affirmed.

Joseph A. Brown, for appellant. Attorney General Webb, J. H. Riordan, Deputy Atty. Gen., C. M. Fickert, Dist. Atty., and Maxwell McNutt, Asst. Dist. Atty., for the People.

HALL, J. Appellant was jointly charged with one Harold Jones with the crime of attempt to commit robbery, and was upon his trial found guilty as charged, and upon judgment being pronounced took an appeal from such judgment to this court.

[1] The only point urged in the brief for a reversal is that the evidence does not show any overt act or attempt upon the part of appellant, but only acts of preparation. We think, however, that the evidence in the

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

record does show something more than mere acts of preparation, and does show a sufficient overt act to constitute an attempt to commit robbery, within the rule as to attempts to commit crimes as laid down in People v. Stites, 75 Cal. 570, 17 Pac. 693.

The evidence tends to show that either appellant or his codefendant, at between 1 and 2 o'clock in the morning, pushed open the swinging doors of a saloon situate on Kentucky street, thrust his head within, and seeing that there were about 12 men in the saloon, withdrew and crossed the street and joined his codefendant. The two men walked away, but were immediately followed by an officer to whom they had been pointed out. The defendants were followed by the officer for about two blocks, when they took refuge in a lumber yard, where, after a search of five or six minutes, they were found by the officer hiding behind a pile of lumber. Each defendant wore around his neck a handkerchief, with holes so fashioned that it might serve as a mask to conceal the features. Appellant had upon his person a loaded pistol. His companion had upon his person cartridges, and a pistol was shortly afterwards found, by a second officer, concealed where defendants were apprehended. They were immediately taken back to the saloon. The next day appellant admitted to an officer that he "was out to do a job, but not to do that saloon."

[2] It is quite immaterial whether it was appellant or his codefendant that thrust open the door of the saloon and started to enter therein, for there can be little doubt but that they were acting in concert in whatever they were engaged upon the night in question.

The facts in evidence were ample to justify the conclusion that the person who pushed open the saloon door did so for the purpose and with the intent to enter the saloon, and with force and violence feloniously take from the possession of the inmates such money as they might have upon them. The pushing open the door and the partial entry through the same were overt acts that went beyond mere acts of preparation. They were such overt acts as amounted to an attempt to commit the intended crime within the doctrine laid down in People v. Stites, 75 Cal. 570, 17 Pac. 693. The large number of persons in the saloon prevented the consummation of the robbery. In the Stites Case the defendant and a confederate had arranged to place an explosive or bomb upon the track of the Sutter street railroad. The bomb having been previously prepared, Stites took it and left his house and went to meet his confederate. Having met him, they proceeded on their way toward their objective point, where they intended to place the bomb on the track, but, before reaching the point, discovered that they were being watched by some police officers, when they abandoned their purpose. It was held that the evidence supportd the verdict of guilty. The court held that the construction of the bomb was an act of preparation only. The court, however, said: "But when the prisoner left his house on the morning of the 16th of February and went to Turk street pursuant to the antecedent arrangement between his confederate and himself, it amounted to an overt act done by him for the purpose of effecting the crime intended, and was in law and fact a criminal attempt."

So, in the case at bar, when one of the defendants pushed open the saloon door with intent to enter and rob the inmates, he was guilty of an overt act that amounted in fact and in law to an attempt to commit the crime of robbery. This case cannot be distinguished in principle from People v. Stites, supra. It is unimportant that the evidence in the record before us does not show which of the defendants committed the overt act. The whole case shows that they were acting in concert and as confederates, and each was responsible for the criminal acts of the other committed in furtherance of their joint enterprise.

The judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

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18 Cal. App. 205

UNION COLLECTION CO. v. ROGERS et al.
(Civ. 920.)

(District Court of Appeal, First District, California. Feb. 10, 1912.)

1. Guaranty (§ 87*) — Action — Pleading— Variance.

The variance between a complaint, stating that the defendant had guaranteed, in writing, the payment of a certain indebtedness at a specified rate per month, and proof that he made a written guaranty of the payment, without specifying any day when payment should be made, could not have misled or prejudiced the defendant, where he denied having executed any guaranty at all, and where the whole indebtedness was overdue before the action was commenced.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 345; Dec. Dig. § 87.*]

2. Appeal and Error (§ 197*)—Objection Below—Variance.

A variance which could not have misled or prejudiced the defendant was not reversible error, where the point was not raised below.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 197.*]

3. Appeal and Error (§ 1010*)—Review—Findings.

A finding supported by the positive testimony of one witness, which testimony is disputed by the adverse party, will not be disturbed, although the reviewing court would have made a different finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3982; Dec. Dig. § 1010.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. APPEAL AND ERROR (§ 1058*)—REVIEW—HARMLESS ERROR — STRIKING OUT TESTIMONY.

In an action against a party on a guaranty, error, if any, in striking out an answer on cross-examination that he signed no guaranty on the date in question was harmless, where he fully covered the same matter in answer to other questions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200–4206; Dec. Dig. § 1058.*]

5. APPEAL AND ERROR (§ 867*)—SCOPE OF REVIEW—MOTION FOR NEW TRIAL.

An objection that the judgment is not supported by the findings cannot be raised upon an appeal from an order denying a motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476–3486; Dec. Dig. § 867.*]

Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by the Union Collection Company against E. B. Rogers and another. There was judgment for plaintiff against E. B. Rogers only, and, from an order denying his motion for a new trial, he appeals. Affirmed.

Percy L. Shuman and Charles Baer, for appellant. J. S. Reid, for respondent.

HALL, J. This action was brought against the Rogers Engineering Company, as principal obligor, and E. B. Rogers, as guarantor, to recover the sum of $575.69 and interest.

The defendant corporation was never served with summons, and the action was dismissed as to it. Judgment was recovered against defendant E. B. Rogers, as prayed for. This is an appeal by him from the order denying his motion for a new trial. He also took an appeal from the judgment; but such appeal has been heretofore dismissed, because not taken within the time allowed therefor by the statute.

Plaintiff sued as assignee of the Buffalo Gasoline Motor Company, a corporation.

It is in substance alleged in the complaint, among other things essential to a cause of action, that the defendant Rogers Engineering Company, on the 23d day of March, 1906, was indebted to the Buffalo Gasoline Motor Company in the sum of $865.69, and on said day promised, in writing, to pay said Buffalo Gasoline Motor Company said sum of $865.69, and thereupon did pay thereon the sum of $290, and by said writing further promised to pay the balance of said indebtedness, to wit, $575.69, with interest thereon at the rate of 6 per cent. per annum until paid, at the rate of $75 per month, commencing with the 15th day of April, 1906. This is followed by an allegation that appellant, at the same time and place, in writing, guaranteed the payment of the said indebtedness and interest for a valuable consideration. (The writings sued on were destroyed in the great conflagration of 1906.)

[1] The court found the above allegations to be true; and the principal contention of appellant on this appeal is that such findings are not supported by the evidence. And this contention is predicated upon the fact that the evidence shows that, by the terms of the writing, the principal obligor promised to pay the indebtedness and interest at 6 per cent., without any specification as to when such payment should be made, and the provision that the balance of $575.69 should be paid at the rate of $75 per month was by a parol agreement only. In other words, the evidence given supports the allegations as made in the complaint as to the promise in writing to pay the balance of the indebtedness of $575.69, with interest at 6 per cent. per annum, but does not support the allegation that such payment was to be made at the rate of $75 per month.

This presents a case of variance between the allegations of the complaint and the proof, which could have worked no injury to defendant, and could not have misled him in maintaining his defense, which was that he had not signed or executed any guaranty at all of the debt in question. "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party had been so misled, the court may order the pleading to be amended upon such terms as may be just." Code Civ. Proc. § 469.

In the case at bar, the evidence given upon behalf of plaintiff shows that the defendant corporation was indebted in the amount alleged, and in writing agreed and promised to pay the same, with interest, as alleged, and that appellant, who was the president of the principal obligor, in writing guaranteed such payment. Whether or not the balance of the indebtedness was payable at once, or was payable only in installments of $75 per month, is of little or no importance; for in either case the whole of such indebtedness was long overdue before the action was commenced. No objection was made to the introduction of the evidence, either upon the ground of variance or any other. If such objection had been made, doubtless the court would have permitted an amendment, so that the allegations and proof might correspond. The allegation and finding to the effect that the balance of the indebtedness was to be paid at the rate of $75 per month may be disregarded, and we still have an allegation and finding that the principal obligor, in writing, promised to pay the balance of the indebtedness, to wit, the sum of $575.69, with interest at 6 per cent. per annum, and that appellant, in writing, guaranteed the payment of the same. In either aspect of the case, the evidence and other findings show that the whole of such balance was long overdue and unpaid when the action was brought.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[2] We do not think a new trial should be ordered for the variance complained of, especially as the point was not raised in the court below, either upon objection to evidence or upon a motion for a nonsuit. Eversdon v. Mayhew, 85 Cal. 1, 21 Pac. 431, 24 Pac. 382.

[3] Appellant also urges that the finding that appellant guaranteed, in writing, the payment of the debt is not supported by the evidence. He concedes that there is a conflict in the evidence upon this point, but urges that the finding in question is not supported by a preponderance of evidence. If there is a substantial conflict in the evidence upon an issue of fact, this court will not disturb the finding of the trial court, because it may think that the trial court has not decided in accordance with the preponderance of evidence. The finding in question is supported by the positive testimony given by the witness Reid, and, although such testimony was disputed by appellant, the contention of appellant that the finding in question was not supported by the evidence cannot be sustained.

[4] The court did not err to the prejudice of appellant in striking out an answer that he gave on cross-examination, as follows, "I am positive that I signed no paper guaranteeing any claim of any kind on that date"; for in other answers that appellant made to other questions he fully and clearly covered the same matter.

[5] The only other point raised by appellant, to wit, that the judgment is not supported by the findings, cannot be raised upon this appeal, being, as it is, an appeal from an order denying a motion for a new trial. Hunter v. Milan, 133 Cal. 601, 65 Pac. 1079.

The order is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

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18 Cal. App. 202

BRODERICK v. COCHRAN et al. (Civ. 898.)

(District Court of Appeal, First District, California. Feb. 9, 1912. Rehearing Denied by Supreme Court April 9, 1912.)

1. Judgment (§ 143*)—Excuse for Default—Mistake of Attorney.

Under Code Civ. Proc. § 473, which provides that the court may, in the furtherance of justice and on proper terms, permit the correction of mistakes, where there was a default judgment after the filing of a demurrer within the time granted a defendant to answer, the defendant's attorney believing that the demurrer satisfied the leave granted, setting aside the judgment and permitting the defendants to answer was a proper exercise of the court's discretion.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269–291; Dec. Dig. § 143.*]

2. Judgment (§ 155*)—Excuse for Default—Mistake of Attorney—Notice Necessary—Affidavit.

Though a notice of a motion to set aside a default and judgment did not state that the affidavit of one of the defendants would be used on the hearing, where a copy of the affidavit was served on the attorney for plaintiff, together with the notice of motion, the notice given was sufficient under Code Civ. Proc. § 1010, which provides that notices in writing must state the time a motion will be made, the grounds, and the papers upon which it is to be based.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 306, 307; Dec. Dig. § 155.*]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by D. J. Broderick against Robert Cochran and another. From an order vacating a judgment taken for plaintiff by default, plaintiff appeals. Affirmed.

Edward J. Lynch, for appellant. C. D. Dorn, for respondents.

KERRIGAN, J. This is an appeal by plaintiff from an order vacating a judgment taken by default.

The complaint in the case was filed February 28, 1910. March 1st following the summons was served in the city and county of San Francisco, where the action was commenced. Thereafter the defendants were granted by the court up to and including the 21st of March within which to answer. On this date, the defendants served and filed a demurrer to the complaint, and the same was placed on the law and motion calendar for hearing on March 25th, as required by the rules of court. This calendar was then continued by the court to April 1st. While the demurrer was on the court calendar on this date, it was not on the official printed calendar; and the attorney for defendants, supposing, therefore, so he alleges in an affidavit filed by him, that the demurrer would not be heard, failed to appear in court. Thereupon the attorney for the plaintiff moved the court to strike from the files the demurrer of the defendants, and to enter judgment against them by default, on the ground that the defendants' time to answer had expired without an answer having been filed by either of them, and that the demurrer had been filed after the time allowed by law therefor. This motion was granted. No notice of the motion was given, and the defendants knew nothing about the judgment of default against them until April 6th, on which day their counsel prepared, served, and filed all the papers necessary to support a motion to vacate the judgment so entered, and noticed the same for hearing on the 8th day of April. The affidavit of counsel for defendants shows that he supposed the filing of the demurrer "to be a legal and proper answer to the said complaint"; that he "interpreted and understood the said order of the court to give the defendants 10 days to plead after the 10th day of March, 1910, and he is now surprised to find the same interpreted to mean that he could only answer and could not demur to the complaint." Upon the showing made, the court ordered the judgment set aside upon the payment of costs.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] In believing that he might demur after having taken time, by order of the court, to answer only, counsel for defendants, it is conceded by both sides, was acting under a misapprehension as to a proposition of law. Courts, however, under the provisions of section 473, Code of Civil Procedure, may relieve parties from mistakes as to the legal effect of acts of their attorneys. Douglass v. Todd, 96 Cal. 655, 31 Pac. 623, 31 Am. St. Rep. 247; Ward v. Clay, 82 Cal. 502, 23 Pac. 50, 227; Langford v. Langford, 136 Cal. 507, 69 Pac. 235; Gould v. Stafford, 101 Cal. 34, 35 Pac. 429. Here it is not disputed that defendants' attorney believed he had a right to interpose a demurrer to the complaint. No objection appears to have been made by the attorney for the plaintiff when a copy of the demurrer was served upon him; he gave the defendants no notice of a motion to strike the demurrer from the files; the motion to vacate the default was promptly made; and, as it is manifest that the plaintiff suffered no injury in the premises, it would seem that the court, in setting aside the judgment and permitting the defendants to answer, exercised its discretion in accordance with the soundest principles of justice. O'Brien v. Leach, 139 Cal. 222, 72 Pac. 1004, 96 Am. St. Rep. 105; Melde v. Reynolds, 129 Cal. 308, 61 Pac. 932.

[2] The notice of motion to set aside the default does not state that the affidavit of Robert Cochran, one of the defendants, would be used on the hearing. It appears, however, that a copy of that affidavit was served on the attorney for the plaintiff along with the notice of motion. He was therefore apprised that this affidavit would be relied upon at the hearing of the proceeding, and we have no doubt that this amounted to a substantial compliance with the provisions of section 1010, Code of Civil Procedure. The affidavit of the attorney for the defendants alone contains all essential facts necessary to sustain the order of the court here questioned.

The order appealed from is affirmed.

We concur: LENNON, P. J; HALL, J.

18 Cal. App. 234

NETO v. CONSELHO AMOR DA SOCIEDADE 41 et al. (Civ. 879.)

(District Court of Appeal, Third District, California. Feb. 15, 1912. On Petition for Rehearing, March 15, 1912. Rehearing Denied by Supreme Court April 12, 1912.)

1. Beneficial Associations (§ 5*) — By-Laws—Validity.

A by-law of a fraternal beneficial association, making membership in a rival society a ground of expulsion, is not invalid, since the members of such association may agree to be governed by such rules as they see fit to adopt, so far as not immoral or contrary to public policy or law.

[Ed. Note.—For other cases, see Beneficial Associations, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.*]

2. Beneficial Associations (§ 7*)—Knowledge of By-Laws—Presumptions.

A member of a fraternal benefit association is presumed to know the conditions of membership as contained in the by-laws.

[Ed. Note.—For other cases, see Beneficial Associations, Cent. Dig. §§ 8, 11; Dec. Dig. § 7.*]

3. Beneficial Associations (§ 12*) — Membership—Recourse to Courts.

A member of a beneficial association must exhaust the remedies provided by the constitution and by-laws within the association, as by appeal, etc., before he may resort to the courts to retain membership.

[Ed. Note.—For other cases, see Beneficial Associations, Cent. Dig. § 21; Dec. Dig. § 12.*]

4. Beneficial Associations (§ 12*) — Membership—Protection by Courts.

The rule requiring members of a beneficial association to exhaust their remedies within the society before appealing to the courts does not apply where it has violated its own laws and regulations, so as to arbitrarily invade the rights of members.

[Ed. Note.—For other cases, see Beneficial Associations, Cent. Dig. § 21; Dec. Dig. § 12.*]

5. Mandamus (§ 16*)—Defenses — Futility of Writ.

Where a member of defendant beneficial association admitted, when charged of the offense, that she belonged to another association contrary to the by-laws, and at the time the present suit was brought, more than two years after her expulsion, testified that she was still a member of such other society, the fact that her expulsion may have been irregular would not be ground for issuing a writ of mandate to compel her reinstatement, since the writ is only issued to prevent substantial injury, and to issue it would be useless because such member might again be expelled for her continued violation of the by-laws.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 19–22; Dec. Dig. § 16.*]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Maria S. Neto against Conselho Amor Da Sociedade 41 and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Louis Gonsalves, T. J. Weldon, and W. D. L. Held, for appellant. F. L. De Freitas and Langan & Mendenhall, for respondents.

BURNETT, J. Respondent Conselho 41 is a social, fraternal, and beneficial organization composed of Portuguese women. Of this appellant became a member on the 15th day of September, 1901, and retained her membership therein until January 20, 1907, when she was expelled. On the 1st of July, 1906, appellant became a member and the president of another similar organization known as the U. P. P. E. C., and which, for the sake of brevity, will be referred to hereafter as the U. P.'s. For the same reason, we shall designate respondent association as the S. P.'s.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

In July, 1901, the Supreme Council of the S. P.'s adopted a resolution reciting that: "Whereas, the society of Portuguese ladies known by the initials U. P. P. E. C. was organized through spite," etc.: "Be it resolved that there shall not be admitted into this society any more ladies belonging to the former society. And be it further resolved that no member of this society shall belong to the former under penalty of expulsion." With some elaboration this was formally made a part of the constitution and by-laws by the action of the Grand Council of the order in July, 1903. When the local society was organized, the members present, including appellant, were informed by the installing officer that it was a law of the order that a lady belonging to the S. P.'s could not join the U. P.'s under penalty of expulsion. In appellant's application for membership she declared, among other things, that she accepted and acknowledged "that the statement of the laws and regulations of the society constitute an express condition without which I shall have no right to participate or enjoy the benefits or any privileges of same."

[1] That such a regulation is not opposed to public policy, does not contravene any provision of law, and is within the scope of the charter provisions of the organization is not controverted nor does it admit of serious question. Nor will any one dispute, what the authorities hold, that individuals who form themselves into a voluntary association may agree to be governed by such rules as they see fit to adopt, so long as they are not immoral, contrary to public policy or the law of the land. As said in Lawson v. Hewell, 118 Cal. 618, 50 Pac. 764, 49 L. R. A. 400, through Mr. Justice Harrison: "Individuals who associate themselves in a voluntary fraternal organization may prescribe conditions upon which membership in the organization may be acquired, or upon which it may continue, and may also prescribe rules of conduct for themselves during their membership, with penalties for their violation, and the tribunal and mode in which the offenses shall be determined and the penalty enforced. These rules constitute their agreement, and, unless they contravene some law of the land, are regarded in the same light as the terms of any other contract."

[2] The rule is, also, that a member is presumbed to know the terms of membership and the conditions under which he may retain his connection with the organization. It may be observed, though, that we have here, in addition, evidence of the positive knowledge by appellant of the inhibition as to membership in the other order.

Some time in July, 1906, appellant proffered her dues for membership in the S. P.'s; but they were rejected on the ground that she belonged to the U. P.'s, the president telling her that if she wanted to belong to the former order she must leave the latter, but appellant said she would not, that she belonged to both, and always would. Thereafter, on September 16, 1906, written charges were preferred against her in which her membership in the proscribed order was alleged, and a committee of investigation and trial was thereupon appointed in accordance with the rules of the association. She was served with a copy of the charges and notified of the time, September 17th, set for the hearing by the committee. She appeared at the time and place designated in the notice, and, upon the charges being read to her, she replied: "I belong to the U. P. P. E. C., and I will give my decision as the constitution demands." The committee informed the accused that if she desired further time to make further defense if would be granted her. The further hearing was thereupon continued till September 20th, and the accused did not appear. At this last meeting it is at least questionable whether a quorum of the committee was present; but this seems entirely immaterial, as it was simply for the purpose of affording appellant a chance to offer any explanation of her admitted conduct. She declined to take advantage of the opportunity. Her statement to the committee amounted virtually to a plea of guilty to the charge. Manifestly no further evidence was required, and the committee reported the proceedings to the council, and, upon a unanimous vote, appellant was expelled, as aforesaid. According to the by-laws, the accused was allowed one month to present further evidence to the council to refute the report of the committee, and she had the privilege also within one month of appealing from the judgment of expulsion to the supreme president or to the Supreme Council. She took no step in either direction, but, more than two years after she was expelled, she filed her petition for a writ of mandate for restoration to membership. This was denied, and hence the appeal. Some objections are made to the proceedings of the committee; but we deem it unnecessary to notice them in detail. They have, however, not escaped our attention. The trial was somewhat less formal than we might expect in a court of justice, but no substantial right of appellant was invaded. Every step was taken that is required by the laws of the order. Indeed, if everything had been done exactly as advocated by appellant, the result must have been the same, because there is no kind of pretense that she was not guilty of the charge. Even in her testimony taken at the trial in May, 1909, she said: "The Mendocino Council U. P. P. E. C. was organized the first Sunday of July, 1906, with 19 members, and I was elected president." She further declared that, when she appeared before the committee as aforesaid and was asked if she belonged to the U. P. P. E. C., she answered, "Yes, and I am still a member of the U. P. P. E. C., and have been since I first joined." The whole proceeding, in fact, shows that there was no controversy as to her membership in the U. P.'s, or that she intended to continue as such. Her attempted justification at the trial was that when she joined the U. P.'s she accepted the law to be as contained in the 1900 edition of the constitution of the S. P.'s given her by the organizer of the local council. This did not contain the provision in question, since the amendment was adopted, as we have seen, in July, 1901. Her mistaken view of the law cannot affect, of course, the judgment of expulsion.

[3] Again, since she was regularly tried according to the regulations of the order, she should have "exhausted the remedies prescribed by the constitution and by-laws of said defendant relative to her alleged expulsion." She alleged in her complaint that she had done so, but this is directly opposed to the evidence.

In Levy v. Magnolia Lodge, I. O. O. F., 110 Cal. 307, 42 Pac. 890, it is said: "Yet the fact that the laws of the lodge provided a remedy for the grievance complained of, which he had not pursued and exhausted, would have been a perfect defense to his action in any state court. (Citing cases.) On the same principle courts of equity decline to interfere with voluntary benevolent associations so long as the means of relief provided by the society itself have not been availed of and exhausted. Lafond v. Deems, 81 N. Y. 507; Dolan v. Court of Good Samaritan, 128 Mass. 437; Chamberlain v. Lincoln, 129 Mass. 70."

In Lawson v. Hewell, 118 Cal. 613, 50 Pac. 763, 49 L. R. A. 400, also, it is declared: "The proceedings against the plaintiff are shown by the complaint to have been taken in strict accordance with the rules of the order. He has received notice of the hearing, and he has shown no facts which authorize the conclusion that he will not receive a fair and impartial hearing. From the decision at that hearing he can seek redress by an appeal to the Grand Chapter. So long as he has this right of redress within the order, he has no right to invoke the aid of the courts."

[4] This rule it may be said, does not apply where the order has violated its own laws and regulations and has arbitrarily invaded private rights, as was the case in Schou v. Sotoyome Tribe, 140 Cal. 254, 73 Pac. 996, where it was justly held that: "Although, as a general rule, one who has become a member of a benevolent order is not entitled to appeal to the courts for redress until after he has adopted the lawful procedure and exhausted the lawful remedies prescribed by the constitution and by-laws of the order, yet where sick benefits were sought on behalf of an insane member by his wife as guardian of his person and estate, and the order violated its own laws in not giving her any notice or opportunity to produce testimony in behalf of her husband for an adverse decision against him in the order, and on appeal to the great council, the court has jurisdiction to hear and determine the merits of the controversy." Here as we have seen, the charges were preferred, notice given, hearing had, report made by the committee, and expulsion adjudged substantially in accordance with the rules of the order. If we admit that there was any informality in the proceeding, it does not carry us beyond the conclusion that appellant should have pursued the remedies provided by the regulations of the society.

[5] Again, the trial court would be justified in taking this view of the situation: The remedy sought by appellant is equitable in its nature. It presupposes a wrong to be redressed, a right to be restored. Its invocation is based upon the assumption that appellant is entitled to the privileges of which she has been despoiled, that she has not forfeited her claims to membership in the order, and that justice and reason require her restoration to her former status. The proof, however, upon which was predicated the demand for the issuance of this extraordinary equitable remedy, discloses the fact that appellant admitted before the committee that she was guilty of the offense charged, and at the time of the trial herein—more than two years after her expulsion—as we have seen, she declared under oath that she was still a member of the other society, thereby revealing her continued violation of the by-law in question. Her position, then, before the court assumed the attitude of one seeking the annulment of an irregular expulsion in order that she might be regularly expelled. The writ of mandate should not be issued for such a vain and nugatory purpose. It is not issued on mere technical grounds. Its design is to do substantial justice and prevent substantial injury. State ex rel. Young v. Temp. Benv. Ass'n, 42 Mo. App. 485; Burton v. St. George Society, 28 Mich. 261.

Some other considerations are discussed by counsel, but we can see no substantial merit in the appeal, and the judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

On Petition for Rehearing.

BURNETT, J. In her petition for rehearing appellant calls attention to the fact that, contrary to a recital in the opinion heretofore filed herein, it was expressly admitted by respondents at the trial of this action that the charges preferred against her were not read to appellant by the investigating committee. The statement in the opinion was based upon the recitals in the minutes of the council containing the report of the committee. These minutes were admitted in evidence, and it appears therein that "a copy of the charges was duly served on the accused sister, and she with the committee met at the city of Mendocino, county of Mendocino, state of California, on the 17th day of September, 1906. *The charges were then read to the accused sister by a member of the committee,*" etc. But the matter seems to be entirely immaterial, as she had been served with a copy of the charges, and there is no contention that she was not fully informed of the nature of the accusation or that the laws of the order required the charges to be read to her by the committee.

Appellant makes a distinction between being a member and *persisting* in being a member of the proscribed order. However, since she admitted she was a member of the U. P.'s and manifested no inclination or purpose to give up her membership therein, it seems reasonable to conclude that she intended to "persevere" in said connection. It may be remarked, also, that the record shows that, some time before the charges were preferred against her, she attended a meeting of the S. P.'s, and tendered her dues to the secretary, who refused to accept them on the ground that appellant had joined the U. P.'s. The president told her "if she belonged to ours she must leave the other," and she said: "I won't; I belong to the two, and I always will." While this evidence was not taken by the committee at the investigation, it illustrates the attitude of appellant during the entire period covered by the trial before the superior court.

If, as contended by appellant, her answer to the committee should be construed as expressing a purpose "to conform to the laws of defendant society in 30 days," it would be difficult to explain why she made no attempt to do so. The by-laws provided that: "To the report of the committee the accused can present her further evidence and refutation within a month; and the council shall say if the committee erred or not, shall submit the case to the same or another committee or shall proceed anew with the trial." She did not avail herself of this privilege nor appeal in any way to the constituted authorities of the order.

It cannot be said that hasty action was taken by the council, as appellant was not expelled till more than three months after the report of the committee was made. And while, as already stated, the proceedings in a few particulars were somewhat inartificial, no substantial right of appellant seems to have been invaded, and we think the court was justified in denying the writ.

The specific points made by appellant have been examined; but as we view the matter, no sufficient reason has been presented for a rehearing of the case. The petition is therefore denied.

We concur: CHIPMAN, P. J.; HART, J.

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18 Cal. App. 180

SILVERSTON v. MERCANTILE TRUST CO. et al. (Civ. 887.)

(District Court of Appeal, Third District, California. Feb. 8, 1912.)

1. Stipulations (§ 3*)—Propriety.

The parties to a subsequent action may stipulate as to the material contents of a former judgment which is sought to be invoked as a bar.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. § 2; Dec. Dig. § 3.*]

2. Appeal and Error (§ 934*) — Presumptions—Support of Judgment.

Where, in partition in which defendant claimed that the property was held in trust by it, the record shows that a prior action was brought against plaintiff herein and others for the appointment of a trustee by the court in the place of a deceased trustee, which was contested by plaintiff, but does not show the grounds of the contest, or contain all of the findings on such action, it will be presumed, in support of the judgment below for defendant, that one of the grounds of contest was the invalidity of the trust, and that it was held valid.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777–3781; Dec. Dig. § 934.*]

3. Judgment (§ 725*) — Conclusiveness — Matters Concluded.

Under the direct provisions of Code Civ. Proc. § 1911, a former judgment works an estoppel as to matters which are necessarily involved in the former suit, or necessary thereto, as well as matters appearing on the face of the judgment to have been adjudicated.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1255; Dec. Dig. § 725.*]

4. Judgment (§ 725*)—Res Judicata—Matters Concluded.

The validity of the trust was necessarily involved in an action for the appointment of a trustee and for an accounting and distribution, though its validity may not have been specifically questioned, so that a judgment therein, appointing the trustee, is res judicata of the validity of the trust in a subsequent action between the same parties.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1255; Dec. Dig. § 725.*]

5. Evidence (§ 82*) — Presumptions — Performance of Official Duty.

It is presumed that the court was satisfied of the legality of a trust before appointing a trustee, since it was its duty to ascertain that fact before making the appointment.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 341; Dec. Dig. § 82.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Eleanor Sophia Silverston against the Mercantile Trust Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Hillyer, Stringham & O'Brien, for appellant. Platt & Bayne, for respondents.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

BURNETT, J. The action is in partition. Appellant states that "there is practically no controversy as to the facts." The amended complaint alleges that plaintiff and defendant Mary Gray Tobin are the owners as tenants in common of certain personal property consisting of notes and bonds; that the Mercantile Trust Company of San Francisco claims some interest adversely to plaintiff, but that it is without right. The answer denies that plaintiff and said defendant are the owners or tenants in common or otherwise of the property, and admits that the said Mercantile Trust Company claims an interest in the property adverse to plaintiff, but denies that such claim is without right. It is alleged in the answer that the property is held in trust by said company as follows: That, on the 15th day of August, 1893, the plaintiff, defendant Mary Gray Tobin, and Edwin R. Dimond, together with their father, W. H. Dimond, entered into an agreement with Horace G. Platt, which is set forth as Exhibit A, according to the terms of which said Platt was to receive certain real and personal property belonging to W. H. Dimond and to his three children in trust for said children during the term of their lives, applying the income to their use and support, and to "give and convey" one-third of said property to E. R. Dimond upon the death of said W. H. Dimond, and, upon the death of either of the daughters, "to give and convey" one-half of the remaining two-thirds to the devisees and legatees or heirs of the one so dying. On August 16, 1893, another agreement was made, whereby W. H. Dimond succeeded Horace G. Platt as trustee under the same trust; that said W. H. Dimond died on or about the 18th day of June, 1896, without having appointed his successor in said trust, either by will or deed; that thereafter Edwin R. Dimond and the Union Trust Company of San Francisco, as executors of the last will and testament of said W. H. Dimond, brought an action in the superior court in and for the county of San Francisco against plaintiff herein, her husband, Paul R. Jarboe, Mary Gray Tobin, and her husband, Joseph S. Tobin; that in the complaint therein the execution of said deed of trust, referred to as Exhibit A, and also the execution of the deed of trust from said Platt to W. H. Dimond, and also the death of said Dimond, without having appointed a successor, were alleged and set forth, and the prayer was that the court appoint a successor in said trust to said W. H. Dimond, and that the plaintiffs, as said executors, be authorized to turn over to said trustee so appointed by the court the property set forth in said deeds of trust; "that Eleanor Sophie Jarboe [the plaintiff herein] appeared in said action and contested the same; that said action was tried upon its merits; that the court filed its findings of fact and conclusions of law, and found that all the allegations of the complaint were true, and that a judgment and decree should be entered, adjudging that said W. H. Dimond was the trustee under said trust, and that Horace G. Platt and B. P. Oliver should be appointed trustees in place of said W. H. Dimond, deceased, with all the powers, duties, liabilities, and obligations set forth in said trust as incumbent upon and belonging to the trustee under said trust, and thereupon the court duly made, gave, and entered its judgment and decree, appointing Horace G. Platt and B. P. Oliver trustees in the place and stead of W. H. Dimond, deceased, as trustees under said trust, with all the powers, duties, liabilities, and obligations set forth in said trust as incumbent upon and belonging to the trustee under said trust;" that they accepted the trust and so entered upon the discharge of their duties; that certain other actions were brought, in which plaintiff herein was a party, relating to this trust property, that they were contested by plaintiff herein and tried upon their merits, and judgment rendered therein. The answer further alleges that the action is barred by the laches of plaintiff and by the provisions of section 343 of the Code of Civil Procedure. Furthermore, it is averred that "the same cause of action at issue in this action, to wit, the validity of said trust above set forth, was duly adjudged and decided in said three actions above mentioned and set forth, to wit, said action brought by said executors of the will of W. H. Dimond, and said action brought by this plaintiff and others against said trustees and executors of the will of W. H. Dimond, deceased, and said action, above set forth, brought by said trustees against this plaintiff and others; that this plaintiff appeared in each of said actions and contested the same; that said three actions were heard and decided upon their merits; and that in each of said three actions the trust herein set forth was in issue, and was adjudged and decided to be valid."

The judgment roll in one of these actions, No. 24,203, entitled Edwin R. Dimond and Union Trust Company, etc., v. Eleanor Sophia Jarboe and Others, "and also the judgment roll in No. 24,202, entitled Horace G. Platt and B. P. Oliver, as Trustees, v. Eleanor Sophia Jarboe, and Others," were received in evidence. It is stipulated by the parties hereto, as stated by appellant, that the statements appearing in the answer to the amended complaint as to the contents of the record in the two actions just mentioned are substantially correct statements of the contents of the said judgment rolls, and are sufficiently detailed for the purposes of this appeal. From said statement, it appears specifically that in the first above mentioned case the court found, among other things, as hereinbefore stated, that "Horace G. Platt and B. P. Oliver should be appointed trustees in place of said W. H. Dimond, deceased, with all the powers, duties, liabilities, and obligations set forth in said trust as incumbent upon and belonging to the trustees under said trust, and that said parties, under and by virtue of said judgment and decree, accepted said trust and entered upon the discharge of their duties as such trustees under said trust, as successors to said W. H. Dimond, with all the rights, powers, duties, and estate held or enjoyed by said W. H. Dimond as such trustee, as aforesaid." In the second of these cases, the court found all the allegations of the complaint to be true, which included the averment of the institution of an action by said Eleanor Sophia Jarboe, Paul R. Jarboe, Mary Gray Tobin, and Joseph S. Tobin against Horace G. Platt and B. P. Oliver, as trustees, and the Union Trust Company of San Francisco, as executor, of the last will of decedent, and the rendering of a judgment therein, adjudging and decreeing what part of the money in the hands of the defendants constituted a portion of the principal sum of said trust property, and what part constituted the income of said trust property collected by said W. H. Dimond, and directing the distribution of these funds in accordance with the terms of said trust; one-fourth of the income fund being distributed to said Eleanor Sophia Jarboe. It was further alleged in the complaint that said action was heard and decided upon its merits; that the court found all of the allegations of the complaint therein to be true, and that the account of said trustees was correct as set forth in the complaint, and that all of the acts of the trustees, as set forth in the complaint, were done within the line of their duty as such trustees, and that the court found, as a conclusion of law, that said account should be settled and allowed as presented, and that the resignation of said Horace G. Platt be accepted; and that he be discharged from all further liability under said trust, and that B. P. Oliver be adjudged to be the sole and surviving trustee under said trust, and that a decree was entered accordingly.

It thus appears that an action was brought by appellant herself, in connection with others, for the purpose of enforcing the particular trust by compelling the division of some $22,000 recovered from the executors of the estate of said W. H. Dimond, deceased, as a part of the trust estate, and that the money was actually divided and distributed according to the terms of said trust. It is declared by respondent that "it would be difficult, indeed, to show more clearly than has been here done that the existence of this trust had been directly involved in the litigation above referred to, and its validity adjudicated and established." Further, it is argued that, since it appears that appellant contested each of the actions whose judgment rolls were introduced herein in evidence, and the particular grounds of her contest are not set forth, we must assume that one of the grounds was that such trust was invalid. It is claimed that this follows from the presumption that we must indulge in favor of the judgment of a court of general jurisdiction; that the burden, in other words, is upon appellant to show that said contest did not in fact involve directly the determination of the validity of said trust. The familiar doctrine is invoked, as stated in Bliss v. Sneath, 119 Cal. 526, 51 Pac. 848, that, "when a judgment of the trial court is brought here for review, it is incumbent upon the appellant affirmatively to show some reversible error committed by that court. If the appeal is presented upon the judgment roll, the error must appear on the face of the record. Not only will error never be presumed, but every presumption will be indulged in favor of upholding the judgment."

On the other hand, it is the contention of appellant that estoppel upon a different cause of action only extends to matters actually litigated and determined, and not to questions involved and defenses which might have been, but were not, made. And that it must appear from the record affirmatively that such question was raised and litigated, in order to preclude the losing party from contending to the contrary in another suit. As authority for this position, the principal cases cited are: Cromwell v. County of Sacramento, 94 U. S. 351, 24 L. Ed. 195; Freeman v. Barnum, 131 Cal. 387, 63 Pac. 691, 82 Am. St. Rep. 355; Ephraim v. Pacific Bank, 136 Cal. 646, 69 Pac. 436. In the first, the question was whether or not the validity of certain bonds or coupons could be attacked, the claim being that the plaintiff was barred by the judgment in an action brought by the plaintiff on earlier maturing coupons on the same bonds, and the court, through Mr. Justice Field, said: "The language, therefore, which is so often used, that a judgment estops, not only as to every ground of recovery or defense actually presented in the action, but also as to every other ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever. But, where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. * * * On principle, a point, not in litigation in one action, cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action."

In the Freeman Case, supra, the said opinion of Judge Field is cited with approval, and it is held that this rule "applies to the question as to the constitionality of subdivision 36 of section 25 of the county government act of 1893 [St. 1893, p. 346]. It is true that matter was necessarily involved, and must have been determined before judgment could have been entered in the former suit. But it does not appear from the record that such question was raised and litigated. This being a different action upon a different cause of action, the defendant is not estopped from raising the objection."

In Ephraim v. Pacific Bank, supra, the judgment was held not to constitute an estoppel, for the reason that the issue raised in the second action was not a material issue raised in the first action, and was not necessarily involved in the determination of the first trial, as appears from the following quotation from the decision: "The defendants [in the first action], without any just reason, set up the contract or agreement as herein alleged, *but being outside the issues*, and not passed upon by the court below, it is not res judicata. The elementary rule in this class of cases is stated in section 1911 of the Code of Civil Procedure: 'That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto.' It is evident that the liability of defendants does not appear to have been adjudged upon the face of the decree settling the account; nor was their liability actually or necessarily included therein."

[1] But, accepting appellant's view of the law of estoppel as applied to judgments, supported, it may be said, as that view is by the Freeman Case, supra, that a judgment is conclusive only as to the material matters which appear on the face of the record to have been actually determined, still it does not follow that this particular finding of the lower court lacks sufficient support. To the contrary, we must hold that the validity of the said trust was directly put in issue and determined in the former actions. This follows from the stipulation that the answer of respondent herein contains a correct statement of the contents of the judgment roll in each of said actions. It must be accepted as true, therefore, as alleged in said answer, that the existence and validity of said trust were put in issue and adjudicated. Of course, there is no legal objection to giving effect to this stipulation of the parties, and the case is no different from what it would be, had the entire judgment roll in said actions been incorporated in the bill of exceptions, and in the pleadings therein should be disclosed a specific averment as to the validity of said trust, followed by an affirmative finding thereon by the court. Indeed, we have a right to assume that such would appear from a full exposition of said judgment rolls, but that they were omitted in consequence of said stipulation.

[2] But if we have given this stipulation a wider scope than was intended by the parties, nevertheless, by virtue of the presumption suggested by respondent, we must uphold the finding of the lower court. As we have seen, it appears that appellant contested each of the actions, the judgment rolls in which were introduced in evidence in this case, and were before the trial court. It does not appear what the grounds of contest were. There is nothing in the record before us to negative the assumption that one of the grounds of said contest was the invalidity of said trust. Since the record does not purport to set forth all the findings of the court in said actions, we may assume, also, that the validity of said trust was expressly found. If the contrary be the fact, appellant should have exhibited it in the record.

[3] But, aside from the foregoing, it is apparent that appellant's position is entirely untenable. The rule as to estoppel by judgment is not correctly stated in the Freeman Case, supra. The learned justice who wrote the opinion apparently overlooked the latter part of section 1911 of the Code of Civil Procedure. That section furnishes the presumption or rule of evidence for our guidance in ascertaining what has been determined by a judgment. We are not limited to that "which appears upon its face to have been so adjudged"; but the judgment also embraces whatever is actually and necessarily included therein or necessary thereto. Parties are therefore estopped, by a former judgment, from contending for the contrary, not only as to the matters which appear to have been determined, but also as to those which were necessarily involved therein or necessary thereto. For this doctrine, there is abundance of support. Indeed, most of the cases go so far as to hold that there is an estoppel as to all the matters that might have been litigated in the former action. It is not necessary, however, to go to that extent to uphold the finding of the lower court upon this point.

In Woolverton v. Baker, 98 Cal. 632, 33 Pac. 732, it is said: "Where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as a part of the subject in contest, but which was not brought forward, only because they have through negligence, inadvertence, or even accident, omitted part of their case. The plea of res adjudicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

In Flynn v. Hite, 107 Cal. 455, 40 Pac. 749, it is held, as stated in the syllabus, that "the validity of a lease which might be shown in evidence in support of a plea of right of possession in an action of ejectment is adjudged against by the recovery of the plaintiff in the ejectment suit; and the failure of the defendant to offer the lease in evidence in support of the plea cannot affect the conclusiveness of the judgment against his right to recover damages for not being permitted to occupy the premises recovered in the ejectment suit."

In Crew v. Pratt, 119 Cal. 149, 51 Pac. 42, it is said: "It may be stated as a general proposition that a judgment is conclusive, not only as to the subject-matter in controversy in the action upon which it is based, but also in all other actions involving the same question, and upon all matters involved in the issues which might have been litigated and decided in the case; the presumption being that all such issues were really met and decided. Freeman on Judgments, § 253; Parnell v. Hahn, 61 Cal. 131; Lillis v. Emigrant, etc., Co., 95 Cal. 553, 30 Pac. 1108; Woolverton v. Baker, 98 Cal. 631, 33 Pac. 731; Howell v. Budd, 91 Cal. 342, 27 Pac. 747; Burris v. Kennedy, 108 Cal. 338, 41 Pac. 458; Estate of Hudson, 63 Cal. 457. * * * The subject-matter upon which the court was called to act in the present instance was the settlement of the final account and distribution of the estate of O. C. Pratt under his last will. As an incident of this duty, it devolved upon the court to determine whether or not there was a valid trust created by the will, and whether the respondents were lawfully created the trustees thereof. The court could not dispose of this question without passing upon the validity of the trust. It was the fulcrum upon which that branch of the case turned. * * * In the present case, we are of opinion it was, under the law, the duty of the court to adjudicate the question of the validity of the Pratt trust, and that, having done so and adjudged it to be valid, while its conclusion was erroneous and the judgment open to reversal on appeal, yet, as no appeal was taken therefrom, and as the time therefor has long since expired, it is not now open to attack."

In Bingham v. Kearney, 136 Cal. 175, 68 Pac. 597, it was held that a judgment in a former action, foreclosing a contract of sale for default of the purchaser in payment of purchase money, which has become final, is conclusive against the right of the purchaser to maintain a subsequent action to rescind the contract of sale and to recover back the purchase money paid; the court saying: "It is the rule, long recognized in this country, that a judgment between the same parties is conclusive, not only as to the subject-matter in controversy in the action upon which it is based, but also in all other actions involving the same question, and upon all matters involved in the issues which might have been litigated and decided in the case; the presumption being that all such issues were met and decided." The rule is reaffirmed in Ivancovich v. Weilenman, 114 Cal. 757, 78 Pac. 268; Estate of McDougald, 146 Cal. 195, 79 Pac. 878; Swamp Land Reclamation District v. Blumenberg, 156 Cal. 539, 106 Pac. 389. See, also, the late case of Gibbs et al. v. Peterson, 127 Pac. 62, where the rule is again announced and other Supreme Court decisions are cited in its support.

[4, 5] It seems entirely clear that, in the actions for the appointment of a trustee under the trust and for an accounting and distribution of the trust fund, the validity of said trust was necessarily involved. The manifest foundation for such action is the existence and legal effect of the trust. Its validity may not have been questioned; it may have been conceded by all parties; the court may have given it little consideration; but it is indisputable that the determination of its validity is inseparably associated with the judgments to which we have referred. It would be a grave reflection upon any court to suggest that it would appoint a trustee to carry out the provisions of a purported trust without inquiry as to its validity, and without being satisfied that it is legally operative. There is manifestly no authority for the appointment of a trustee to carry out the provisions of a void trust, or to determine the existence of a trust fund, and direct its apportionment and distribution in accordance with the terms of such trust. We must assume that the court would, if possible, avoid any such illegal and abortive act, and that it would preliminarily determine that the contemplated proceeding was legal, as being based upon a valid declaration of trust. At least, such is manifestly its duty, and we must hold that it was performed.

The estoppel was properly pleaded. It was established by the record of the former actions, from which it appears that the validity of said trust now assailed by appellant was necessarily involved in the judgments rendered in those actions; and, under the authorities, it must be held that the question is res adjudicata.

We deem it unnecessary to notice other points made by respondent in favor of the judgment, as we feel satisfied that the finding as to estoppel is correct, and is decisive of the controversy.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

18 Cal. App. 191

BOHN v. GUNTHER. (Civ. 888.)

(District Court of Appeal, Third District, California. Feb. 8, 1912. On Petition for Rehearing, March 8, 1912. Rehearing Denied by Supreme Court April 8, 1912.)

1. Deeds (§ 208*)—Execution—Delivery—Evidence.

In an action to quiet title and to cancel a deed given by the plaintiff to the defendant, evidence *held* to show that a prior deed from the defendant to the plaintiff was actually delivered by the defendant to the plaintiff.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 625–632, 634; Dec. Dig. § 208.*]

2. Deeds (§ 194*)—Evidence—Presumption—Delivery.

Possession of a deed raises a rebuttable presumption that it was delivered.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 574–583, 623; Dec. Dig. § 194.*]

On Petition for Rehearing.

3. Quieting Title (§ 51*)—Relief—Decree—Relief to Defendant.

Though in an action to quiet title and cancel a deed given by the plaintiff to the defendant, the issue made was as to the delivery of a deed by which the property in question was claimed to have been originally transferred to the plaintiff by the defendant, and there was no specific issue raised by the pleadings as to the right of the defendant to have a life estate in the property, the court might properly decree a life estate to the defendant, with remainder in the plaintiff, as the entire title was directly in issue and it would include any less estate.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 101; Dec. Dig. § 51.*]

4. Quieting Title (§ 44*)—Evidence.

In an action to set aside a deed and quiet title, evidence *held* to support a finding that a prior deed given the plaintiff by the defendant was intended to pass the title to the plaintiff subject to the right of the defendant to have a life estate therein.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 89–92; Dec. Dig. § 44.*]

5. Appeal and Error (§ 654*) — Record — Supplementing.

On appeal, the court is bound by the record as it finds it, and cannot supplement it by circumstances mentioned in the briefs of the parties on which the record is silent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2819–2822; Dec. Dig. § 654.*]

Appeal from Superior Court, Humboldt County; Geo. D. Murray, Judge.

Bill by Ida Louisa Emilia Bohn against Robert Gunther to set aside a deed and quiet title to land. From a decree awarding the defendant a life estate with remainder in the plaintiff, defendant appeals. Affirmed.

Gillett & Cutler, for appellant. Mahan & Mahan, Otto C. Gregor, and G. W. Hunter, for respondent.

BURNETT, J. The record contains evidence of the following facts: In 1853 the defendant left Germany, his native land, and, coming to the United States, located in the city of Cleveland, Ohio. There he became well acquainted and friendly with another German by the name of Bodenstein, the grandfather of Ida Bohn, the plaintiff herein. She and her parents since birth had lived in Cleveland. Defendant came to California in 1858, and in 1860 located on the land in dispute, known as Gunther's Island. Upon returning to Germany in 1893, he stopped at Cleveland for the purpose of visiting his friend, Bodenstein, and there he became acquainted with Mr. and Mrs. Bohn and their daughter, Ida, plaintiff herein. He formed an attachment for the girl and he concluded that it would be a good plan to get the Bohns to permit him to take Ida to California and to make her home with him, his purpose being to adopt her as his child and thereby enable her to inherit his property. He was a bachelor, and there was no one about him for whom he had any special fondness. Prior to 1900 some friendly correspondence passed between him and Mrs. Bohn in which he expressed his desire to have her daughter Ida come to California to make her home with him. The parents objected to this. In 1900 he made a trip to Cleveland and spent nine weeks at the home of the Bohns. On one occasion he put his hand upon Ida's shoulder and told her that he had come to Cleveland for the purpose of taking her with him to California, and, before leaving for home, he told her parents that he would see them all in California before a great while. After returning to Eureka, further correspondence ensued between him and Mrs. Bohn in which he urged her to persuade Mr. Bohn to dispose of his property there and come to California. In 1901 the Bohns did dispose of their property at a sacrifice, he being engaged in the mercantile business, and they came to Humboldt county with the understanding that the realty herein involved should become the property of plaintiff.

Among the letters from Mr. Gunther to Mrs. Bohn was one dated Eureka, December 21, 1899, which expresses clearly his sentiments towards plaintiff and his purpose in relation to the property at that time. In the letter, among other statements, he used this language: "Ever since I came from Europe six years ago, I have been thinking what to do with my property in case I die. My half-brothers and sisters would be glad if I died, so that they could get my money, and I do not intend that they shall get it. * * * Last year I built a new house, and I have been thinking what would become of that house if the people I have left me, and I have thought of Ida ever since we moved in the house. * * * I was confident you would not object if I adopted Ida as my daughter since she would be your child as much as she ever was, nor could I think more of Ida after adopting her than I do now, but I would have the consolation to know that my property after I die would not be ate up by lawyers, or go to parties who do not deserve it." In the same letter he wrote to Ida: "Why I was so anxious that you should come now, I have explained to your mother. You may not be able to judge of the matter now as well as in later years, but in the end you will find that if my plans do not succeed my intentions were good." Some time after the Bohns arrived in Eureka and were living on the island, the defendant made this statement to Mrs. Bohn: "Now, I will have to get this fixed up for Ida; I want to get that all fixed right, these dizzy spells may come over me at any time, and my money would go where I wouldn't want it to, and I am going to look after that."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Shortly after the Bohns arrived, defendant asked plaintiff how she spelled her name. He made no explanation at that time, but later he gave her a little blue slip of paper reciting the fact that he had made a deed in her favor to the island property, to be delivered upon his death, and placed it in escrow with one G. R. Georgeson. The slip contained the words, "Deed left with G. R. Georgeson, and acknowledged by George T. Rolley," and the date of the deed was given, and, at the time the slip was delivered, defendant said to plaintiff: "If anything happens to me, in case of my death, you just give this little slip of paper to Mr. Georgeson, and he will give you the deed." This deed was dated August 19, 1901, and it is spoken of as the escrow deed. Other deeds were also executed, but we need not trace the history of the various transactions. The action was brought to quiet title and to cancel a deed to defendant bearing the date of February 10, 1904, and signed and acknowledged by plaintiff one week later, and recorded by defendant on the 11th day of January, 1905, it being alleged in the complaint that said deed was signed and acknowledged with the express understanding that it "was not to be delivered or become operative except and only in the event that said plaintiff died during the life of said defendant," and furthermore that said defendant, "in violation of said understanding and agreement had between plaintiff and defendant in relation to said instrument, obtained possession of said instrument and unlawfully appropriated said instrument, and in violation of the confidence and trust reposed in said defendant by said plaintiff and without her knowledge or consent recorded said instrument." Defendant filed an answer and cross-complaint in which there is a positive denial that plaintiff is or ever was the absolute owner of the property, or that there was any such agreement as set forth in the complaint in relation to said deed of February 10, 1904, or that he surreptitiously or in violation of any confidence obtained possession of it, and it alleges misrepresentations and fraud on the part of plaintiff whereby defendant was induced to execute a deed to plaintiff on the 8th day of September, 1903, and another on February 9, 1904. The cross-complaint recites fully the purpose and understanding as to these instruments and the said escrow deed of August 19, 1901, and avers that plaintiff wrongfully and maliciously, and with intent to cheat and defraud defendant and secretly and without the knowledge or consent of defendant, obtained possession of the last-named deed, and "upon the 31st day of March, 1905, the date of the commencement of this action, said plaintiff wrongfully, unlawfully, and without right placed said escrow deed of record." Defendant therefore prayed for the cancellation of said escrow deed and for a decree quieting his title to the property.

A jury was called at the trial, and they made certain special findings that were adopted by the court, which are directly opposed to appellant's theory of the case as outlined in his cross-complaint. They found that the plaintiff made no fraudulent representations nor false statements to defendant, that she did not (as alleged in the cross-complaint) conspire or design to bring about an estrangement in the relations between defendant and his niece, Martha Gunther. They answered "No" to the question: "Did Robert Gunther make, execute, and deliver to Ida Bohn the deed dated September 8, 1903, and known as the life estate deed, solely for the purposes of discouraging or preventing any contest or litigation against his estate by his niece Martha Gunther, by making it appear that the record title to the property therein described stood in plaintiff?" They answered "Yes" to this interrogatory: "Did Robert Gunther execute and deliver to Ida Bohn the deed dated September 8, 1903, and referred to as the life estate deed, freely and voluntarily, and not by reason of false and fraudulent misrepresentations made by Ida Bohn to Robert Gunther?" They found that Robert Gunther did "execute and deliver to Ida Bohn the deed dated February 9, 1904, and spoken of as the absolute deed, freely and voluntarily, and not by reason of false or fraudulent misrepresentations made by Ida Bohn to Robert Gunther"; that it was the understanding of both parties at the time that Ida Bohn signed and acknowledged the deed from her to Robert Gunther, dated February 10, 1904, that said deed should not become operative unless Ida Bohn should die before Robert Gunther. As to this last, an additional finding was made by the court that "the deed signed and acknowledged by plaintiff to defendant, bearing date February 10, 1904, was not delivered by plaintiff to defendant."

[1] As to the foregoing findings, it may be said that there is in our judgment, abundant evidence to support each of them, as set forth in the brief of respondent, but we

pass them by without further notice and proceed to consider other findings which are decisive of the whole controversy. These are special issues, No. 4 answered "No" by the jury, and No. 5 answered "Yes," and adopted by the court, and finding No. 8 made by the court of its own motion. These findings are to the effect that "neither Ida Bohn nor any other person acting in her behalf took the deed made by Robert Gunther to Ida Bohn, bearing date August 19, 1901, and spoken of as the escrow deed, from the possession of Robert Gunther without right, wrongfully, secretly, and without the knowledge and against the consent of Robert Gunther," and furthermore that this deed "was delivered by Robert Gunther to Ida Bohn on the stairway at his house on the 20th day of February, 1904," or some time thereafter; "that the deed made by Robert Gunther to Ida Bohn bearing date August 19, 1901, was by said Gunther given as a deed of gift to said Ida Bohn on the 20th day of February, 1904, or within a short time thereafter, with the intention on his part to thereby deliver the said deed to her and thereby pass the title from him to her so that said lands should become the property of said Ida Bohn, subject to the right of the defendant to have the use of and the income from said lands for and during the term of his natural life." There is no contention of any undue influence or of any unsoundness of mind on the part of defendant.

It is manifest, therefore, that these findings as to the delivery of said escrow deed by defendant to plaintiff, if supported by the evidence, justify the judgment in favor of plaintiff, as they relate to a time subsequent to the other transactions to which we have referred. This deed was prepared by defendant, all in his own handwriting, as the testimony shows. It was in the possession of Mr. Georgeson for a long time, but defendant finally took it and placed it with his papers in his room at his home on the island. After the execution of the said deed of February 9, 1904, defendant had a conversation with plaintiff in reference to this transaction, and he said to her: "You are with the Mahans, and to-morrow morning when you go over there you tell the Mahans everything we have done, and, if they can suggest anything that will be more secure, I will do anything, for I want you to have the place and I never want you to be bothered." She had a conversation with the Mahans, as directed, and she reported it to Mr. Gunther. He became angry in reference to a statement made by the Mahans that he might take the deed and record it, and he said to her: "Well, do they think I am a child? This is no child's play. When I give a thing I give it. You never saw me take back a present yet." She is corroborated in this by her mother. The defendant himself also testified, on cross-examination, that, "After the absolute deed was made, there was a conversation with Ida in which she stated she hoped I would not be sorry for what I had done, and I said I would not because I knew my party and never took a gift back." He places the conversation, though, at a different time and occasion. It is very reasonable to conclude that in this statement he referred to the gift of this island property.

As to the delivery of this "escrow" deed, plaintiff testified: "It was a few days after or some time after that, a short time, I was on my way upstairs one evening, and I was right about the middle of the stairway, and Mr. Gunther's room comes right out at the foot of the stairway. I was about the middle of the stairway and Mr. Gunther came out of his room and walked around the stairway and he had a paper in his hand in an envelope, and he called to me and said, 'Here, Ida, to show that I really want you to have my property, here is a deed all in my own handwriting; now if anybody should say I was crazy when I gave you my property, that will show that a crazy man could never write a deed like this. It took me a whole week to write it. It will show everybody that I really want you to have my property,' and he said, 'Have you got a good place to keep it?' I said, 'Yes, I had.' He said, 'Well, keep it so you can put your finger on it at any time,' and I took it upstairs with me. I had never seen that paper prior to the time he handed it to me there on the stairway. It was in his handwriting." Thereafter she kept the deed in her possession. Plaintiff's mother and father also testified substantially the same as to the occurrence; the mother adding that when she went upstairs Ida showed her the deed. Defendant also represented to others that Ida owned the island. He explains this transaction by stating that "Miss Bohn knew of the whole thing, that the whole thing was a sham in her favor to prevent my niece from bringing a contest. She knew she was not getting any property by that transaction. I was carrying out this fraud to prevent my niece from contesting my will." But regardless of the question suggested by respondent, whether a court of equity should look with favor upon testimony coupled with the statement that the witness was simply carrying out a fraud, it is clear that the court and the jury had the legal right to believe the testimony of plaintiff and her witnesses, and that said finding in reference to this deed represents a rational inference from the showing made by respondent.

[2] Indeed, she might have relied upon the presumption arising from the possession of the deed, at least until overcome by appellant's evidence (Zihn v. Zihn, 153 Cal. 407, 95 Pac. 868), but the presumption was strongly fortified by the positive testimony of a number of witnesses.

Appellant complains also of that portion of the finding and judgment that accords to him the use and income of the property during his life. It is assailed as representing a timorous compromise, entirely unsustained by the evidence, and clearly without the issues in the case. It is asserted that "at the end of the trial even the plaintiff as a human being must have recoiled from pursuing her efforts to utterly despoil the defendant, and all save defendant must have been ready to compromise upon the theory of this finding." Manifestly we are not in a position to verify this opinion of appellant, but, from the fact that respondent has taken no appeal, we may surmise that she is content with the result. In that, however, we see nothing to her discredit.

As to the evidence, there is much to show that, until an unfortunate misunderstanding arose between the parties growing out of attentions paid to respondent by a young man whom appellant seems to have disliked, it was the manifest purpose and understanding of all the parties concerned that appellant should enjoy the property while he lived, and that then it should vest absolutely in respondent. From the correspondence hereinbefore referred to, it is clear that the Bohns came to California with the understanding that Ida was to have the property, but that appellant should not be deprived of its use or income while he lived. Evidence of this also is found in the execution of said escrow deed of August 19, 1901, and of the life estate deed of subsequent date giving him control of the property while he lived. Indeed, the testimony of plaintiff alone is sufficient to support the conclusion that this was the understanding and intention of the parties.

It is true that this issue was not specifically raised by the pleadings. The title in fee, however, was directly in issue, and this would include any less estate, and the court, under our practice, in an action to quiet title would certainly not be precluded from determining just what estate each party owns. The situation is similar to that involved in the Zihn Case, supra, where there was a finding that "it was understood and agreed by and between the parties hereto that the plaintiff should have a life estate therein, and that said grantees should become the owners in fee thereof, subject to the plaintiff's life estate and right to use and occupy the same for his life." In discussing this, the Supreme Court, through Mr. Justice Angellotti, says: "This finding, which is upon a matter not specifically referred to in any of the pleadings, does not necessarily imply any lack of understanding upon the part of the donor as to the effect of the absolute deed of gift, or that the deed as delivered was not fully in accord with the desire and intention of the donor, but it is entirely consistent with the fact of a separate understanding and agreement then assented to by the grantees, relying on which plaintiff was willing to make and knowingly and voluntarily made delivery of the absolute deed of gift with the full understanding of its legal effect." The only question could be whether a parol agreement of like import could be enforced, but the power of a court of equity to accomplish this should hardly be open to controversy. The point, though, is not made by appellant. Besides, if such contention should be made and upheld, the result would be to leave the absolute title in respondent, and, under the circumstances, any court should hesitate to deprive appellant of the fruits of the judgment, although such disposition may be invited by him.

Appellant laments the inequality of the contest before the jury between the tears of an attractive young woman and the unalluring but ingenuous story of an old man. The tears, however, are not preserved in the record. If they were, we do not know how much they might affect the judgment of this court. It is sufficient to say, though, that, accepting the facts as we must, the judgment of the lower court is not only amply sustained, but that it is eminently just and equitable.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

On Petition for Rehearing.

BURNETT, J. The petition for rehearing is addressed to the proposition that the finding of the lower court to the effect that plaintiff is entitled to the fee, subject to the right of defendant to the possession and use of the property during his life, is not within the pleadings, and is unsupported by the evidence.

[3] It is no doubt true, as claimed by appellant, that "the plaintiff's case cannot be better as proved than it is as stated. A party cannot travel out of the matter alleged in his pleading to make a ground of relief. A finding is useless and idle unless the facts found are within the issues, and a judgment based upon such facts cannot be sustained." And we have no fault to find with the cases cited in support of the doctrine, but they involve a different situation from what we have here. It seems plain on principle that, in legal procedure as well as in physics, the whole includes a part, and that it cannot be said that this finding is entirely without the matter alleged in the pleadings.

In the Zihn Case, 153 Cal. 405, 95 Pac. 868, the principle is recognized, where the Supreme Court approved a finding of the lower court awarding the plaintiff therein a life estate under a deed absolute in form, notwithstanding that there was no specific averment in any of the pleadings as to such life estate.

In Pennie v. Hildreth, 81 Cal. 133, 22 Pac. 400, which was an action to quiet title, the

Supreme Court said: "If the plaintiff claims a fee simple, he may show that he has nothing more than a lien or any interest less than he claims, and that he (the defendant) has an interest also, either paramount or subordinate to that of the plaintiff, and the decree of the court should declare the rights of the parties in the property accordingly. If the defendant had an equitable title to one-half of the property in controversy, whether that interest was subject to the mortgage of the plaintiff or paramount to it, he had a right to have it so decreed, and the interest of the plaintiff declared."

[4] As to the evidence to support the finding, we think there can be no kind of doubt. Much of it we deemed unnecessary to set out in the former opinion, but we called attention to certain facts and circumstances which appeared to us sufficient rationally to justify the court's conclusion. In her answer to appellant's petition for rehearing, respondent points out in the transcript unequivocal testimony to the effect that it was the purpose and understanding of appellant that he should retain the life interest in the property. We quote simply from one of the witnesses as to a conversation with Mr. Gunther: "I said, 'I see you have deeded your island away.' He said, 'yes,' and in a moment he said he wanted his property to go where he wanted it to go while he was alive. He said in that conversation that he had a life lease in the property. * * * He simply said he had reserved a life estate—a life lease."

[5] Some asserted circumstances are mentioned by appellant concerning which the record is entirely silent. We need not, of course, remind the able counsel for petitioner that we are controlled by the record as we find it.

Appellant seems to misconstrue the spirit of an expression found in the concluding paragraph of the former opinion, and, as it is unnecessary to the decision, the said paragraph is stricken out and there is substituted therefor the following: "It is sufficient to say in conclusion that, accepting the facts as we must under the well-established rule applicable to appellate tribunals, the judgment of the lower court is not only amply sustained, but is eminently just and equitable."

The petition for rehearing is denied.

We concur: CHIPMAN, P. J.; HART, J.

(18 Cal. App. 227)

POOL v. PHŒNIX REFINING & MFG. CO.

(Civ. 1,057.)

(District Court of Appeal, Second District, California. Feb. 13, 1912.)

1. SALES (§ 377*)—DAMAGES—LOSS OF PROFIT.

Under Civ. Code, § 3358, which provides that no person can recover a greater amount in damages for a breach of a contract than he could have gained by the full performance thereof, a complaint charging a breach of a contract to purchase is insufficient, where it contains no allegation respecting the value of the goods purchased at the time the contract was rescinded and the goods retained by the seller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1092; Dec. Dig. § 377.*]

2. SALES (§ 377*) — PLEADING — DAMAGES—LOSS OF PROFIT.

Where a complaint in an action for damages for the breach of a contract of sale providing for the payment of freight charges by the consignee contains no allegation as to the value of the goods at the time of the rescission of the contract, it is not rendered sufficient by an allegation of the amount of the freight charges paid by the shipper, as the contract to pay such charges was not separable, and the value of the goods might have become enhanced in an amount sufficient to cover any loss occasioned by payment of the freight charges.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1092; Dec. Dig. § 377.*]

Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Action by George G. Pool against the Phœnix Refining & Manufacturing Company. From a judgment for plaintiff on the overruling of a demurrer to the complaint, defendant appeals. Reversed.

E. L. Foster, for appellant. Joseph H. Tam, for respondent.

JAMES, J. This appeal was taken by the defendant from a judgment, and is presented upon the judgment roll alone. To the complaint of plaintiff defendant interposed a demurrer, setting forth as a ground thereof that said complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and defendant answered, after which the cause went to trial. On this appeal the question to be considered is as to whether the trial court was right in overruling the demurrer of defendant to the complaint of plaintiff.

Plaintiff acquired title to a claim of the Union Hardware & Metal Company by assignment thereof, upon which he brought suit demanding judgment in the sum of $485.52, which the trial court awarded to him, together with interest and costs. The facts which constituted the alleged cause of action were, in substance, as follows: In June, 1908, defendant ordered from the Union Hardware & Metal Company a car load of merchandise, consisting of steel sheets, which was to be shipped by the vendor from its factory at Steubenville, Ohio, to defendant at Bakersfield, Cal. Defendant agreed, upon the receipt of the merchandise at the city of Bakersfield, to pay the amount of the agreed purchase price, being the sum of $1,761.81, together with freight charges which might be made on account of the shipment. The merchandise was shipped and arrived at the city of Bakersfield in August, 1908. The defendant, notwithstanding it had notice of the arrival thereof, failed and refused to pay the freight charges, or to receive the merchandise, and the same remained in charge of the railroad company for the period of 76 days at that point. Thereafter the Union Hardware & Metal Company paid the charges which had accrued, both those made for the transportation of the merchandise and demurrage accruing during the 76 days that the car was at the city of Bakersfield. The merchandise was then forwarded to the Union Hardware Company's warehouse in the city of Los Angeles. It was alleged further in the complaint that the freight rates and charges from the city of Steubenville, Ohio, to the city of Bakersfield, were $204.76 in excess of freight rates which would have been charged had the shipment come directly from the city of Steubenville to the city of Los Angeles; that, further, the Union Hardware & Metal Company was obliged to pay additional freight charges of $204.76 for the transportation of the freight from the city of Bakersfield to the city of Los Angeles, making a total, including interest on the amounts mentioned, of $485.52. This action was in form an action for damages arising upon breach of contract of a vendee to receive and pay for personal property, which contract the vendor elected to rescind because of such breach.

[1] The complaint contained no allegation respecting the value of the car load of merchandise, and for aught that appears therein plaintiff or his assignor may not have suffered any damage at all; that is, the car load of merchandise may have been worth a great deal more than the price agreed to be paid for it by the defendant when plaintiff's assignor rescinded the contract and took back its property. Civ. Code, § 3358. The contract as alleged was a contract for the sale of personal property for which defendant was to pay a certain stipulated sum, and, in addition thereto, the freight charges which would accrue upon the arrival of the shipment at the city of Bakersfield. If in the complaint it had been shown by proper allegation that the merchandise was of no greater value in the market to plaintiff's assignor than the agreed purchase price, at the time the contract was rescinded, then, of course, the amounts of money paid out by the Union Hardware & Metal Company on account of the failure of defendant to discharge fully its obligations under the contract would properly be recoverable as damages. Irrespective of the provisions of the Civil Code determining the measure of damages in various cases where a vendee refuses to receive and pay for personal property sold to him (Civ. Code, §§ 3310, 3311), it is clear that the plaintiff in this case has not alleged facts from which it can be reasonably inferred that any damage at all was suffered by his assignor.

[2] The agreement to pay freight charges cannot be separated from the main contract of purchase and treated as a distinct obligation assumed on the part of the vendee. The agreement to pay freight charges formed a part of the consideration of the sale. We think that the trial court erred in overruling the demurrer to the complaint.

The judgment is reversed.

We concur: ALLEN, P. J.; SHAW, J.

(162 Cal. 413)

THOM v. STEWART. (L. A. 2,775.)

(Supreme Court of California. March 26, 1912.)

1. Contracts (§ 103*)—Immoral or Unlawful Consideration—Effect.

A contract, the consideration of which is immoral or unlawful, is void.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 468–476; Dec. Dig. § 103.*]

2. Contracts (§ 128*)—Notes—Consideration—Illegal Promise.

A note, given on an agreement that a third person, arrested for embezzlement, would not be prosecuted by his surety, if the note was given, is void as against public policy.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 633–653; Dec. Dig. § 128.*]

3. Bills and Notes (§ 493*)—Presumptions—Prima Facie Proof.

Where a maker of a note, when sued thereon by an indorsee after maturity, admitted the execution thereof as alleged in the complaint, and pleaded an illegal consideration, the indorsee, by introducing the note in evidence, established a prima facie case within Civ. Code, § 1614, declaring that a written instrument is presumptive evidence of a consideration; and under section 1615, declaring that the burden of showing a want of consideration lies with the party seeking to avoid the instrument, the maker had the burden of showing want of consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1652–1662; Dec. Dig. § 493.*]

4. Bills and Notes (§ 518*)—Presumptions—Prima Facie Proof.

Where, in an action on a note, defended on the ground of illegality of consideration, the court found that the claim of the maker was not sustained by a preponderance of the evidence, the presumption created by Civ. Code, § 1614, that a written instrument is presumptive evidence of a consideration prevailed, and furnished sufficient evidence for a finding that the note was given for a good and valuable consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1816–1821; Dec. Dig. § 518.*]

5. Appeal and Error (§ 1011*)—Verdict—Review—Conflicting Evidence.

Where, in an action on a note, defended on the ground of the illegality of the consideration, the maker positively testified to facts proving an illegal consideration, and plaintiff positively denied such testimony, and a third person corroborated the maker and inferences supported by the maker, there was a conflict in the testimony within the Code, providing that the direct evidence of one witness who is entitled to credit is sufficient to prove any fact; and it was the province of the trial court to determine the credibility of the witnesses.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

6. APPEAL AND ERROR (§ 1011*)—VERDICT—REVIEW—CONFLICTING EVIDENCE.

Under the Constitution, limiting the jurisdiction of the Supreme Court to questions of law, the Supreme Court may not review conflicting evidence; and it is only where there is no evidence to sustain a finding, or where it can be said, as a matter of law, that the evidence is insufficient to sustain it, that the Supreme Court has jurisdiction to consider the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

Department 2. Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by C. C. Thom against C. P. Stewart. From a judgment for plaintiff, defendant appeals. Affirmed.

Woodruff & McClure, for appellant. Nathan P. Bundy and Gray, Barker, Bowen, Allen, Van Dyke & Jutten, for respondent.

LORIGAN, J. Plaintiff sued defendant to recover judgment on a promissory note for $2,750, executed by the defendant to the Metropolitan Bank & Trust Company of Los Angeles and assigned after maturity to plaintiff, and for a sale in satisfaction of the judgment of certain capital stock of the National Sugar Company, pledged by defendant as collateral security for the payment of the note.

The defendant, in his answer, admitted the execution of the note, and set up as an affirmative defense illegality of consideration for its execution, averring that the only consideration therefor was the promise and agreement of the plaintiff, Thom, as agent for the United States Fidelity & Guaranty Company, that if defendant executed the note one Eben C. Crowell, who had been arrested in Arizona for embezzling $2,500 from the United States customhouse at Nogales, while acting as cashier thereof, would not be prosecuted for said embezzlement by said company, which stood as guarantor to the United States government for any loss sustained through the dishonesty of said Crowell.

Judgment was entered in favor of the plaintiff, and from it and an order denying his motion for a new trial defendant appeals.

The court found generally that the promissory note was given by defendant to the assignor of the plaintiff for a good and valuable consideration, and that the averment in the answer that it was given to said assignor on the promise or agreement of the United States Fidelity & Guaranty Company that it would not cause said Crowell to be prosecuted for said embezzlement was untrue.

[1, 2] There can, of course, be no question of the principle of law under which this defense was interposed by defendant, or which would apply, had the court found upon it in his favor. Any agreement or contract, the consideration of which is immoral or unlawful, is void, and a promissory note, based upon such a consideration as was claimed by defendant, is void as against public morals and public policy, and is incapable of enforcement.

The main questions involved on this appeal are whether the findings of the court that the note was supported by a good consideration and against the defense of illegality of consideration are sustained by the evidence.

The admitted facts are that the United States Fidelity & Guaranty Company (to be hereafter referred to as the Guaranty Company) had issued a fidelity bond to the United States on behalf of E. C. Crowell as customhouse cashier at Nogales, Ariz.; that Crowell was indicted on February 18, 1908, for the embezzlement of $2,500 of customhouse funds, arrested, and confined in jail at Tombstone, Ariz., and was being prosecuted by the United States government; the Guaranty Company taking no part in the prosecution. Crowell and defendant were friends of many years standing, had known each other in Arizona; the defendant, prior to coming to Los Angeles, having resided in Nogales. Crowell, after his arrest and previous to the day his case was set for trial, which was a few months thereafter, had written several letters to the defendant, asking him to furnish the money necessary to cover the amount he was charged with having embezzled, so as to prevent him from being sent to the Yuma penitentiary for a term of years. The note in question was executed by defendant to the bank on April 20, 1908, and on the same day the money was telegraphed by the Guaranty Company to a bank in Nogales and paid over to the United States government. On the next day, April 21st, the date set for his trial, Crowell pleaded guilty, and on April 24th was sentenced to one year in the territorial prison of Arizona. At the time the note was executed by the defendant, plaintiff, Thom, resided in Los Angeles, and, as shown by his testimony, was associated with the Guaranty Company, not as its general agent, but as representing the company, although in what particular capacity does not appear. He was at the same time in the employment of the bank, which was agent for the Guaranty Company, and the note in question was made payable to the bank as the representative of the Guaranty Company, which was the real beneficiary. On the Saturday prior to the day set for the trial of Crowell, a special agent of the Guaranty Company (Galbraith by name) temporarily in Tombstone, and who knew Crowell well, called upon him at the jail. Crowell said he had tried to raise the money to reimburse the government, but without success; that he had received a letter from Stewart, stating that he had no money, but had some National Sugar Company stock; that he (Crowell) had tried all his friends; and that Galbraith was the only one who could help him. Crowell further told Galbraith that if the money was paid into the bank before the trial came off that he intended to plead guilty, and was informed by his attorney that if the money was so paid before sentence it was customary to shorten the sentence by several years, and that this was the reason he wanted to get the money paid before sentence. After leaving Crowell, Galbraith immediately sent the following telegram to Los Angeles: "F. M. Kelsey, Metropolitan Bank, Los Angeles. Get Johns and A. P. Stewart, Security Building, together on telephone immediately. Crowell loss." It does not appear who Johns was. Galbraith also wired to C. F. Fuller, connected with the Guaranty Company at Los Angeles, asking him to see that Kelsey got the telegram, and to assist him in looking up the defendant. On Monday following the date of the execution of the note in question, Galbraith got a telegram from San Francisco that the money had been wired to the First National Bank of Nogales. As stated by the witness, "the reason the loss was paid immediately and sent down there by wire to Nogales and used under the solicitation of Mr. Crowell and his attorney was that, when the case came up, the attorney might tell the judge that the loss had been made good;" that the reason the note was given to the company by Mr. Stewart was to reimburse the money that Mr. Crowell had taken; that when a person bonded by the United States Fidelity & Guaranty Company defaults the company "takes no steps, excepting to put the prosecution on the holder of the bond."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

As to the testimony relating to the actual execution of the note by defendant, Stewart, and the directly attendant circumstances, the defendant testified that on Monday morning, the day of the execution of the note, when he came to his office in Los Angeles, he found a message, left by Fuller on the Saturday previous, asking him to call upon him. He went to the office of Fuller in the Pacific Electric building, and one of the clerks (Fuller being absent) told him that Fuller wanted him to go to the Metropolitan Bank and see Mr. Thom, the plaintiff. Defendant did so, telling Thom that Fuller had left a card, saying that he (Fuller) wanted to see him about Crowell in Tombstone; that he had not found him in his office, but had been instructed by the clerk that Fuller wished him to call upon Mr. Thom. Thom informed him that the manager of the company in San Francisco wanted to talk with him about the matter, and called up the latter for that purpose upon the telephone. Thom stated to the manager that the defendant was in the office and asked him whether he wanted to talk to him, to which the manager evidently responded in the negative, because while Thom and the manager were talking defendant asked Thom if he should talk to the manager, and Thom said, "No;" that it was all right. "I got all the information." During his conversation with the manager, Thom made some notes, apparently with reference to the subject of the conversation. Defendant further testified that after the conversation between the manager and Thom the latter told him that the company wanted him to pay what Crowell had taken, and if he did they would not prosecute Crowell; that he told Thom he was not prepared to pay the money, and the latter asked if he could give a note with collateral security, which defendant said he could and would do; that he asked Thom if the Guaranty Company was the only one prosecuting Crowell, and was told by him that, to the best of his knowledge, it was. Defendant then testified: "So I agreed to give a note for $2,750, so that Crowell would not be prosecuted and sent to the penitentiary; and I signed a note at that time, and he told me that it would be all right. * * * At that time, Mr. Thom agreed that the Guaranty Company would not prosecute Mr. Crowell if I would give the note. * * * He did not agree that no one else would prosecute him. He stated that he did not know of any one else that was prosecuting him." After the execution of the note, defendant sent a telegram to Crowell, stating that the matter had been settled up and the note signed.

Some months afterwards, and subsequent to the sentence of Crowell, the defendant took a business associate of his, Dr. C. S. Hutchinson, to the bank, with the declared purpose of procuring an admission from Thom that the note was given in consideration that Crowell would not be prosecuted by the Guaranty Company, and testified that Thom then and there, in the presence of Dr. Hutchinson, admitted that this was true. Dr. Hutchinson was called as a witness by the defendant, and, after stating that he accompanied Mr. Stewart to the bank, the only material testimony given by him was: "Mr. Stewart asked Thom what they were going to do about his note, and he said—he told Mr. Thom that he understood that they would not prosecute Mr. Crowell down in Arizona; and Mr. Thom said that, so far as they were concerned, they would not prosecute him, and I said to Mr. Thom, 'Well, then, didn't you tell Mr. Stewart you would not prosecute him, or he would not be prosecuted, if this note was put up,' and he said, 'So far as we are concerned, we will not prosecute him,' and that he [defendant] would have to take it up with the San Francisco office in order to have anything done about this note."

The plaintiff, Thom, in his own behalf, testified: "At no time did I ever say to Mr. Stewart that, if he executed the note to the Metropolitan Bank & Trust Company, delivering the collateral security therefor, that the United States Fidelity & Guaranty Company would not prosecute Eben C. Crowell;" nor did he state at any time to Stewart, in the presence of Hutchinson, that the Fidelity & Guaranty Company or "we" would not prosecute Crowell. Further he testified: "I don't know of my own personal knowledge what the consideration of the note was. * * * The reason for sending for Stewart was upon the telegraphic suggestion from our special agent, Charles D. Galbraith. * * * I never saw Mr. Stewart before he came to our office. * * * I do not know whether Mr. Crowell embezzled any money at Nogales or not; and neither the company nor any of its representatives ever notified me, prior to this transaction, that Eben C. Crowell had embezzled any money. The telegram received by me from Mr. Galbraith was the only word I had prior to the sending of the note. * * * I would like to have it understood how my position in this matter was. I knew absolutely nothing until after the transaction was completed. I knew absolutely nothing more than what was contained in that telegram, excepting a few brief facts given to me over the phone." This was all the evidence offered by the parties respecting the circumstances under which the note was executed.

[3, 4] The legal situation under the pleadings and evidence is this: Plaintiff pleaded the execution of the note, and defendant, in his answer, admitted such execution and set up as an affirmative defense against its validity and his liability on it that the consideration for its execution by him was illegal. Under this state of the pleadings, when the plaintiff upon the trial offered the note and the court admitted it in evidence, and plaintiff thereupon rested his case, prima facie proof of the right of plaintiff to recover upon the note according to its terms was established, because, under the Civil Code, § 1614, a written instrument is presumptive evidence of a consideration. This, of course, is a disputable presumption, but as a presumption it is sufficient evidence of a consideration, and must be accepted as such, unless it is overcome by evidence to the contrary; and "the burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it." Civ. Code, § 1615. This burden the defendant assumed in his answer, and attempted to support by his evidence. The court found, however, that this claim of defendant was not sustained by a preponderance of the evidence. Therefore the presumption prevailed and furnished sufficient evidence for the finding of the court that the note was given for a good and valuable consideration.

[5] We are asked by appellant to review the evidence and hold that the finding of the court against his defense of illegality of consideration was not sustained by it. But the evidence on the subject is in substantial conflict. There is, on the one hand, the positive statement of the defendant that the promise was made by the plaintiff, and, on the other hand, as equally a positive denial by the plaintiff that any such promise was made. Of course, counsel for appellant admits this conflict, but contends that it is not a substantial conflict; the position taken by him being that, in addition to the statement of the defendant as to the promise, his statement is corroborated by Dr. Hutchinson, and is further so strongly supported by reasonable inferences and probabilities to be drawn from all the evidence in the case that the testimony of the plaintiff should have been ignored by the trial court as a mere pretense of evidence and improbable. It can hardly be claimed that the testimony of Dr. Hutchinson corroborated that of the defendant. He did not testify that the plaintiff had admitted making such a promise. But, assuming that Dr. Hutchinson's testimony does corroborate defendant, and that there are inferences and deductions which, upon a consideration of all the evidence, support the testimony of the defendant, still it cannot be said that for these reasons there is any inherent improbability in the statement of plaintiff, or that it amounted to a mere semblance of evidence. It was a square denial that any such promise as defendant claimed to have been made by him was made. It was the testimony of a reputable witness bearing upon the direct fact in issue. Under our Code, the direct evidence of one witness who is entitled to full credit is sufficient to prove any fact, except perjury and treason, and is necessarily sufficient to create a substantial conflict in the evidence, regardless of the number of witnesses or inferences supporting their testimony to the contrary. This is the situation here. It was the exclusive province of the trial court to determine the credibility of the witnesses, the weight and effect to be given to the evidence, to consider inferences reasonably deducible from it, and from the conflicting evidence determine the disputed fact. All the considerations urged here by appellant respecting the evidence in this case were proper to be addressed to and considered by the trial court; but where out of the conflicting evidence that court has determined the fact, and there is evidence to sustain it, this court, on appeal, cannot review or interfere with its conclusion.

[6] Under the constitutional provisions which limit the jurisdiction of this court as an appellate court to questions of law alone, it is not within its power or function to review conflicting evidence, for the purpose of determining whether the trial court should have accepted the testimony of a party against whom a finding is made, rather than the testimony upon which the finding is based. It is only in cases where there is no evidence to sustain a finding,

or where it can be said, as matter of law, that the evidence is insufficient to sustain it, that this court has jurisdiction to consider the evidence. This has been so distinctly pointed out by decision after decision of this court, commencing with Payne v. Jacobs, 1 Cal. 39, up to Fowden v. Pacific Coast S. S. Co., 149 Cal. 151, 86 Pac. 178, and further reiterated in subsequent decisions (Estate of Moore, 122 Pac. 844), that it is matter of surprise that it is not more fully appreciated.

As, under section 1614, supra, the burden of proof was cast upon the defendant to overcome the presumption of sufficient consideration arising from the execution of the note, the finding of the court of which he complains is tantamount to a finding that there was not a preponderance of the evidence produced by him to sustain the burden. Failing in this, the presumption of a sufficient consideration which the law raises from the execution of the note required the further finding made by the court that the note was given for a good and valuable consideration.

In Keating v. Morrissey, 6 Cal. App. 163, 91 Pac. 677, where a petition for a hearing here after judgment in the District Court of Appeal was denied, the principal matters considered here are fully discussed. That action was on a promissory note; the defense being that the note was given on the promise of the plaintiff not to prosecute the son of defendant for forgery. There it was held that the denial by plaintiff of defendant's statement that the note was given to avoid a criminal prosecution for felony raised a sufficient conflict in the evidence to preclude the appellate court interfering with the verdict in favor of the plaintiff, and that the presumption of consideration arising from the execution of the promissory note itself was sufficient to sustain the verdict. There is so much of the opinion in that case directly pertinent to the questions involved here that space will not permit of our quoting from it; and hence we content ourselves with a reference to it.

The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; MELVIN, J.

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162 Cal. 397

FURREY v. LANTZ. (L. A. 2,635.)

(Supreme Court of California. March 25, 1912.)

1. Taxation (§ 615*)—Tax Sale for Nonpayment — Statutory Provisions — Surplus Proceeds.

Pol. Code, § 3897, which provides that a sale by the state of property acquired on a sale for nonpayment of taxes must be to the highest bidder at a price not less than the amount of taxes, costs, interest, etc., is not unconstitutional as not providing for the payment of the excess received by the state to the former owner of the property.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1264; Dec. Dig. § 615.*]

2. Taxation (§ 764*)—Tax Deeds—Sufficiency of Description.

Pol. Code, § 3650, subd. 3, provides that city and town lots must be listed by the assessor in his assessment book under the name of the city or town, with the number of the lot and block, according to the system of numbering therein. A description in deeds to and from the state of property sold for nonpayment of state and county taxes was: "In Los Angeles county, Glendale, lot 22, blk. 4," and lot 24 in the same block was similarly described. In an action to quiet title, there was testimony that Glendale was the name of the town in Los Angeles county in which the property was situated, and that the witness was acquainted with the values of real estate therein and of the values of "lots 22 and 24 in block 4 of said town." *Held*, that the description of the deeds and supporting testimony imply that there was a general system of numbering of blocks and lots of the town, and that the description was according to such system, and it is prima facie sufficient.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1519–1522; Dec. Dig. § 764.*]

3. Appeal and Error (§ 232*)—Presentation of Grounds—Objection to Admission of Deeds.

The sufficiency of a description in a deed from the state to identify land granted to parties will not be considered on appeal, where the only objection to the deed was the general one of incompetency, irrelevancy, and immateriality.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1351, 1368, 1430, 1431; Dec. Dig. § 232.*]

In Bank. Appeal from Superior Court, Los Angeles County; Robert M. Clark, Judge.

Action by W. C. Furrey against Henry P. Lantz, as administrator with the will annexed of the estate of Mary Elizabeth Crocker. From a judgment for plaintiff and an order denying a motion for new trial, defendant appeals. Affirmed.

Charles Lantz, for appellant. Bernard Potter, for respondent.

ANGELLOTTI, J. This is an appeal by the defendant from a judgment in favor of plaintiff, and from an order denying his motion for a new trial, in an action brought by plaintiff to quiet his alleged title to lots 23 and 24 in block 4 of the town of Glendale, Los Angeles county, Cal. Plaintiff claimed under certain deeds to him from the state of California based on sales made by the tax collector of Los Angeles county under authorization from the state controller; the property having been theretofore sold to the state for nonpayment of the state and county taxes for the year 1900, and no redemption thereof having been effected within five years thereafter, deeds therefor having theretofore been executed to the state. If these deeds from the state were effectual to convey the title to plaintiff Furrey, the purchaser, he was at the time of the institution of this action the absolute owner of the property here involved.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

But two points are made for reversal.

[1] The first point is based on the fact that each lot was offered for sale and sold by the state as a whole for a sum largely in excess of the delinquent tax and costs, etc., due thereon. It is not claimed that this course was not in strict accord with the law relating to sales *by* the state of property that it has acquired on account of the nonpayment of taxes, etc. See section 3897, Pol. Code. The claim is that inasmuch as a portion of each lot could have been sold for an amount sufficient to pay all taxes, costs, charges, etc., due thereon, and as the law makes no provision for the payment of the excess received by the state to the former owner of the property, the statute relative to such sales by the state is unconstitutional. Of this point, the District Court of Appeal of the Second District said: "This identical question was presented to the court in the case of Fox v. Wright, 152 Cal. 59, 91 Pac. 1005, where the subject is fully discussed, and it was there held that neither the provision of law authorizing the state to sell as a whole a tract or parcel of land acquired by it under tax proceedings, nor that authorizing the retention of the surplus proceeds of sale where the amount received is in excess of that which the state could exact before sale upon redemption of the property, renders the law obnoxious to the provisions of either state or federal Constitution. Upon the authority of that case, approved in Chapman v. Zoberlein, 152 Cal. 216, 92 Pac. 188, we must hold appellant's contention in this regard without merit." This was a correct disposition of the matter, and we adopt the language of the District Court of Appeal as a part of this opinion.

[2] It is further claimed that the description contained in each of the deeds to the state and in each of the deeds from the state was insufficient to identify the property. The description in the deeds to the state was, as to one of the lots, property "situate, lying and being within the county of Los Angeles, state of California, and described thus: In Los Angeles county, Glendale, lot 22, blk. 4." And as to the other the same, except the number of the lot, which was given as "24." The description in the deed from the state to plaintiff was, as to one of the lots, the property "situate, lying and being in the county of Los Angeles, state of California, and described as follows, to wit: Glendale lot twenty-two (22), block four (4)," and as to the other the same, except the number of the lot, which was given as "twenty-four (24)." Testimony introduced by defendant showed that "Glendale" was the name of the town in Los Angeles county in which the property was situated. Witness B. L. Bates for defendant, testified: "I am acquainted with the values of real estate in the town of Glendale, and of the values of lots 22 and 24 in block 4 of said town of Glendale. * * * Said lots have each a frontage of 50 feet by depth of 150 feet." The description thus appears to have been in accord with the requirements of the Political Code as to the description to be given on the assessment roll; subdivision 3 of 3650 being as follows: "City and town lots, naming the city or town, and the number of the lot and block, according to the system of numbering in such city or town." The description implies that there was in such town a general system of numbering the blocks and lots *of the town*, and that the description given was according to such system. We think it should be held to be prima facie sufficient, at least in the presence of such testimony as we have quoted above, tending to show that the description was such as to leave no question as to the identity of the land referred to. The effect of the description and the evidence quoted, fairly construed, is that there was but one block 4 in the town of Glendale, and but one lot 22 in block 4, and but one lot 24 in block 4 in said town, and that such facts were well known. This renders the description prima facie sufficient. Best v. Wohlford, 144 Cal. 733, 740, 78 Pac. 293. There is a clear distinction between this case and such cases as Miller v. Williams, 135 Cal. 183, 67 Pac. 788, Fox v. Townsend, 152 Cal. 51, 91 Pac. 1004, 1007, and Chapman v. Zoberlein, 152 Cal. 216, 92 Pac. 188. In all of these cases the description was by mere number of lot and block in a specified tract or portion of the city, the name only of such tract or portion being given without any reference to any map, and there was absolutely no evidence to supplement the description.

[3] So far as the record shows, no question was raised in the court below as to the sufficiency of the description to properly identify the land; the objection to the deeds having been most general in its nature, viz., that the same are "incompetent, irrelevant, and immaterial."

The judgment and order denying a new trial are affirmed.

We concur: LORIGAN, J.; SHAW, J.; HENSHAW, J.; MELVIN, J.

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162 Cal. 401

HERSHEY et al. v. RECLAMATION DIST. NO. 730 et al. (S. F. 6,036.)

(Supreme Court of California. March 25, 1912.)

1. COURTS (§ 207*)—MANDAMUS IN SUPREME COURT—DENIAL OF RELIEF IN SUPERIOR COURT.

Where owners of land assessed by a reclamation district sought, by appropriate motion in the superior court, to compel the district to accept its warrants in payment of an assessment, and the relief was denied, the owners were not required to seek relief in the superior court by mandamus to compel such acceptance by the district, but they could apply to the Supreme Court for mandamus for such relief.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 207.*]

2. Mandamus (§ 3*)—Inadequacy of Remedy in Equity.

The existence of a remedy in equity of doubtful efficacy does not bar the right to relief by mandamus.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 8, 10–34; Dec. Dig. § 3.*]

3. Mandamus (§ 118*)—Reclamation District—Enforcement of Statutory Duties.

Mandamus lies to compel the board of trustees of a reclamation district, required to collect assessments, to accept district warrants made by statute a legal medium of payment of assessments.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 250; Dec. Dig. § 118.*]

4. Drains (§ 85*)—Reclamation Districts—Nature.

A reclamation district is a state agency, and the Legislature may determine how assessments shall be payable, and the district must accept payment as commanded by statute.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 89; Dec. Dig. § 85.*]

5. Drains (§ 85*)—Payment of Assessments—Warrants.

Where a statute so provides, a reclamation district must accept its warrants in payment of assessments, though there are warrants in the treasurer's office registered ahead of warrants tendered in payment of assessments.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 89; Dec. Dig. § 85.*]

6. Constitutional Law (§ 190*)—Drains (§ 67*) — Retroactive Laws — Reclamation Districts—Assessments—Judgment — Payment by District Warrants.

An action for delinquent reclamation district assessments under Pol. Code, § 3466, authorizing actions for delinquent assessments and the rendition of a judgment directing a sale for gold and silver coin, is but a step in a proceeding to subject property to the burden of an assessment, and the charge does not become final until a suit is determined against the taxpayer, and a judgment in statutory form merely declares the status of the parties, and section 3457, as amended in 1909 (St. 1909, p. 32), providing that any owner in a reclamation district may, at any time, pay assessments with warrants of the district, is not retroactive when applied to a prior judgment in statutory form, since the section as amended, when considered in connection with section 3465, authorizing the payment of assessments in warrants of the district during the 30 days or more in which the assessments remained in the office of the county treasurer, gives the right to satisfy assessments at any time before actual levy and sale under execution under the judgment in statutory form.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 531–533; Dec. Dig. § 190;* Drains, Cent.Dig. § 73; Dec.Dig. § 67.*]

In Bank. Mandamus by Ella L. Hershey and others against Reclamation District No. 730 and others. Writ issued.

Hudson Grant and Black & Clark, for petitioners. Arthur G. Huston and Harry L. Huston, for respondents.

MELVIN, J. This is a proceeding in mandamus by which petitioners seek to compel the Reclamation District, through its officers, to accept a certain registered warrant of the district in satisfaction of a judgment whereby an assessment against the land of petitioners was judicially found to be valid and a lien was declared against the said property. The sum due upon the warrant, with accrued interest, exceeds the amount of the judgment including costs of suit; but petitioners offered to pay the equivalent of the costs in money, and to waive the excess of the warrant and interest thereon over the tax as finally determined in the judgment.

The judgment against the petitioners here was entered February 23, 1908. No appeal was taken therefrom, but one was prosecuted to this court from the order denying a motion for a new trial. This was determined in favor of the Reclamation District September 8, 1911. See Reclamation Dist. No. 730 v. Hershey, 117 Pac. 904. While said appeal was pending, the Legislature by an amendment to section 3457 of the Political Code, which took effect February 20, 1909 (St. 1909, p. 32), provided that "any owner of land in the district may at any time pay any assessment thereon, or any part thereof, with warrants of the district." Under the law as it existed at the time the assessment was declared against the land of petitioners, it was payable in warrants of the district during the 30 days or more in which the assessment list might remain in the office of the county treasurer. Sec. 3465, Pol. Code. Petitioners contend that the amendment to section 3457 of the Political Code operated as an extension of the right to make payment in warrants of the district, and that such settlement might be made at any time before actual sale upon execution of the land upon which the lien has been declared. Respondents insist that, as the judgment declaring an assessment of a reclamation district to be a lien "must direct that the sale be made for gold and silver coin of the United States" (Pol. Code, § 3466), there can be no payment in any other medium; that to apply section 3457, Political Code, as amended in 1909, to an existing judgment would be giving it a retroactive effect; and that mandamus is not the proper remedy for the relief sought by petitioners, assuming that they are entitled to any such interpretation of the law as that for which they contend. We will consider the last point first.

[1-3] Before applying for the writ of mandate, petitioners had brought the matter before the superior court by appropriate motion. This was denied, and petitioners properly object to seeking a writ of mandate from that court which, upon consideration of their motion, has refused them the very relief which they seek by this proceeding. A suit in equity would be of doubtful efficacy,

and the existence of such a remedy does not bar the right to a writ of mandate. Holtum v. Grief, 144 Cal. 527, 78 Pac. 11. It is the duty of the board of trustees to collect assessments (Angus v. Browning, 130 Cal. 502, 62 Pac. 827), and mandamus is the proper proceeding to enforce the acceptance by them of a certain medium of payment, if such tender is made lawful by legislative act. It has been held (properly we think) that mandamus is the suitable instrumentality by which a state officer may be compelled to accept a state bond coupon which has been made, by law, a medium of payment of state taxes. Hartman v. Greenhow, 102 U. S. 672, 26 L. Ed. 271; Poindexter v. Greenhow, 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185. Similarly mandamus is available to petitioners for the purpose of compelling the acceptance by the officers of the reclamation district of the warrant which they have offered, provided, of course, that the Code section upon which they rely is to be given the construction for which they contend. Let us now examine their position.

[4, 5] They contend that, as the reclamation district is a state agency, and as the Legislature has the power to determine how assessments shall be payable, the district must accept payment as commanded by the Legislature. With this view of the law we entirely agree. Long ago it was settled in California that in levee districts (which for purposes of taxation are exactly similar to reclamation districts) the tax collector must accept warrants of the districts in payment of taxes under a statute making such warrants legal tender for that purpose, notwithstanding another section of the same statute providing that all taxes levied by virtue of the act should be paid in gold or silver coin. The statute was interpreted to mean that the taxes were payable either in warrants or money, but that when paid with the latter a particular kind of money should be used. Prescott v. McNamara, 73 Cal. 236, 14 Pac. 877. That case is also a complete answer to the contention of respondents that the warrant offered to them was not acceptable for the reason that others had been registered ahead of it in the treasurer's office. There are numerous authorities holding that it is proper for a state to make its taxes payable in its own obligations. We cite a few of them: English v. Oliver, 28 Ark. 317; New Orleans v. Clark, 95 U. S. 644, 24 L. Ed. 521; State v. Cassard, 21 La. Ann. 751.

[6] We now come to the more serious questions concerning the applicability of section 3457 to the facts of this proceeding. The lien of the assessment had been declared by the judgment of the superior court before the amendment of section 3457 of the Political Code. Would not the application of that statute to an existing judgment be therefore retroactive? We think not. Long prior to the amendment to said section 3457, this court had declared that the actions authorized by sections 3466 and 3493½ of the Political Code were part of the proceedings for the creation of an assessment. An action under one of these statutes determined as between the district and the landowner the validity of the assessment, awarding, as an incident to such determination if it were in favor of the district, an execution to procure satisfaction of the assessment. As was said in the opinion of this court in Reclamation District No. 530 v. Phillips, 108 Cal. 313, 41 Pac. 336: "The suit is itself a step in a proceeding to subject the property of a taxpayer to the burden of a tax, and the charge does not become final until the suit is determined against the property owner. Otherwise it would be a proceeding in which one might be deprived of his property without due process of law." Such a proceeding is quasi in rem. Reclamation Dist. No. 551 v. Van Loben Sels, 117 Cal. 165, 49 Pac. 131. As was said in the opinion in that case: Such an action is "designed as one of the processes to test the legal perfection of an assessment levied by a reclamation district. The property owner is entitled to a hearing at one time or another upon the question of benefits. Reclamation District v. Evans, 61 Cal. 104; Reclamation District v. Phillips, 108 Cal. 306 [39 Pac. 630, 41 Pac. 335]; Hagar v. Reclamation District, 111 U. S. 701 [4 Sup. Ct. 663, 28 L. Ed. 569]. Before the passage of section 3493½ of the Political Code he made his showing when action was brought to enforce this assessment. But to obviate difficulties and delays which thus arose, this peculiar proceeding was established. By it is provided a forum before which a property owner may go and make full proof of his objections to the assessment. The final determination of the court upon the matter may be used by or against him in any future action to collect the tax. Thus it gives the property owner the hearing to which he is entitled, but provides that such hearing may take place in advance of an action upon the assessment. It is, then, a process of law forming one of the steps by which the lien of the tax is fixed upon property." Such a judgment declares a status as between the parties. It does not merge into a judgment some lesser right. What, then, did the Legislature mean by the provision that "any owner of land in the district may *at any time* pay any assessments thereon, or any part thereof, with warrants of the district"? Obviously this language was not meant to apply merely to the 30 days or longer during which the lists remain in the office of the treasurer, for that matter was already covered by section 3465 of the Political Code. Did the privilege of payment in warrants extend only to the date of the commencement of an action to test the validity of the assessment? There is nothing in the broad language of the statute to suggest such a limitation. Was it terminated by the entry of judgment or even by the judgment becoming final? We think not, because a landowner would have no day in court except in the course of that suit. Constitutionally he was entitled to contest that action; otherwise he would be deprived of his property without due process of law. A judgment against him would be the only authoritative declaration that the assessment was free from legal objection. It would still be an assessment—merely that, the judgment serving not to change but only to certify is character. Applying this reasoning to the case at bar, we must conclude that petitioners had the right to satisfy the assessment against their property at any time before actual levy and sale under execution, and this is true notwithstanding the mandate of section 3466 of the Political Code that the decree direct the sale to be made in gold and silver coin, and the money collected to be placed with the county treasurer to the credit of the district. The two sections (3466 and 3457) are easily harmonized upon the principle declared in Prescott v. McNamara, supra.

Notwithstanding their tender of costs in cash and their waiver of their claim under the warrant for any sum in excess of the judgment, petitioners ask us to declare that both the costs and the amount found due under the assessment are payable by the warrant. The answer to this is that the very purpose of this proceeding is to enforce upon the district acceptance of the tender made by petitioners, and we are not required to indulge in speculation regarding our action if some different offer of payment had been made by them.

Let the writ issue as prayed.

We concur: HENSHAW, J.; LORIGAN, J.; SHAW, J.; ANGELLOTTI, J.

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162 Cal. 427

LONG et al. v. LONG et al. (Sac. 1,833.)

(Supreme Court of California. March 27, 1912.)

1. Exceptions, Bill of (§ 43*)—Settlement —Delay—Excuses.

Where a proposed bill of exceptions was not delivered to the clerk for the judge within the 10 days allowed by Code Civ. Proc. § 650, but was mailed in due time and lost in the mail, and the court afterwards, upon motion and due notice, permitted the bill to be filed and duly settled, it was a proper part of the record on appeal.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 72½; Dec. Dig. § 43.*]

2. Frauds, Statute of (§ 129*)—Contract Not to be Performed within a Year—Subcontract to Carry Mail—Performance.

An oral agreement, made in February, 1907, with parties having contracts to carry the United States mail for four years from July 1, 1906, whereby the subcontractor was to carry it for the remaining period at a fixed sum per year, is a contract for services not to be performed within a year, and, though partially performed, void within the statute of frauds (Civ. Code, § 1624).

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 287–292; Dec. Dig. § 129.*]

3. Frauds, Statute of (§ 119*)—Enforcement—Perpetration of "Fraud."

The refusal of one who has made an oral contract for services not to be performed within a year to execute a written contract as agreed does not constitute "fraud," within the rule that the statute of frauds will not be enforced, where the effect would be to perpetrate a fraud.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 266, 267, 270; Dec. Dig. § 119.*

For other definitions, see Words and Phrases, vol. 3, pp. 2943–2954; vol. 8, p. 7666.]

4. Frauds, Statute of (§ 119*)—Statute as Defense—Estoppel to Set up Statute.

Plaintiffs, having an established livery business, took two contracts to carry the United States mail for a period of four years from July 1, 1906, and in February, 1907, made an oral agreement with defendants, whereby defendants undertook to carry it for the remaining period, and to execute a written contract to that effect to the plaintiffs, who thereafter changed their residence, sold a part of their teams, and took other teams away. *Held*, in an action for breach, where it was not shown that it was necessary for plaintiffs to change their residence after making the agreement, or that defendants had knowledge of such intention, that defendants were not estopped from repudiating the oral contract, on the ground that it was void under the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 266, 267, 270; Dec. Dig. § 119.*]

In Bank. Appeal from Superior Court, Lassen County; N. D. Arnot, Judge.

Action by J. C. Long and another against T. H. Long and another. Judgment for plaintiffs, and defendants appeal. Reversed.

Dodge & Barry, for appellants. Rankin & Julian, for respondents.

SHAW, J. This is an appeal from the judgment, taken within 60 days after its rendition.

[1] The respondents' objections to the consideration of the bill of exception are without merit. The proposed bill and the proposed amendments thereto were not delivered to the clerk for the judge within the time required by section 650, Code of Civil Procedure; but it appears that they were mailed to the clerk in due time, and that they did not reach him because they were lost in transmission through the mail. Upon motion, after due notice as the record recites, the court afterwards made an order relieving the appellants of this omission, and permitting the bill and amendments to be then filed, which was done. The bill was thereafter duly settled, and it is therefore properly a part of the record on appeal.

The case involves a breach of an alleged agreement to execute a subcontract for the carriage of the United States mails on two mail routes. The acts of Congress provide that a mail contractor under the United States will not be permitted to sublet or transfer his contract without the consent in writing, of the Postmaster General, and that when such consent is obtained the subcontract between the contractor and his transferee must be in writing, and a copy thereof must be filed in the office of the Second Assistant Postmaster General. Thereupon the amount thereby agreed to be paid to the subcontractor is to be retained out of the amount due the original contractor, and is to be paid by the Post Office Department direct to the subcontractor, and the remainder only is paid, as before, to the original contractor. Act of May 17, 1878, c. 107, 20 U. S. Stats. 62, §§ 2 and 3 (U. S. Comp. St. 1901, p. 2704). There is a further provision in the act of May 4, 1882, that, where a mail contract is sublet for less than the sum fixed in the original contract, the Postmaster General may, at his discretion, cancel the original contract and enter into a contract directly with such subcontractor. Act May 4, 1882, c. 116, 22 U. S. Stats. 53 (U. S. Comp. St. 1901, p. 2706). This, however, did not occur in the present case. The statute is stated only to illustrate the intention of the parties.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The following is a statement of the facts alleged in the complaint: The plaintiffs had two contracts with the United States for the carrying of mails on two certain mail routes, one for $1,300 per year and the other for $980 per year, each payable monthly. The contracts were for four years, beginning July 1, 1906, and ending July 1, 1910. The parties were partners in the livery business at Susanville, where they resided, and they had the necessary outfit of horses and vehicles for carrying the mails and performing the contract. About February 1, 1907, plaintiffs and defendants made an agreement that defendants would perform the service of carrying the mails on both said routes for the remaining time of the contracts for the sum of $1,700 per year, and that as soon as the consent of the Postmaster General could be obtained the defendants would execute and deliver to plaintiffs subcontracts to carry said mails over said routes for the remaining time of the original contracts, which said subcontracts should specify that the defendants were to receive the same sums as were named in the original contracts, aggregating $2,280 a year. It was also agreed that after the execution of said subcontracts the defendants would pay over to the plaintiffs each month, out of the moneys received on said contracts, sums amounting to $580 a year, being the difference between the original contract price of $2,280 a year and the price of $1,700 a year, for which defendants agreed to do the service. It was further agreed that, until the subcontracts were executed, the defendants would carry the mails for the plaintiffs, and that plaintiffs would collect the money from the United States and pay the defendants monthly at the rate of $1,700 a year. In pursuance of this provisional agreement, the defendants began carrying mails on said routes on February 12, 1907. The plaintiffs paid them monthly therefor at the rate of $1,700 a year until August 12, 1907. Relying on this oral agreement and on the performance thereof by the defendants, the plaintiffs made important changes in their situation and conditions, to wit: They sold some of their horses and rigs. J. C. Long removed with his family from Susanville to San Luis Obispo county; and George B. Long took the remainder of the partnership outfit pertaining to the livery stable and mail-carrying business to Rosebud, Nev., and there engaged in the livery business and purchased some real estate. The consent of the Postmaster General to the subcontracts was obtained on July 16, 1907. On August 12, 1907, plaintiffs requested of defendants the execution of the subcontracts as agreed upon; but the defendants refused to execute the same, abandoned the mail routes, and thereafter refused to carry the mails thereon. Plaintiffs were thereby compelled to resume the carrying of said mails, purchase additional stock for that purpose, transfer their outfit from Rosebud to Susanville, and abandon their property and business in Rosebud. By the refusal to execute the subcontracts plaintiff allege they were damaged in the sum of $2,000. By being forced to leave Rosebud, buy more stock, and resume the carrying of the mails at Susanville, they allege damage in the further sum of $1,500. The findings are that the damage from these causes were, respectively, $1,670 and $743, and judgment was thereupon given for $2,413.

[2] The answer avers that these several agreements were oral, and were consequently void under section 1624, Civil Code. The court made no finding as to the fact that they were oral; but it did find the conclusion that they were not void under section 1624. The evidence, however, shows, without conflict, that they were not in writing, and the respondents concede the fact. In our consideration of the case, we must therefore assume that the contracts were not in writing, and determine whether or not an action will lie upon an oral contract of this nature.

[3] The principal point made by the respondents in favor of the judgment is that the oral contract was partly performed, and that, in consequence thereof, it was taken out of the statute of frauds. This contention cannot be maintained. The case, in this particular, is not distinguishable from the case of Seymour v. Oelrichs, 156 Cal. 793, 106 Pac. 88, 134 Am. St. Rep. 154. In that case, the effect of an oral contract between Seymour and the defendants, whereby they agreed to employ him for the period of 10 years, and to put the contract in writing, was considered. Seymour had commenced

the employment, and had served a number of months thereunder, for which he had received the stipulated compensation. The court declared that such part performance was not sufficient to make a case in equity for the enforcement of a contract of that character. This is the general rule laid down in all the authorities. 20 Cyc. 290. The contract in question was in substance an agreement, whereby the defendants undertook to perform the work which the original contracts required to be done by the plaintiffs. It did not relate to real estate, nor to the sale of property, and required nothing but the performance of services. Part performance, of such contracts, where entire performance is not to be made within a year, does not take the contract out of the statute. The refusal of the defendants to execute the written contracts does not constitute fraud, within the rule that the statute of frauds will not be enforced, where the effect would be to perpetrate a fraud. Feeney v. Howard, 79 Cal. 529, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162; 26 Am. & Eng. Ency. of Law, 52; 20 Cyc. 285; Chase v. Fitz, 132 Mass. 359; Wakefield v. Greenhood, 29 Cal. 604; Glass v. Hulbert, 102 Mass. 24, 3 Am. Rep. 418; Caylor v. Roe, 99 Ind. 9; Fuller v. Reed, 38 Cal. 108.

[4] In the District Court of Appeal, it was held that the circumstances of the case were such that the defendants were estopped to set up the invalidity of the contract. This was based chiefly on the authority of Seymour v. Oelrichs, supra. There are essential points in which the facts of that case differ from those in the case at bar. There Seymour was employed in a position for life at a good salary. This fact was known to the other parties, and they orally agreed to employ him for a larger salary for 10 years, and to execute a written agreement to that effect, and they asked him to give up his life position at once and enter their service under said agreement, which he accordingly did. He was thereby induced by them to change his condition by resigning his former position, which he could not regain, and the other parties were aware of this necessity, and of the fact that he resigned his former position in reliance upon their agreement and promise. Their knowledge of the necessity of his resignation if he entered their service, and of his reliance upon their agreement as an inducement to resign, were held to be essential to the creation of an estoppel preventing them from repudiating their oral agreement, and justifying the court in enforcing it. In the case at bar, it is not alleged that it was necessary for plaintiffs, or either of them, to leave Susanville when they ceased to carry the mails, or that they informed defendants that they intended to do so, or that they intended to change their residence or condition in any respect because of the proposed transfer, or that the defendants had knowledge of any such necessity or purpose. There is no evidence tending to show these facts, supposing them to have been pleaded, except the testimony of J. C. Long that he told the defendants before making the oral agreement that he had to go away because of his wife's health, and that after the agreement was made they sold two rigs and four horses and took the other equipment away "on the strength of the agreement that we made with the defendants." He did not say that the defendants were informed at the time of making the agreement that they intended to do this, or that they, at that time, had such intention, or that J. C. Long would not have gone away for the sake of his wife's health, even if they had not made the agreement. There is therefore nothing upon which the supposed estoppel can rest.

Section 1973 of the Code of Civil Procedure provides that evidence of a contract which, by its terms, is not to be performed within a year from the making thereof cannot be received without the writing or secondary evidence of its contents, and that such contract must be in writing to be valid. The defendants objected to the evidence of this agreement, on the ground that it was incompetent evidence of such an agreement. The objection was well taken, and it should have been sustained. We do not deem it necessary to discuss or consider the other points suggested by the appellants.

The judgment is reversed.

We concur: ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

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162 Cal. 406

In re KEATING'S ESTATE. (L. A. 2,822.)

(Supreme Court of California. March 25, 1912.)

1. New Trial (§ 79*)—Grounds—"Against Law."

Where there has been no error in determining or affecting any issue of fact, there is no ground for new trial; the grounds specified in Code Civ. Proc. § 657, all referring to such errors, even the ground specified that the decision is "against law" referring to a situation furnishing a reason for re-examining an issue of fact.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 165½; Dec. Dig. § 79.*]

2. New Trial (§ 79*)—Grounds—Decision "Against Law."

A decision is not against law, within Code Civ. Proc. § 657, permitting a new trial on that ground, when the only fault in the findings is that they do not support the legal conclusions drawn from them and the judgment based thereon.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 165½; Dec. Dig. § 79.*

For other definitions, see Words and Phrases, vol. 1, p. 260.]

3. New Trial (§ 79*)—Appeal and Error (§ 867*)—Scope of Inquiry.

No question of the sufficiency of findings to support either conclusions of law or the judgment can be considered on motion for a new trial or appeal from an order denying a new trial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 165½; Dec. Dig. § 79;* Appeal and Error, Dec. Dig. § 867.*]

In Bank. Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Accounting by the executors of Fanny Letitia Keating, deceased. From an order denying a new trial, the executors appeal. Affirmed.

M. A. Luce and Luce, Sloane & Luce, for appellants. Haines & Haines, Doolittle & Morrison, and Jerauld Ingle, for respondents.

PER CURIAM. After decision in department, a rehearing by the court in bank was ordered, and upon further consideration of the case the opinion in department written by Mr. Justice ANGELLOTTI is adopted as the opinion of the court. The decision is as follows:

"The deceased, Fanny Letitia Keating, was, at the time of her death, a resident of the county of San Diego in this state. She died testate, leaving a large estate. Her property was located in this state and in the states of Missouri and Kansas. The California property aggregated in value over $200,000. The Missouri property, except for the rents hereinafter referred to, consisted entirely of real estate, having an estimated value of $175,000, and the Kansas property of real estate having an estimated value of $21,300. At the time of the settlement of the accounts of the executors, there was on deposit in bank in Kansas City, Mo., to the credit of the trustees under her will, $8,000, rents collected on such real property, and the evidence was sufficient to support a conclusion that a very small portion of this amount had been collected by the agent of deceased prior to her death. The will provided for the disposition of certain specific personal property, the payment of a number of legacies, etc. (some of the legacies being charitable), the setting apart of $50,000 in trust, the income of which was to be paid to two sisters, and which $50,000, upon the death of the survivor of said sisters, was to form a part of the residue devoted to the trust hereinafter mentioned, and gave to the three trustees designated therein, being the same three persons who were appointed executors, all the rest and residue of her estate, to administer the same as a medical relief fund for the sick poor. By a codicil, she changed the amount to be set apart for her sisters from $50,000 to $80,000, and made some minor changes in regard to the trust for the sick poor, which it is not necessary to note here. The will and codicil were admitted to probate as the last will of decedent in the superior court of San Diego county. The executors caused duly authenticated and exemplified copies of the will and probate to be recorded in the proper counties in Missouri and Kansas; but letters testamentary have never been taken out or proceedings in administration had in either of said states. The executors proceeded with the administration of the California assets. In that administration all of the California property was reduced to money. From this money, all of the debts, charges, and expenses of administration have been paid, and also all legacies and dispositions for purposes other than the trust for the sick poor, except the disposition for the benefit of the sisters. After payment from the California assets of the debts, charges, and expenses of administration and legacies, there remained $37,624.80 of said assets for distribution as residue. No part of the Missouri or Kansas property has been sold or converted into money. The devises and bequests for charitable uses collectively exceeded one-third of the entire estate of deceased by a very large amount. No limitation of the amount which may be given for charitable uses is made by the law of either Missouri or Kansas. The executors sought in the superior court a settlement of their final accounts and a distribution of the residue of the California assets. Certain heirs of deceased appeared and claimed that the executors should be compelled to sell the Missouri and Kansas property, and account to the California court therefor, and that the proceeds of such sales and the income from such property prior to the sales should be distributed by the California court in such a manner that said heirs should receive, to the exclusion of the residuary devisees and legatees, the trustees of the trust for the sick poor, all of the same exceeding such amount as would leave disposed of for charitable uses one-third of the entire estate of decedent. Section 1313, Civ. Code. The superior court distributed the $37,624.80 of California assets remaining for distribution, giving $23,833.07 thereof to said heirs as property 'not validly disposed of by said will,' and the remaining $13,791.73 to the trustees of the trust for the sick poor. No one complains here of this disposition. The court, sustaining the contention of the heirs, went further, and ordered: (1) An accounting by the executors as to all income of the Missouri and Kansas property which had come under their control, whether accruing before or after the death of decedent; (2) an accounting by them each six months of all rents and profits hereafter accruing; (3) the sale by said executors, as soon as the same can advantageously be made, of the Missouri and Kansas realty; (4) the setting apart of $80,000 of the proceeds of such sales for the benefit of the surviving sister and the payment of the income thereof to her as long as she shall live. It was further ordered that jurisdiction of the estate be retained for the purpose of making all such further orders, judgments, and decrees as may be necessary to the complete settlement of the estate and final distribution thereof. It is of these matters that the executors complain on this appeal.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"The main contention of the heirs on the merits is: First, that the provisions of the will are such as to show that the deceased intended to dispose of her residuary estate as personalty, and the effect of that intention was to work an equitable conversion from realty to personalty of the Missouri and Kansas property, thus making the same subject to administration and distribution as personal property in and according to the law of this state; and, second, that, if the first claim be not good, the executors may be compelled by the California court to reimburse the California estate by paying thereto such proportion of the debts, charges, and expenses of administration and legacies paid from the California assets as should, in justice, have been paid from the Missouri and Kansas property.

"Realizing fully the importance of these questions, and the strength of the argument made by learned counsel for appellants against the views adopted by the superior court, we nevertheless are forced to the conclusion that the contention of respondents to the effect that appellants can be given no relief on this appeal must be sustained.

"There is no appeal from the decree or order made on settlement of accounts and petition for distribution; in other words, there is no appeal from the judgment. The only appeal is one by the executors from an order denying their motion for a new trial.

[1] "The scope of the inquiry that can be made on motion for a new trial is thoroughly established by our decisions. 'A new trial is a re-examination of an *issue of fact* in the same court after a trial and decision by a jury, court or referee.' Section 656, Code Civ. Proc. Where there has been no error in determining any *issue of fact* or affecting the determination of any question of fact, there is no ground for a new trial, and the grounds specified in section 657, Code of Civil Procedure, as grounds for a new trial, all refer to such errors, for it is established that the specified ground of the decision being 'against law' refers to a situation furnishing a reason 'for a re-examination of an issue of fact.' Kaiser v. Dalto, 140 Cal. 169, 73 Pac. 829.

[2] "A decision is not 'against law,' within the meaning of section 657, Code of Civil Procedure, when the only fault in the findings is that they do not support the legal conclusions drawn from them and the judgment based thereon. Swift v. Occidental M. Co., 141 Cal. 165 et seq., 74 Pac. 700. As said by the court, speaking through Chief Justice Beatty, in Sharp v. Bowie, 142 Cal. 467, 76 Pac. 66: 'Nothing can be considered on the appeal (appeal from order denying a new trial) that does not go to show that a re-examination of some issue of fact is necessary for the protection of the rights of the appealing party.'

[3] "It is overwhelmingly settled that no question of the sufficiency of the findings to support either conclusions of law or judgment can be considered on motion for a new trial, or on appeal from an order denying a new trial. Swift v. Occidental M. Co., supra; Kaiser v. Dalto, supra; Sharp v. Bowie, supra; Coburn v. California, etc., Co., 144 Cal. 82, 77 Pac. 771; Great Western, etc., Co. v. Chambers, 153 Cal. 310, 95 Pac. 151; Mentone Irr. Co. v. Redlands, etc., Co., 155 Cal. 324, 100 Pac. 1082, 22 L. R. A. (N. S.) 382, 17 Ann. Cas. 1222.

"An examination of the record on this appeal demonstrates that the only contention of appellants that is worthy of serious consideration is one practically to the effect that the findings do not sustain the judgment. There was practically no conflict in the evidence as to any material fact, and all the material facts are fairly and fully set forth in the findings. It is true that there are in the statement on motion for a new trial specifications of insufficiency of evidence to sustain certain findings of fact, but the objections thereby made are not well based.

"That portion of finding 4 reading as follows: 'That the inventory filed by said executors in the matter of said estate on December 4, 1906, * * * is not a full or complete inventory of said estate'—is so attacked, but the remainder of the finding as made states clearly that such inventory included all such property as was actually in the state of California, and that the only property omitted therefrom was the real property located in the states of Missouri and Kansas, and the rentals of said real property. The finding, as a whole, is in entire accord with the admitted facts, except possibly as to a small portion of the rentals, and, even as to that, was sufficiently supported by the evidence.

"Finding 7 is also attacked on the same ground. This finding declares that the residuary estate of decedent consists of the residue of the California assets, and also of the real property situate in the states of Missouri and Kansas (describing it), and the rents collected therefrom. The specification states that this conclusion is not sustained by the evidence 'for the reason that it appears from the evidence that all of said property in said finding described is real estate and the rents and profits accruing therefrom since the death of said decedent, and is no part of the assets of said California estate, and is not subject to the jurisdiction of the courts of California.' Except as to the matter of the rents and profits, which we referred to in discussing finding 4, all of these facts are clearly shown by this and other findings, if appellant's claim that the will, which is also set forth in the findings, did not effect an equitable conversion of the foreign realty into personalty, be correct. The finding that this property constitutes a portion of the residue of the estate in California is clearly a mere conclusion of the trial court based solely on the language of the will, and the theory that such will effected the equitable conversion of the realty into personalty, a theory maintained in the first formal conclusion of law. The record presents no warrant for the re-examination of any issue of fact in regard to this matter. What appellants are really complaining of is the conclusion of law drawn by the trial court from the facts found. It is also stated in this specification that the finding is not sustained for the reason that the evidence shows that the heirs had conveyed all their interest in the Missouri and Kansas property to the trustees under the will of deceased. Assuming that the evidence so shows, the property would not for that reason cease to be a portion of the residue of the estate.

"Finding 10, attacked for insufficiency of evidence to support it, is to the effect that the executors obtained the quitclaim deeds just referred to upon the representation that such deeds would facilitate the conversion of the realty into personalty and the settlement of the estate. If this finding is at all material, it is amply sustained by the language of the document executed by the trustees within a few days after the execution of the deeds.

"Findings 11 and 12, also attacked for insufficiency of evidence to support them, are entirely in accord with the evidence. The executors and trustees have not set apart or invested 'the sum of eighty thousand ($80,000) dollars or any part thereof as a fund' to pay the income thereof to the surviving sister, and they do hold the Missouri and Kansas real estate subject to a direction to set aside and invest said fund of $80,000 for such purpose. The fact that they, with the written consent of such sister, have elected to set apart until the sale thereof certain of the Missouri real property from the income of which her payments shall be made, in no way affects the correctness of the findings assailed.

"Finding 16, so far as we can see, is not opposed to appellants' theory of what the evidence shows.

"The foregoing are the only findings attacked. The decision is not 'against law' within the meaning of section 657, Code of Civil Procedure (Swift v. Occidental M. Co., supra), and no claim is made that the trial court erred in the matter of the admission or exclusion of evidence.

"These are the only grounds specified in support of the motion for a new trial.

"It is manifest, as said before, that appellants' real objection is that the lower court drew erroneous conclusions from the facts found and made its judgment accordingly. They make no answer to respondents' claim that such objections cannot be considered on motion for a new trial, and we do not see how, in view of the authorities, any sufficient answer can be made.

"The order denying a new trial is affirmed."

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162 Cal. 444

RUNO v. WILLIAMS. (L. A. 2,762.)

(Supreme Court of California. March 29, 1912.)

1. APPEAL AND ERROR (§ 1002*)—REVIEW—VERDICT—CONFLICTING EVIDENCE.

The Supreme Court cannot disturb a verdict where the evidence is conflicting.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. § 1002.*]

2. EVIDENCE (§ 151*)—ADMISSIBILITY—MALICE—MOTIVE.

In an action for malicious prosecution, malice in fact being the gist of the action, defendant was not limited to proof of acts, conduct, and surrounding circumstances to show absence of malice, but could state what his motive was for instituting the criminal prosecution, and to answer the direct question whether in doing so he was actuated by malice, or by an honest belief that plaintiff was guilty of the offense charged.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 440; Dec. Dig. § 151.*]

3. MALICIOUS PROSECUTION (§ 56*) — ELEMENTS—BURDEN OF PROOF.

The two essential elements necessary to establish an action for malicious prosecution are want of probable cause and malice, the burden of proving both of which is on plaintiff.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 112–116; Dec. Dig. § 56.*]

4. MALICIOUS PROSECUTION (§ 32*)—MALICE.

The existence of malice in an action for malicious prosecution may be inferred from want of probable cause, or from acts or declarations of the defendant indicating ill will or malicious motive in the prosecution. The want of probable cause does not raise a legal presumption of malice, though the jury may, if they find there was no probable cause for the prosecution, infer malice therefrom.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 67, 68; Dec. Dig. § 32.*]

5. MALICIOUS PROSECUTION (§ 20*) — "PROBABLE CAUSE."

Probable cause for a criminal prosecution is in effect the concurrence of the belief of guilt with the existence of facts and circumstances reasonably warranting the belief.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 26–28; Dec. Dig. § 20.*

For other definitions, see Words and Phrases, vol. 6, pp. 5618–5627; vol. 8, p. 7765.]

6. MALICIOUS PROSECUTION (§§ 60, 59*) — PROBABLE CAUSE—EVIDENCE.

In an action for malicious prosecution, questions asked of the district attorney as to whether the facts stated to him by defendant were the same as those developed on plaintiff's preliminary examination, whether the construction placed on the law by the magistrate in discharging plaintiff was a construction which he put on the law when he advised defendant to make the criminal complaint, and whether in his interviews with defendant the latter manifested a malicious and hostile disposition toward plaintiff, were improper.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 138–145, 125–137; Dec. Dig. §§ 60, 59.*]

7. MALICIOUS PROSECUTION (§ 72*)—PROBABLE CAUSE—INSTRUCTIONS.

In an action for malicious prosecution, the court should instruct the jury that, if they find the facts in a certain way, there was no probable cause, and their verdict should be for plaintiff, but, if they found them in another way, there was probable cause, and the verdict should be for defendant.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 168–173; Dec. Dig. § 72.*]

Department 2. Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by A. E. Runo against A. G. Williams. Judgment for plaintiff, and defendant appeals. Reversed.

Riley & Hubbell, for appellant. Wright, Schoonover & Winnek and E. D. McKee, for respondent.

LORIGAN, J. This action was brought to recover damages for malicious prosecution.

Plaintiff, a building contractor, and defendant, about April 1, 1909, made a verbal contract under which the former was to furnish the labor and material and build for the latter three houses and barns, referred to in the testimony as jobs 9, 12, 14. The contract price for each job—whether $1,275 or an excess thereof—is in dispute between the parties, but for present purposes this is immaterial. On July 11, 1909, the building of one of the houses and barns—job 9—had been finished by plaintiff and accepted by defendant, and the other two were well on towards completion. On the day last referred to a dispute arose between plaintiff and defendant, brought about by the latter with reference, among other matters, to the contract price for constructing the houses, in the course of which he charged plaintiff with having "got" him for $1,500 with reference to the contracts, though in what respect was not particularly mentioned. Prior to this the relations of the parties had been quite friendly.

On July 14, 1909, defendant swore to a complaint before a justice of the peace charging plaintiff with embezzlement under section 506 of the Penal Code, which provides that "any contractor who appropriates money paid to him for any use or purpose other than for that which he received it is guilty of embezzlement." The complaint set forth that plaintiff and defendant entered into a contract to furnish labor and materials to build and construct the house heretofore referred to as having been completed (job 9) for the price of $1,275; that defendant paid to plaintiff between the 6th of April and the 22d of June, 1909, the sum of $1,200 for the use and purpose of paying a specified lumber company $620.75 for lumber used in the construction of said house, and for the use and purpose of paying a specified hardware company $165.75 for hardware and plumbing used and employed in said house, and to pay for other charges for labor and material which had been furnished defendant and used in the construction thereof; that plaintiff paid to the lumber company only $300.75 of said $620.75, leaving a balance of $320 due and unpaid; that plaintiff did not pay to the hardware company the said $165.75 for the plumbing and materials so furnished and used in the construction of said house, but that said bill is wholly unpaid; and that on June 1, 1909, the plaintiff feloniously and fraudulently appropriated to his own use the sum of $485.75 paid to him for the purpose of paying the bills of said lumber company and hardware company, and did thereby feloniously embezzle the same. On this criminal charge plaintiff was arrested and confined in the county jail for almost six days when he gave bail. A preliminary examination was had covering several days, and on July 30, 1909, the plaintiff was discharged by the magistrate on the ground indorsed on the complaint, that no sufficient cause appeared to believe the plaintiff guilty of the offense charged in the complaint.

Plaintiff then brought this action, averring that the criminal charge against him and his arrest and prosecution thereunder were made by defendant and done maliciously and without probable cause, averred damages in the sum of $25,300 sustained through his imprisonment for nearly six days, the alleged destruction of his business as a contractor, the great grief, pain, and humiliation suffered through the malicious acts of defendant, and the payment of $300 to counsel representing him at the preliminary hearing before the magistrate on the charge of embezzlement.

Defendant in his answer admitted the making of the criminal charge, and the arrest, imprisonment, and prosecution of the plaintiff, but denied that the same was done maliciously and without probable cause; and averred affirmatively that the same was done with probable cause and without malice, and in an honest belief on the part of defendant that the plaintiff had in fact committed the offense charged against him, and denied that plaintiff had sustained damage.

On the trial the evidence with respect to the issue of want of probable cause in making the criminal charge was mainly that of the respective parties to the action. Plaintiff testified that the only contract between himself and defendant was that the houses were to be built for $1,375 each, with added charges for extras; that defendant was to deposit to his credit in the local bank such moneys on the contract as plaintiff required as the work progressed, and when he requested them; that no payments were made to plaintiff personally, but that checks were sent by defendant to the bank and the amounts, by arrangement between them, deposited to the credit of plaintiff and drawn against by him; that plaintiff never saw the checks sent to the bank by defendant; that the amounts claimed by defendant to have been embezzled by plaintiff were not paid by the defendant to the plaintiff for the purpose of paying lumber company or hardware company bills as charged in the criminal complaint, or for any specific purpose, but were paid into the bank on various dates and in different amounts on the several jobs of building that the plaintiff was doing for defendant under these building contracts, to be applied in meeting and discharging the indebtedness of the defendant to plaintiff and that at the time the criminal complaint was filed against him the defendant still owed him a balance of $925 on the house (job 9) referred to in the criminal complaint and to which the lumber bill and hardware bill related.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The defendant as a witness admitted that the payments to the plaintiff were made, not to him personally, but by sending checks to the bank as plaintiff requested money, but testified that said checks as agreed between them were deposited to the credit of plaintiff on the particular jobs marked on each check; that, aside from checks for the other jobs, he deposited on May 6, 1909, to the credit of plaintiff on job 9 a check for $500, and on June 22, 1909, a check for $200; that the money represented by these checks and a prior check for $500 were deposited to the credit of plaintiff on job 9 and on plaintiff's demand for money to pay the lumber bill and hardware bill and other items asserted in the criminal complaint pertaining to that job, and for that express purpose; and that plaintiff did not use the money so paid and deposited to his credit to pay the hardware bill at all and made but a partial payment, as stated in the criminal complaint on the lumber bill. He testified, further, that, before making the criminal complaint, he had called on the district attorney of San Diego county, and stated to him the facts as they are set forth in the criminal complaint and was advised by the district attorney that upon those facts the plaintiff was guilty of embezzlement, and advised his arrest; that the district attorney prepared the criminal complaint and defendant swore to it.

On cross-examination defendant admitted that he had not told the district attorney that he had made these payments to the plaintiff by depositing them to his credit in the bank, or that during the dispute between them a few days prior to making the complaint the plaintiff had offered to submit any grievances asserted by defendant and all differences between them to arbitration by disinterested persons. In this same connection it is claimed that by the testimony of the defendant himself and as otherwise appearing, the defendant did not make a full and fair disclosure of the facts to the district attorney as he knew them to exist when he consulted him as to the prosecution of the plaintiff.

The district attorney testified that upon the facts stated to him by the defendant he advised defendant that plaintiff was guilty of felony embezzlement and drew the criminal complaint sworn to by defendant; that, after the discharge of plaintiff on the preliminary examination he advised the defendant to bring the matter to the attention of the grand jury when it convened; that he notified the defendant after the grand jury met and appeared with defendant before that body, but nothing appears to have resulted therefrom.

Aside from the altercation, in detailing which plaintiff stated that defendant threatened physical violence and attempted to carry it into execution on July 11, 1909, the plaintiff offered testimony to show that defendant had, after the discharge of the plaintiff on the preliminary hearing, stated to a person for whom plaintiff had built a house that a lien had been placed on it, when, in fact, it had not. About a week or two after the preliminary examination a lumber dealer who had supplied materials for one of the houses called on defendant for payment of a bill for lumber supplied to plaintiff. He testified that the correctness of his bill coming up in the discussion, and, the plaintiff being referred to, the defendant made certain statements from which the witness inferred that defendant did not think plaintiff honest; that "he thought Runo ought to be behind the bars and that he would get him there yet." This testimony was introduced by plaintiff to show express malice on the part of the defendant towards plaintiff in making the criminal charge, and is the principal, if not the only, evidence on the issue of malice, save the inference thereof which the jury would be warranted in drawing from the finding of want of probable cause, in making the criminal complaint. Defendant did not testify respecting the statements attributed to him, but denied any attempt to inflict violence upon plaintiff during their dispute.

There was other evidence in the case, but what we have recited is sufficient for the consideration of the principal points involved in this appeal.

As to the rule for assessing damages, the jury were instructed that, if their verdict should be for plaintiff, they might assess not only actual damages, but also exemplary damages which are administered at law by way of example.

The jury returned a general verdict in favor of plaintiff for $5,000. Defendant moved for a new trial, and the court ordered that, unless plaintiff remitted one-half of the judgment and all accumulated interest, the motion would be granted. Plaintiff filed the required remission, and the motion for a new trial was thereupon denied. Defendant appeals from the judgment and the order denying his motion for a new trial.

[1] It is claimed by appellant that the evidence is insufficient to sustain the verdict. We do not pursue this matter. It is sufficient to say that the evidence here was, as it is usually in contested cases, in conflict on all material issues, and, that being the situation, this court has no jurisdiction to disturb the verdict.

The principal complaint of appellant is as to certain rulings of the court on the admission of testimony and respecting instructions to the jury.

[2] When the defendant was on the stand after testifying as to the facts and circumstances upon which he claimed the criminal charge made by him against the plaintiff was based, he was asked by his counsel: "What was your motive and reason for instituting the criminal prosecution against Mr. Runo?" Further: "Whether in instituting the criminal prosecution you were actuated by malice, hatred, or ill feeling, or whether you were actuated by an honest belief that he was guilty of the offense that you charged against him?" Still further, whether, "when you instituted the criminal prosecution, you honestly believed in good faith that he was guilty of the offense as charged against him?" Objections to these questions on the ground that they called for the opinion and conclusion of the witness and were incompetent, irrelevant, and immaterial were sustained. These rulings are assigned as error, and we are satisfied that the assignment is well taken.

[3] The two essential facts which must concur to support an action for malicious prosecution are want of probable cause and malice, and the burden of proving both is upon the plaintiff.

[4] Malice in fact is really the foundation of the action, and is usually the pivotal point upon which the action turns. It is always a fact directly in issue. Its existence may be inferred by the jury from want of probable cause for the prosecution or from acts or declarations of the defendant expressing or indicating prejudice, ill will, or malicious motive in the matter of the prosecution. The want of probable cause does not raise a legal presumption of malice. The law presumes nothing on that issue any more than it does on any other issue of fact in a civil action. The jury may, however, if they find that there was no probable cause for the prosecution infer malice therefrom, although malice is not a necessary inference to be deduced therefrom. But, in whatever way it may be proven, whether by inference from want of probable cause or by acts or declarations of the defendant manifesting prejudice or ill will, it must be proven as a fact. This being true, and it being equally true that whatever the plaintiff must prove the defendant may disprove, the latter has an unquestioned right to introduce any competent evidence to show that he had probable cause for instituting the criminal prosecution, or that, even if he did not have, he was not actuated by malice in doing so. It is to be noted in this connection that in support of the defense of probable cause it must appear that the defendant had reasonable grounds to believe, and that, in fact, he did believe the charge he made was well founded. It is not sufficient that the facts and circumstances were such as would lead a reasonable and prudent man to believe that the offense charged was committed, but it must also appear that he acted upon them in an honest and reasonable belief that the plaintiff was guilty.

[5] Probable cause is, in effect, the concurrence of the belief of guilt with the existence of facts and circumstances reasonably warranting the belief. Harkrader v. Moore, 44 Cal. 144; Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31. It is apparent, therefore, that a belief in the guilt of the plaintiff as to the offense charged was one of the relevant and pertinent facts to be shown by the defendant in support of his claim of probable cause in making the accusation. Nor can it be claimed that, in addition to proof of his honest belief in the guilt of the plaintiff, it is not equally pertinent on the distinct issue of malice for the defendant to show such belief and his reason, motive, and good faith in making the criminal charge.

As a general proposition, the right of a defendant to present evidence on these matters as bearing on the issues of probable cause and malice may not be disputed, and the only question is must the state or condition of mind of the defendant, respecting belief, motive, and good faith be restricted to proof of acts and circumstances accompanying or surrounding the accusation, or in addition thereto, is the defendant a competent witness to testify directly respecting them. Under the uniform rule of the authorities he unquestionably is.

The rule is well settled in this state and other jurisdictions that, where the malice, intent, or motive of the party is under the issues in the case a material fact to be established, the testimony of the party himself directly to the point is competent evidence to prove it. Mowry v. Rabbe, 89 Cal. 606, 27 Pac. 157; Fleet v. Tichenor, 156 Cal. 343, 104 Pac. 458, 34 L. R. A. (N. S.) 323; Walker v. Chanslor, 153 Cal. 118, 94 Pac. 606, 17 L. R. A. (N. S.) 455, 126 Am. St. Rep. 61; Barnhart v. Fulkerth, 93 Cal. 497, 29 Pac. 50; Kyle v. Craig, 125 Cal. 107, 57 Pac. 791. The case nearest in character to the one here where the rule was applied is Fleet v. Tichenor, supra, an action for damages for slander where it is said: "The trial court sustained objection to two questions asked the defendant as to whether or not she was actuated in anything she had said or done by any wish or desire or any design or purpose to injure plaintiff. The questions were proper, both to show absence of actual malice for the purpose of avoiding exemplary damages and under the defense of privileged communication, and the court erred in overruling them. The general rule is well settled that, under our system, a witness may be examined as to the intent with which he did a certain act, when that intent is a material thing in the action. A jury or trial judge is not bound, of course, to believe the witness when he says he did not have a certain intent, but may find in the circumstances, actions and language an entirely different intent, but the testimony of the witness 'is competent and relevant and not immaterial.'" So in this case, as we have pointed out, the direct testimony of the defendant as to his belief, motive, and intent in making the criminal charge was competent evidence on the question of malice in fact, and pertinent also to his defense of the existence of probable cause for the prosecution.

The general rule announced is the one obtaining in other jurisdictions and applied in numerous cases where the actions were as here, for malicious prosecution and the questions put to the defendants were practically identical with those which were asked of the defendant in this case. In the following cases the direct question put to the defendant was whether when he made the complaint he believed it to be true or believed plaintiff guilty: Spalding v. Lowe, 56 Mich. 366, 23 N. W. 46; Garrett v. Mannheimer, 24 Minn. 193; Sparling v. Conway, 75 Mo. 510; Turner v. O'Brien, 5 Neb. 542; McKown v. Hunter, 30 N. Y. 625; White v. Tucker, 16 Ohio St. 468. In the following cases the direct inquiry was made to defendant as to his motive in making the charge: Flickinger v. Wagner, 46 Md. 600; Leak v. Carlisle (City Ct. N. Y.) 75 N. Y. Supp. 382; Schwarting v. Van Wie, etc., Co., 60 App. Div. 475, 69 N. Y. Supp. 978. In others the direct inquiry put to the defendant was whether in making the charge he was actuated by malice or ill will: Coleman v. Heurich, 2 Mackey (D. C.) 189; Campbell v. Baltimore & O. R. R. Co., 97 Md. 341, 55 Atl. 532; McCormack v. Perry, 47 Hun (N. Y.) 71; Heap v. Parrish, 104 Ind. 36, 3 N. E. 549. In the case of Vansickle v. Brown, 68 Mo. 627, the direct question asked of defendant was whether he acted in good faith in making the charge, and in Sherburne, Admr., etc., v. Rodman, 51 Wis. 479, 8 N. W. 414; the court was considering rulings upon direct questions asked the defendant upon all of the above matters in the same manner in which they were directed to the defendant in this case. In all the cases cited (without quoting from them) the right to make the direct inquiry on these matters was sustained on appeal or the cases were reversed for refusing to permit answer to such direct inquiries. See, also, 3 Elliott on Evidence, § 2479. In their brief counsel for respondent fail to make any argument or to cite any authority sustaining the ruling of the trial court on these questions. Their position on the subject simply is that "the appellant was permitted to present every fact and circumstance tending to show his motive." The complete answer to this suggestion is, as we have just pointed out, that the court erroneously refused to permit him to introduce competent evidence on this very material subject. It is further suggested that the trial court decided on the motion for a new trial that, in view of all the other evidence, any statement of appellant as to his motive could not change the result. Any decision to that effect does not appear in the record, and would be of no consequence if it did. The evidence was competent and material to go before the jury and defendant had the right to have the jury determine, as is their exclusive province, the credit, weight, and effect to be given to it, and not the court.

[6] It is further claimed by appellant that the court erred in refusing to allow the district attorney of San Diego to answer several questions. The latter testified that he had been consulted in his official capacity by the defendant; that the latter made a statement of the facts and upon them he advised him that the plaintiff was guilty of embezzlement; that he drafted the complaint which defendant swore to and prosecuted the charge before the committing magistrate. On the objection of the plaintiff he was not permitted to testify as to what statement of facts defendant made to him. While defendant reserved an exception to this ruling, no point is made respecting it on this appeal. His complaint is as to other rulings on questions asked the district attorney, namely: Whether the facts stated to him were the same as were developed upon the preliminary examination; whether any different facts material to the prosecution developed upon such examination than those which had been stated to him; whether the construction placed on the law by the magistrate in discharging plaintiff was the construction which he put on the law when he advised the defendant to make the criminal complaint; and whether in his interviews with the defendant the latter manifested a malicious and hostile disposition towards plaintiff. The court sustained objections to all these questions. We perceive nothing wrong with the rulings and nothing is suggested by counsel for appellant in their support except that the testimony which he sought to elicit had a bearing on the question of the good faith of the defendant. But none of it could possibly have any

relation to that question save that the last inquiry, as an inquiry, is addressed to the matter. We are satisfied, however, that proof on that subject could not be made in the manner attempted.

[7] Appellant also complains of certain instructions by the court because he asserts that thereunder the court left it to the jury to determine for themselves whether the facts proved did or did not establish a want of probable cause, instead of embracing in the instructions the facts which the evidence in the case tended to prove, and then instructed the jury that "as from the evidence they should find the facts which, in the opinion of the court, would or would not be sufficient to show probable cause, their verdict should be for or against the defendant." Ball v. Rawles, post. We will devote no time to this subject or to a consideration of the claim of respondent that when all the instructions are considered it is apparent that the jury were properly instructed.

The law is clearly and definitely settled how a jury shall be instructed in cases of this character. Grant v. Moore, 29 Cal. 644; Harkrader v. Moore, supra; Eastin v. Bank of Stockton, 66 Cal. 123, 4 Pac. 1106, 56 Am. Rep. 77; Fulton v. Onesti, 66 Cal. 575, 6 Pac. 491; Ball v. Rawles, 93 Cal. 222, 28 Pac. 937, 27 Am. St. Rep. 174; Smith v. Liverpool Ins. Co., 107 Cal. 433, 40 Pac. 540; Scrivani v. Dondero, 128 Cal. 31, 60 Pac. 463. And as this case must go back for a new trial, the parties and the court on a consideration of these authorities should have no difficulty whatever in formulating and giving to the jury clear and definite instructions governing their duties in considering their verdict.

For the error in refusing to permit defendant to testify directly on the subject of his belief, good faith, and motive in making the criminal charge as bearing on the issues of both probable cause and malice, the judgment and the order denying a new trial are reversed.

We concur: HENSHAW, J.; MELVIN, J.

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162 Cal. 422

OWENS et al. v. DUDLEY, Mayor, et al.

(L. A. 2,737.)

(Supreme Court of California. March 27, 1912.)

1. Pleading (§ 46*) — Municipal Corporations (§ 1034*)—Designation of Parties—Capacity in Which Sued.

An error in the caption of a complaint for an injunction against municipal officers in designating certain defendants as trustees instead of councilmen, under St. 1907, p. 1007, or a mistake in the precise designation of other defendants, is immaterial, where the complaint shows with sufficient certainty the real capacity in which they are made parties; and an averment that the proceedings sought to be enjoined were had by the legislative body of the city of Santa Monica, without averring it to be a municipal corporation, is sufficient.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 101–103; Dec. Dig. § 46;* Municipal Corporations, Dec. Dig. § 1034.*]

2. Evidence (§ 25*)—Judicial Notice—Municipal Corporations.

The court will take judicial notice that the city of Santa Monica, whose charter was approved by the Legislature (St. 1907, p. 1007), is a municipal corporation.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 31–33; Dec. Dig. 25.*]

3. Municipal Corporations (§ 513*)—Public Improvements — Grounds of Injunction—Cloud on Title.

The Vrooman Act (St. 1885, p. 147), relating to work upon streets, as amended by Gen. Laws 1909, Act 3930, makes no provision for a deed upon delinquency in the payment of an assessment, but by section 8 declares what shall be contained in the assessment, by section 9 makes the assessment a lien upon property, and by section 12 provides that in suits by a contractor to enforce the lien of an assessment the warrant, assessment, certificate, and diagram, with the affidavit of demand and nonpayment, shall be prima facie evidence of the regularity and correctness of the assessment. *Held*, in an action to enjoin municipal officers from proceeding with a public improvement, or with collection of assessments therefor, on the ground that the assessment was invalid, that, as the statute required no recitals which on their face would show the invalidity, and as the parties assessed would have to resort to extraneous evidence in proving their defense of invalidity, equity would enjoin the assessment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1188–1206; Dec. Dig. § 513.*]

Department 2. Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action for injunction by James S. Owens and others against T. H. Dudley, Mayor of the City of Santa Monica, C. D. Pettis, Street Superintendent, J. D. Kneen, and others. From an order denying a motion by defendants Pettis and Kneen to dissolve a temporary injunction, defendants appeal. Affirmed.

Tanner, Taft & Odell, for appellants. Chas. J. Noyes, for respondents.

LORIGAN, J. This is an appeal from an order of the superior court denying a motion of the defendants Pettis and Kneen to dissolve a temporary injunction which had been granted plaintiffs ex parte upon the verified complaint in the action.

The plaintiffs, nineteen in number, property owners in an assessment district established by the city council, to be charged with the expense of a proposed street improvement in the city of Santa Monica, brought this action against the mayor and common council of the city, the city engineer and street superintendent respectively named, and J. D. Kneen, to have the proceedings toward such improvement, which had culminated in the awarding of a contract therefor to the defendant Kneen, declared null and void, and for a preliminary injunction, to be made perpetual by judgment, restraining the collecting or assessing the expense thereof against the property of the plaintiffs, or creating any lien thereon.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The complaint averred, with reference to the preliminary steps necessary to be taken by the municipality in order to give it jurisdiction to make the proposed improvement, which was to consist of paving with concrete "Ocean Front Promenade," or to enter into a valid contract therefor and support a valid assessment under the so-called Vrooman Act of 1885 (St. 1885, p. 147), as amended (Deering's Gen. Laws 1909, p. 1283 et seq.), that neither the ordinance of intention to do said paving nor the "notice of street work" provided for in said act were published, as by law required, in a paper of general circulation, published for one year immediately prior to said publication in the city of Santa Monica, nor was said ordinance of intention ever posted, as the act requires, on or near the council chamber door of the city council of said city; that for the same reason as is alleged concerning the publication of the ordinance of intention and "notice of street work" the "notice inviting sealed proposals" and the "notice of award of contract" were not published; nor was either of these last notices referred to ever posted at the council chamber door. Other averments are made in the complaint, under which it is claimed that the proceedings eventuating in the award of a contract to the defendant Kneen and the contract itself, are invalid. It is then averred that a contract to do the work was entered into between the city and Kneen, and that the latter was proceeding to perform the work under it.

The motion of defendants to dissolve the injunction in the court below was based upon the complaint itself; their position being that no cause of action for an injunction is shown thereby, and that the order granting a preliminary one was improper. The same position is taken here.

[1] It is claimed that the complaint is insufficient, because there is no allegation therein of the official capacity of any of the defendants named as mayor or trustees in the caption of the complaint, and no allegation that the city of Santa Monica is a municipal corporation. There is no merit in either of these points. It is true that in the caption of the complaint certain defendants are designated as "trustees" instead of "councilmen," which is their proper official designation as members of the legislative body of the city of Santa Monica. Stats. 1907, p. 1007. But this error in strict official designation is of no moment. It is quite apparent from the averments in the complaint, and from the official documents attached thereto as part thereof, that all these persons referred to are complained of in their official capacity as councilmen. Equally so as to the mayor. A mistake in the caption of a complaint as to official designation of parties is of no grave consequence, if the allegations in the body of it show with sufficient certainty the real capacity in which they are parties to the suit.

[2] Neither was it necessary to aver that the city of Santa Monica is a municipal corporation. It was averred that the proceedings in reference to paving "Ocean Front Promenade" were had by the legislative body of the city of Santa Monica, and the court will take judicial notice that the city of Santa Monica is a municipal corporation; its charter having been approved by the Legislature. Stats. 1907, supra.

[3] It is further claimed by appellants that upon the facts alleged plaintiffs are not entitled to an injunction; that if all the acts of the city of Santa Monica were illegal and void, as alleged in the complaint, it would follow that any proposed assessment which might be levied would be illegal and void, and in that case an injunction will not lie, citing Byrne v. Drain, 127 Cal. 663, 60 Pac. 433. But that case has no application here. The decision was based upon the general rule that a court will not restrain a sale of property for taxes, assessments, or otherwise, when it is clear that the sale or assessment is void upon the face of the proceedings, or from the recitals in the deed, or on the face of the assessment made by the superintendent of streets, upon which the party claiming under the deed, or attempting to enforce the assessment, must rely to make out a prima facie case to recover upon the deed or to enforce the assessment lien. As, for instance, where an act under which a tax sale is attempted to be made, or a statute under which an assessment lien purports to be created and enforceable, are unconstitutional and void, or when, as in Byrne v. Drain, supra, the proceedings to open a street, under which the sale of property is sought to be enjoined, were void, because the act under which they were inaugurated was inoperative in the city of Los Angeles. As in such cases the invalidity of the deed or the assessment lien appears upon their face, they can cast no cloud upon the property of the party seeking the injunction; and equity will not enjoin the issuance of the deed or the making of the assessment by the municipal authorities, but will leave the party claiming to be injuriously affected to assert his rights when suit is brought upon the deed, or the lien of the assessment is attempted to be foreclosed. But this rule is not applied where there is nothing upon the face of the deed or the assessment, made and delivered to a contractor under the Vrooman Act, disclosing their invalidity, and the party seeking to defeat the deed or the assessment lien must resort to extraneous evidence to accomplish it. Under such circum-

stances, as the owner of the property would be required to present evidence to defeat a recovery on the deed or a foreclosure of the assessment lien, the issuance of the one or the making of the other would cast a cloud upon his title, and hence would entitle him to have a court of equity interpose to prevent the sale or the making of the assessment.

In the proceedings taken under the Vrooman Act involved here, there is no provision for a deed upon a delinquency to pay the assessment. The making of the assessment by the superintendent of streets and its recordation, with the warrant, diagram, and certificate of the city engineer attached, constitute a lien upon the lots assessed for a period of two years, subject to be foreclosed by action. Sections 8, 9, and 12 of the act.

Section 8 provides what shall be contained in the assessment; and there is nothing which is required to be recited there which could possibly show upon its face that the assessment was invalid for the reason, as alleged by plaintiffs, that the common council never obtained jurisdiction to order the work done, or that no valid contract was entered into on account of other defects preceding its award. It is also provided in the act (section 12) that in suits brought by the contractor to enforce the lien of the assessment "the said warrant, assessment, certificate and diagram, with the affidavit of demand and nonpayment, shall be held prima facie evidence of the regularity and correctness of the assessment and of the prior proceedings and acts of the superintendent of streets and city council, upon which said warrant, assessment and diagram are based, and like evidence of the right of the plaintiff to recover in the action." It is obvious, as there are no recitals required in the assessment which could show on its face its invalidity on the grounds alleged by plaintiffs, and the assessment, etc., are by section 12 of the act made prima facie evidence of the regularity of all proceedings by the council on which the assessment is based, that the plaintiffs will be compelled, in order to defeat the assessments and the liens to be imposed upon their property thereby, to resort to evidence dehors the recitals in the assessments, and to overcome the presumptive evidence clause of the statute attaching by reason of their issuance. This necessity of a resort to extraneous evidence to defeat the lien of an assessment otherwise on its face, and by virtue of the presumption, valid, presents a proper case for the interposition of a court of equity to prevent the making of an assessment or the creation of a lien which will cast a cloud upon the title of plaintiffs. Bolton v. Gilleran, 105 Cal. 244, 38 Pac. 881, 45 Am. St. Rep. 33; Chase v. Treasurer, etc., 122 Cal. 540, 55 Pac. 414.

The order appealed from is affirmed.

We concur: HENSHAW, J.; MELVIN, J.

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18 Cal. App. 271

PEOPLE v. FERRARA. (Cr. 371.)

(District Court of Appeal, First District, California. Feb. 21, 1912.)

1. CRIMINAL LAW (§ 1037*)—APPEAL—NECESSITY OF OBJECTIONS.

An improper remark of the court, not objected to at the time, will not be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1691, 2645; Dec. Dig. § 1037.*]

2. CRIMINAL LAW (§ 1044*) — APPEAL — ADMISSION OF EVIDENCE.

Where a witness' answer to a question was unexpected, as no motion was made to strike it out, its admission cannot be reviewed, unless all testimony as to the matter to which it referred was inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2672, 2674, 2675; Dec. Dig. § 1044.*]

3. WITNESSES (§ 414*) — IMPEACHMENT — REBUTTAL—SELF-SERVING DECLARATIONS.

Where the prosecuting witness on a trial for larceny was cross-examined to show that he could not identify accused as the thief until he had visited him five times, and that such identification was the result of remarks and suggestions by the police, it was competent to show that he had identified a picture of accused immediately after the larceny.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1287, 1288; Dec. Dig. § 414.*]

4. CRIMINAL LAW (§ 1137*)—PREVIOUS CONVICTION—REFERENCE TO ON TRIAL.

An allusion to the fact that accused had been convicted before does not constitute a violation by the prosecution of Pen. Code, § 1025, providing that, if a person accused of crime pleads not guilty and answers that he has suffered a previous conviction, such previous conviction shall not be alluded to on the trial where the matter was interjected into the case by accused's attorney.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3010; Dec. Dig. § 1137.*]

Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Steven Ferrara was convicted of grand larceny, and he appeals. Affirmed.

Clarence Wilson, for appellant. Attorney General Webb and J. H. Riordan, Deputy Atty. Gen., for the People.

KERRIGAN, J. The defendant was charged with the crime of grand larceny. He was tried, convicted, and sentenced. This appeal is prosecuted by him from the judgment and from an order denying his motion for a new trial.

The defendant and the prosecuting witness, J. Valmini, met for the first time on the morning of August 15, 1910, in a saloon in Oakland. After taking several drinks together, in company with others, these two men left the saloon and went to a restaurant. While there defendant made conditional arrangements to obtain a room in the house where Valmini lived, and in the course of conversation with Valmini, learned from him that he had $2,100 on deposit in a bank, and was looking for a location suitable for conducting a saloon business. Leaving the restaurant, an automobile was hired, and they rode to Valmini's lodgings. There the defendant secured a room, and, having done so, suggested to Valmini that they go down town and draw the money out of the bank, which was done. After getting the money in currency, Valmini, in company with the defendant, went back to his room, and withdrew the money from his pocket, intending to put it in his trunk. At this moment the defendant took the money out of Valmini's hand, saying he would wrap it up in a handkerchief. Valmini turned to open the trunk, and when he faced back again, the defendant handed him a package wrapped up in a handkerchief, which Valmini took and placed in his trunk, locking it. The defendant then proposed that they go to San Francisco, but at the suggestion of Valmini they spent the rest of the day in company with the landlady and her daughter automobile riding, returning between 6 and 7 o'clock in the evening. Defendant renewed his invitation to Valmini to go to San Francisco, and they started together for that city; but, at a point en route the defendant informed his companion that it was unnecessary for him to go any further, and suggested that they meet the following morning. Returning home, Valmini discovered the loss of his $2,100. The matter was immediately reported to the police department, and in July of the following year the defendant was apprehended in Portland, Or., charged with the larceny of this money. The defendant at the trial admitted a prior conviction, but pleaded not guilty to the present charge of grand larceny, and in support of his defense attempted to prove an alibi. Valmini, the landlady, and her daughter testified that the defendant was the man who was with Valmini at the times respectively referred to on August 15, 1910, when his money was stolen. On the other hand, a saloon keeper, a bartender, and a cook, all engaged in the same place of business in Portland, testified that during all the month of August, 1910, the defendant was in that place (Portland) and that they saw him daily.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Upon the redirect examination of the prosecuting witness, the following took place: "Q. Mr. Valmini, about the time you lost your money * * * did you talk with Mr. Kyle (a detective) about this case? * * * A. I think I talked to Kyle the next day. Kyle took me over to the city. * * * Q. Did he show you anything at that time? A. He took me over to the city and showed me all the pictures. * * * Q. Where? Mr. Wilson (defendant's counsel): I object to that, about taking the pictures, unless the defendant was present. The Court: He may answer. Mr. Rogers: Q. Where were those pictures? A. Over in the police court over there, in the police department over in the city. I don't remember where the place was. Mr. Wilson: I want to enter another objection. The testimony is incompetent, irrelevant, and immaterial, as basis for reversal, and I will make a motion now, in view of that testimony brought out, that this jury be dismissed and a new panel impaneled. The Court: If he saw the picture of the defendant anywhere, he may testify that he saw it and recognized it. If it is prejudicial, it comes from the fact that it is in a place it has no business to be, maybe; but couldn't he say in answer to your objection that he didn't recognize this man, but that he saw and recognized a picture of him, if that is the object of it? * * * Mr. Rogers: Now, amongst those pictures did you see any picture that you recognized? A. I recognized the picture of Steven Ferrara." Defendant contends that the admission of the testimony with reference to the pictures was injurious, as well as was the observation of the court that perhaps the picture was found at a place where it had no right to be.

[1] As to the claimed misconduct of the court, no objection having been taken to the remark at the time, the possibility of injury to the defendant cannot now be considered. People v. Walker, 15 Cal. App. 400, 114 Pac. 1009; People v. Mayes, 113 Cal. 618, 45 Pac. 860; People v. Davenport, 120 Pac. 451; People v. Ruef, 14 Cal. App. 576, 114 Pac. 48, 54.

[2] Coming now to a consideration of the evidence just quoted, it is virtually conceded that the answer of the witness that the pictures were shown him at the police department was unexpected; and as no motion was made to strike it out, defendant cannot now at this time be heard to complain unless the testimony of the witness as to the identification of the defendant's photograph was inadmissible. Ency. of Evidence, p. 178.

[3] It is important in this connection to remember that the testimony questioned was elicited upon redirect examination after counsel for the defendant had sought to break down or weaken the testimony of the witness as to the identity of the defendant. By the cross-examination of counsel for the defendant he sought to show that at all times prior to the trial the witness was doubtful as to the matter, and that it was not until he had visited the defendant five times that he was able to identify him, and that at this time the recognition was the result of remarks, intimations, and suggestions of members of the police department. The purpose of the introduction of Valmini's prior identification of defendant's photograph was not to prove the identity of the accused as the guilty party—for which purpose it is conceded it would be incompetent (People v. Johnson, 91 Cal. 265, 27 Pac. 663; People v. McNamara, 94 Cal. 509, 29 Pac. 953; State v. Houghton, 43 Or. 125, 71 Pac. 982)—but rather to establish the truth and credibility of his statement that after the defendant's arrest he could and did identify him as the guilty par-

ty. For this purpose the testimony was admissible.

In Commonwealth v. Jenkins, 10 Gray (Mass.) 485, it is said that: "Where a witness is sought to be impeached by cross-examination or independent evidence, tending to show that at the time of giving his evidence he is under a strong bias, or in such a situation as to put him under a sort of moral duress to testify in a particular way, it is competent to rebut this ground of impeachment, and to support the credit of the witness, by showing that when he was under no such bias, or when he was free from any influence or pressure, he made statements similar to those he made at the trial."

In the case of Yarbrough v. State, 105 Ala. 43, 16 South. 758, a witness on behalf of the state testified that she had heard the defendant conspiring with others to commit the crime with which he was charged. On cross-examination evidence was elicited from her, showing that a short time before she gave this information to the person assaulted she herself had been arrested on a criminal charge preferred by the defendant. To rebut the unfavorable inference thus arising from such evidence, it was held admissible to show that the witness had given the same information to the person assaulted and to others, before her arrest on the charge preferred by defendant. The court further said: "The distinction must be kept in mind between such evidence and its purpose, and when a witness attempts to corroborate his own evidence, by proof of having made similar statements to others, the latter is inadmissible. It is mere hearsay, and not competent as tending to prove a fact; but when it is sought to discredit the witness, by attributing his or her testimony to some act on the part of the person testified against calculated to excite unfriendly feelings in the witness, in rebuttal from the inference to be drawn from such act it may be shown that the witness made the same statement prior to the time when the proven act occurred. This evidence could not be considered as original or corroborating evidence of the truth of the fact testified to, but purely in rebuttal of the inference that the testimony was manufactured or the result of the unfriendly act." See, also, Hewitt v. Corey, 150 Mass. 445, 23 N. E. 223; People v. Doyell, 48 Cal. 85, 91; Barkly v. Copeland, 74 Cal. 1, 15 Pac. 307, 5 Am. St. Rep. 413; Cal. El. Light Co. v. Cal. S. Dep. Co., 145 Cal. 124, 78 Pac. 372.

The text-books also support this view. See Wharton's Crim. Evidence (9th Ed.) § 492; Wigmore on Evidence, §§ 1129, 1130.

[4] Detective Kyle corroborated the testimony that Valmini, two or three days after the larceny, recognized the photograph of the defendant. This testimony, as we have just seen, was competent. During the examination of this witness something was said about the defendant having been in trouble before. This matter, however, was interjected into the case by defendant's counsel, and therefore, of course, did not constitute a violation of the provisions of section 1025 of the Penal Code by the prosecution.

The judgment and order are affirmed.

We concur: LENNON, P. J.; HALL, J.

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18 Cal. App. 276

REIOS et al. v. MARDIS et al. (Civ. 910.)

(District Court of Appeal, First District, California. Feb. 21, 1912.)

1. Assignments (§ 121*)—Actions—Parties.

Under Code Civ. Proc. § 367, requiring an action to be in the name of the real party in interest, the assignee of a contract of guaranty may sue thereon in his own name.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 200–205; Dec. Dig. § 121.*]

2. Assignments (§ 18*)—Guaranty.

Where a guaranty for payment of rent was not limited to the lessor personally, it could be assigned and sued on by the assignee.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 25–27; Dec. Dig. § 18.*]

3. Assignments (§ 121*) — Guaranty of Lease.

Where an assignment of a lease and guaranty thereof was with the consent of the guarantor, the assignee was not deprived of right to sue thereon by Civ. Code, § 2819, exonerating him if "without his consent" the rights and remedies of the parties are altered.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 394; Dec. Dig. § 121.*]

4. Assignments (§ 80*) — Guaranty of Lease.

A guaranty of a lease executed and indorsed on the back of the lease contemporaneously with its execution became a part of the lease to be construed with it, the liability of the guarantor being commensurate with that of the lessee, and the assignment carrying with it the same remedies for recovery of rent, or nonperformance of the lease, as the assignor might have had in the first instance under Civ. Code, § 821, giving a transferee of land on which rent has been reserved the same remedies as his grantor.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 296, 298; Dec. Dig. § 80.*]

5. Pleading (§ 205*)—General Demurrer—Scope.

A general demurrer which did not purport to single out allegations of the complaint relating to an assignment of a lease and guaranty not alleging that the assignment was in writing was not sustainable if the complaint as a whole stated a cause of action, because facts were defectively pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 481–510; Dec. Dig. § 205.*]

6. Appeal and Error (§ 854*)—Review—Reasons for Decision.

If a general order sustainig a demurrer is well founded on any of the grounds stated in the demurrer, the order will be sustained, notwithstanding the trial court's erroneous reliance on another ground.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408–3430; Dec. Dig. § 854.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

7. PLEADING (§ 229*)—AMENDMENT.
Several repeated failures to properly amend a complaint in an essential particular capable of amendment justifies refusal of further permission to amend.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 591; Dec. Dig. § 229.*]

8. PLEADING (§ 34*)—CONSTRUCTION.
Though Code Civ. Proc. § 1971, requires interests in real property to be created by writing, if a pleading avers an assignment of a lease, it will be presumed in support of the pleading that the assignment was in writing.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 66–75; Dec. Dig. § 34.*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Anita B. Reios and another against J. D. Mardis and another. From a judgment for defendants on demurrer, plaintiffs appeal. Reversed, with leave to defendant to answer.

Jas. P. Sweeney (Jos. P. Lucey, of counsel), for appellants. L. S. Melsted, for respondent Enterprise Brewing Co.

LENNON, P. J. In this action plaintiffs sought to recover the sum of $3,000, alleged to be due and unpaid as rental from the defendant J. D. Mardis for the use and occupation of certain premises in the city and county of San Francisco, pursuant to the terms of a written lease entered into between plaintiffs' assignor and the defendant Mardis. The Enterprise Brewing Company, a corporation, was joined as a party defendant, and judgment prayed for against it in the sum of $1,500, because of its alleged liability under a written guaranty for the payment of the rent reserved in the lease. In substance it appears from the plaintiffs' complaint that the defendant Mardis, after entering upon the use and occupation of the leased premises, failed to pay the stipulated rent for several months preceding the commencement of the action. The guaranty was executed contemporaneously with the lease, and was made a part thereof. The execution of the lease was the expressed consideration for the guaranty. By its obligation the guarantor promised and agreed that the lessee would pay all the rent due or to become due under the lease, and perform every other condition thereof, and, if the lessee defaulted in any of the conditions of the lease, the guarantor would hold the lessor harmless to the extent of $1,500. Prior to the default of Mardis, the lessor, for a valuable consideration and with the consent of the guarantor, assigned the lease and guaranty to plaintiffs. A general and special demurrer to the complaint interposed on behalf of the corporation defendant was sustained by the court below without leave to amend. Judgment was thereupon rendered and entered for said defendant, from which the plaintiffs appeal.

It seems to be conceded that the demurrer was sustained and the privilege of amending denied to the plaintiffs solely upon the ground that the guaranty sued upon was not assignable, and could not as a matter of law be made the basis of a cause of action against the guarantor. At any rate, the question of the assignability of the guaranty is the only point raised in the briefs in support of the demurrer; and, inasmuch as the complaint in all of its essential features appears on its face to be fairly free from the fault of ambiguity and uncertainty, the special grounds of demurrer, in so far as they relate to the certainty and clearness of the allegations of the complaint, need not be considered.

In support of the lower court's ruling sustaining the demurrer, it is contended that a contract of guaranty cannot be enforced except by the party to whom it was given, that the guaranty in the present case was addressed to the lessor named in the lease without a provision permitting its assignment, and therefore was personal to him, and could not be assigned so as to give the assignees a right of action thereon. This contention is based upon the common-law rule which prohibited an assignee from suing in his own name upon a chose in action, or any promise or other liability other than negotiable paper, originally running to his assignors. 2 Blacks, 467, 468; 2 Chitty on Contracts, p. 1357; Daniel Neg. Inst. § 1. The common-law rule that a chose in action was not negotiable in the sense that it was transferable so as to enable the assignee to maintain an action thereon, has been materially modified, if not entirely superseded, by statute in this state. Save, therefore, as a matter of history, the numerous cases cited by respondents from other jurisdictions, where, in the absence of statutory regulation, the rule of the common law prevails, have little, if any, bearing upon the question presented here, and, in so far as they are in conflict with the statutory rule in force in this state, must be disregarded.

The right to recover money by a judicial proceeding is defined to be a thing in action, which, if it arises out of an obligation, may be transferred by the owner without prejudice to any set-offs or other defense existing at the time of or before notice of assignment; and a written contract for the payment of money, even though it be nonnegotiable in form, may be transferred with all the rights of the assignor in like manner with negotiable instruments, subject, however, to all the equities and defenses existing in favor of the maker of the contract at the time of the transfer. Civ. Code, §§ 953, 954, 1458, 1459; Code Civ. Proc. § 368.

[1] In this state "every action must be prosecuted in the name of the real party in interest" (Code Civ. Proc. § 367); and whatever the common-law rule, or the reason for

its origin, may have been it is certain that the immediate effect of the several code sections just cited is to permit the assignee of a contract of guaranty—which is but a chose in action—to sue thereon in his own name. La Rue v. Groezinger, 84 Cal. 281, 24 Pac. 42, 18 Am. St. Rep. 179; Rued v. Cooper, 109 Cal. 682, 34 Pac. 98; Simmons v. Zimmerman, 144 Cal. 261, 79 Pac. 451, 1 Ann. Cas. 850; Weir v. Anthony, 35 Neb. 396, 53 N. W. 206; Small v. Sloan, 1 Bosw. (N. Y.) 352; Wood v. Farmer, 200 Mass. 209, 86 N. E. 297; First Nat. Bank v. Carpenter, 41 Iowa, 518. See Cunningham v. Norton, 40 Pac. 491.[1]

[2] If the contract of guaranty in the case at bar had been specifically limited to the lessor named in the lease, there would have been much force in the contention that the obligation of the guarantor was purely personal, and that its assignment, before default of the lessee, operated as a discharge of the obligation. Here, however, there was no limitation of the guaranty, either expressly or impliedly, to the lessor personally, and, like any other promise made to him, it could be assigned and sued on by the assignee. 20 Cyc. 1431, 1483; Stillman v. Northrup, 109 N. Y. 473, 17 N. E. 379.

[3, 4] Moreover, respondent's contention in this particular must fail in the presence of the fact, alleged in the complaint, that the assignment of the lease and guaranty was made with the consent of the guarantor. Civ. Code, § 2819; Pac. Press Pub. Co. v. Loofbourow, 129 Cal. 25, 61 Pac. 944. Aside from these considerations, the language of the guaranty, which is set out in full in the complaint, indicates that it was executed and indorsed upon the back of the lease contemporaneously with the execution of the lease, and thereby became a part of the lease itself. Jones on Landlord and Ten. § 662; Otto v. Jackson, 35 Ill. 349; Evoy v. Tewksbury, 5 Cal. 285; Hazeltine v. Larco, 7 Cal. 32; Otis v. Haseltine, 27 Cal. 80. This being so, the lease and the guaranty must be construed to be but one instrument, constituting a single contract, upon which the liability of the guarantor, to the extent of its obligation, was commensurate with that of the lessee (Bagley v. Cohen, 121 Cal. 604, 53 Pac. 1117), and the assignment carried with it the same remedies for the recovery of the rent reserved, or for the nonperformance of the terms of the lease as the assignor might have had in the first instance. Civ. Code, § 821.

[5] Upon the oral argument of the case, it was suggested by counsel for the respondent that the complaint did not state facts sufficient to constitute a cause of action, in this: that the assignment of the lease and guaranty was not alleged to be in writing. It was insisted that the demurrer to the present and to each of three preceding complaints covered this particular point, and that, if this be so and the point be well taken, the trial court did not abuse its discretion in refusing plaintiffs permission to amend, and consequently the judgment should stand, regardless of any other theory which, perchance, may have been the real reason for the trial court's ruling upon the demurrer.

[6] It may be conceded that, if a general order sustaining a demurrer be well founded upon any of the grounds stated in the demurrer, the order will be upheld, notwithstanding the lower court's erroneous reliance upon another and different ground to support its ruling. People v. Cent. Pac. R. R. Co., 76 Cal. 29, 18 Pac. 90; Wakeham v. Barker, 82 Cal. 46, 22 Pac. 1131; Sechrist v. Rialto Irr. Dist., 129 Cal. 643, 62 Pac. 261.

[7] It may also be conceded that leave to amend is a privilege which, in the exercise of a sound discretion, may be granted or witheld by the trial court, and that several repeated failures to properly amend a complaint in an essential particular, which is capable of amendment, would be ample justification of the trial court's refusal of further permission to amend. Billesbach v. Larkey (Sup.) 120 Pac. 31. In the case at bar, however, the demurrer, in so far as it related to the sufficiency of the facts stated to constitute a cause of action, was general in its nature. It did not purport to single out and assail the sufficiency of the allegations of the complaint relating to the assignment of the lease and guaranty, and therefore, if the complaint as a whole stated a cause of action, the demurrer, being general, could not have been rightfully sustained, even though some of the facts relied upon to constitute a cause of action may have been defectively and imperfectly pleaded. Hulsman v. Todd, 96 Cal. 228, 31 Pac. 39; Lawrence Nat. Bank v. Kowalsky, 105 Cal. 41, 38 Pac. 517.

[8] By the provisions of section 1971 of the Code of Civil Procedure no interest in real property, other than a lease for a term not exceeding one year, can be created or assigned otherwise than by operation of law or by an instrument in writing subscribed by the party creating or assigning the same. While the language of this section controls the creation and transfer of a lease, and forbids the transfer by parol of such an interest in real property, nevertheless, in counting upon such an assignment, if the pleading avers that it was in fact made the law will presume, in support of the sufficiency of the pleading, that such assignment was in writing. 3 Sutherland's Code Pleading, § 5257; Patent Brick Co. v. Moore, 75 Cal. 211, 16 Pac. 890; Van Doren v. Tjader, 1 Nev. 380, 90 Am. Dec. 498.

The judgment appealed from is reversed, and the lower court directed to overrule the demurrer, with leave to the defendant to answer within such time as the court may designate.

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[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 107 Cal. xvii.

We concur: HALL, J.; KERRIGAN, J.

(18 Cal. App. 282)

L. HARTER CO. v. GEISEL et al. (Civ. 940.)

(District Court of Appeal, First District, California. Feb. 21, 1912.)

1. Courts (§ 200*)—Probate Court—Jurisdiction.

The superior court sitting in probate is a court of general jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 441, 442, 454, 469–471; Dec. Dig. § 200.*]

2. Executors and Administrators (§ 245*) — Claims Against Estate — Failure to Present—Time for Objection.

An objection that a claim was never presented to an executor is too late after the court in settling the executor's account, in accordance with Code Civ. Proc. § 1647, has made an order for the payment of the claim.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 245.*]

3. Executors and Administrators (§ 513*) — Settling Accounts — Jurisdiction — Failure to Present Claim—Collateral Attack.

The failure to present a claim to an executor before the court, acting under Code Civ. Proc. § 1647, settles the executor's account and directs the payment of the claim, does not go to the court's jurisdiction to make the decree, so as to make it subject to collateral attack, but can be corrected only on appeal.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2267–2291; Dec. Dig. § 513.*]

4. Executors and Administrators (§ 513*) —Liability of Surety — Conclusiveness of Adjudication Against Executor.

An order of settlement and allowance made by the superior court under Code Civ. Proc. § 1637, is conclusive against all persons in any way interested in the estate, including a surety of the execuor's bond.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2267–2291; Dec. Dig. § 513.*]

5. Executors and Administrators (§ 529*) —Bonds—Actions—Liability of Surety.

An executor's refusal to comply with the court's order of settlement and payment of claims is a violation of his duty as executor, and the person injured thereby may hold the surety on his bond.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2395–2403; Dec. Dig. § 529.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by the L. Harter Company against Elvira Geisel and the United States Fidelity & Guaranty Company. Judgment for plaintiff, and the United States Fidelity & Guaranty Company appeals. Affirmed.

Thomas, Gerstle, Frick & Beedy, for appellant. S. J. Hankins and Wm. J. Hayes, for respondent.

HALL, J. Plaintiff brought this action to recover of Elvira Geisel, as principal, and the United States Fidelity & Guaranty Company, as surety, the sum of $1,587.31, being the amount of plaintiff's claim against the estate of Eugene Emil Geisel, deceased, ordered by the superior court to be paid to plaintiff by said Elvira Geisel upon the settlement of her final account as administratrix of said estate. Defendant Elvira Geisel, after demurrer overruled, failed to answer to the complaint, and her default was duly entered. The surety, the defendant corporation, answered the complaint, but upon motion of the plaintiff the court entered judgment against it upon the pleadings for the amount sued for. From this judgment said defendant has appealed to this court.

The complaint sets up the various matters of inducement concerning the appointment of Elvira Geisel as administratrix of the estate of said deceased by the superior court of the city and county of San Francisco, the giving and approval of the bond sued on, and the like. It is then alleged "that on or about the 21st day of January, 1909, said court duly approved and allowed the claim of said plaintiff against the estate of said deceased for the sum of $1,587.31. * * * That on or about the 26th day of May, 1909, said court duly and regularly made, rendered, and signed a judgment and decree, settling the first and final account of said executrix; that said judgment ordered, adjudged, and decreed that there was a sufficiency of assets for the payment in full of the indebtedness of said estate, and further directed that said executrix pay to said plaintiff the sum of $1,587.31." Additional allegations show that said judgment and decree was entered in the minutes of the court August 20, 1909; that it has never been appealed from, and has become final, and is in full force and effect; and that no part of the said sum of $1,587.31 has been paid to plaintiff.

The only defense attempted to be set up in the answer of appellant is that the claim of plaintiff ordered to be paid in the decree settling the final account of the administratrix was not presented to the administratrix for allowance, within the time limited by the law and the notice to creditors. This defense is in part pleaded in certain denials, and also in affirmative allegations contained in the answer. It is insisted by respondent that the denials are sham and insufficient, as being made for want of information and belief as to matters that presumptively appear of record. But for the purposes of this discussion we think we may treat the the denials as properly made.

So treating the denials, the question to be determined upon the record in this case is correctly stated by appellant in its brief in these words: "Does the decree settling the final account of the administratrix and directing the payment of the claim of the plaintiff conclusively bind the surety, or may it collaterally attack the decree by showing that the claim was forever barred by reason of the fact that it had not been presented within the time limited in the notice to creditors?" This question we think must be answered against the contention of appellant. It is not pretended that any irregularity occurred as to the notice given, hearing, and settlement of the final account, except that this particular claim should not have been allowed by the court or ordered paid, because not presented to the administratrix within the time directed by the notice to creditors. The attack upon the decree is limited to this point.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] The superior court sitting in probate is a court of general jurisdiction. Estate of Davis, 151 Cal. 318, 86 Pac. 183, 90 Pac. 711, 121 Am. St. Rep. 105.

[2] Upon the settlement of the account of the administratrix, the court must make an order for the payment of the debts of the estate as the circumstances of the estate require. Code Civ. Proc. § 1647. Such order for the payment of the debts is within the jurisdiction of the court, and is a part of the settlement of the account. An objection, made after decree ordering claim to be paid has become final, that it was never presented to the administratrix, comes too late. Estate of Cook, 14 Cal. 130.

[3] This case (Estate of Cook) really disposes of the fallacy that lies at the bottom of the argument of appellant, to wit, that the failure to present a claim in time goes to the jurisdiction of the court to direct the payment of such claim upon the settlement of the account. It is a matter of error, to be corrected on appeal, and not a matter of jurisdiction which will invalidate the decree upon any collateral attack.

[4] The order of settlement and allowance by the court is conclusive against all persons in any way interested in the estate, and can only be attacked in the absence of fraud and collusion upon appeal. Code Civ. Proc. § 1637; Estate of Cook, supra; Estate of Marshall, 118 Cal. 379, 50 Pac. 540; Estate of Grant, 131 Cal. 426, 63 Pac. 731; Estate of McDougald, 146 Cal. 191, 79 Pac. 878. See, also, Gordon v. Gordon, 55 N. H. 399; Florentine v. Barton, 2 Wall. 210, 17 L. Ed. 783. The heirs, devisees, legatees, and creditors are, of course, interested in the disposition that the court may make of the funds found to be in the hands of the administrator, and, if injuriously affected thereby, may in proper time appeal from the order of the court disposing of the estate. If they do not do so, they are bound by the decree made by the court; and it necessarily becomes the duty of the administrator to dispose of the funds in his hands as directed by the order of the court. "The disposition which the court might make of moneys in their hands belonging to the estate is immaterial to the administrators. All that they are concerned in upon a settlement of their account is to be credited with the various payments they have made, and to have the accounts settled according to the correct amount in their hands. Whatever disposition the court makes of this amount is no concern of theirs, and, if the parties interested therein make no objection to the order, they should be content." Estate of Sarment, 123 Cal. 331, 55 Pac. 1015. From the authorities hereinbefore cited, and the discussion thus far had, we think it is demonstrated that when the parties interested in an estate have allowed a decree, settling an account and directing the payment of claims, made after due notice, to become final such decree is as to all persons interested in the estate, protected from collateral attack, unless it may be for fraud or collusion, which is not alleged or claimed in the case at bar.

[5] All parties in interest being bound by a decree so made, it becomes the plain duty of the administrator to comply with such decree. His refusal so to do is a violation of his duty as administrator, for which the person injured thereby may hold his surety. Such order, in the absence of fraud or collusion is conclusive not only against the administrator but also against the surety. Irwin v. Backus et al., 25 Cal. 215, 85 Am. Dec. 125. The cases cited by appellant from other jurisdictions, to the effect that a judgment obtained by a claimant, against an administrator, may be attacked by the surety when sued thereon, because the claim was barred for want of presentation in time, have no application under a system such as we have in this state, where, upon the presentation of the administrator's account, all persons interested in the estate are brought under the jurisdiction of the court by notice, and the court is authorized to make a decree binding upon all persons interested in the estate. While under our system the surety may not be before the court upon the settlement of an account, his principal and all persons interested in the estate are, and are bound by the decree. The breach of duty by the administrator consists in his refusal to comply with an order made by a court having jurisdiction of the subject-matter and the parties in interest. Such a refusal is a breach of his trust as such administrator, and by the very terms of the bond the surety is liable therefor.

The judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(18 Cal. App. 287)

PHILLIPS v. LOGAN. (Civ. 1,044.)

(District Court of Appeal, Second District, California. Feb. 21, 1912.)

Venue (§ 66*)—Change of Venue—Affidavit of Merits—Requisites.

An affidavit of merits by defendant, on motion for change of venue, which avers that affiant "has fully and fairly stated the facts of her case herein to her attorney," by whom she is advised that she has a valid defense on the merits, in effect avers only that she has stated merely her defense, and is insufficient to justify an order for a change of venue.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 110–113; Dec. Dig. § 66.*]

Appeal from Superior Court, Kings County; John G. Covert, Judge.

Action by Dixon L. Phillips against Bertie Logan. From an order granting defendant's motion for a change of place of trial, plaintiff appeals. Reversed.

Dixon L. Phillips and W. A. Strong, for appellant. E. S. Bell, for respondent.

SHAW, J. Plaintiff appeals from an order of the superior court granting defendant's motion for a change of the place of trial from Kings county to the county of Napa, wherein she resided at the time of the commencement of the action.

The error in the court's ruling is based upon the alleged insufficiency of the affidavit of merits made by defendant, wherein it was stated "that affiant has fully and fairly stated the facts of her case herein to her attorney," by whom she was advised that she had a good and valid defense upon the merits of the action. Upon the authority of Nickerson v. California Raisin Co., 61 Cal. 268, and People v. Larue, 66 Cal. 235, 5 Pac. 157, the court erred in granting the motion. The statement contained in the affidavit of merits that defendant had stated *her case* was, in effect, saying that she had stated merely her defense.

The order appealed from is reversed.

We concur: ALLEN, P. J.; JAMES, J.

(18 Cal. App. 267)

GERMAN SAVINGS & LOAN SOCIETY v. BIEN et al. (Civ. 928.)

(District Court of Appeal, First District, California. Feb. 20, 1912.)

1. Judgment (§ 145*)—Defaults—Vacation.

Where a motion to vacate a judgment is promptly made upon the ground that the defendant had never been served, and the court did not therefore obtain jurisdiction, no affidavit of merits is required, and Code Civ. Proc. § 473, providing for the vacation of judgments at any time within a year when from any cause the defendant has not been personally served, having no application, the moving party need not show a meritorious defense.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 271, 292–295; Dec. Dig. § 145.*]

2. Judgment (§ 163*)—Review—Findings.

On a motion to set aside a default judgment on the ground that defendant had never been served, the trial court found on sharply conflicting evidence that the defendant had never been served, and ordered the judgment set aside, although at the close of the evidence he stated as his opinion that the defendant had been served. *Held*, that such statement of the court did not invalidate its finding and order, for the court might at any time change its opinion.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 323; Dec. Dig. § 163.*]

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by the German Savings & Loan Society against Joseph E. Bien and others. From an order sustaining defendant Peyser's motion to vacate a default judgment, plaintiff appeals. Affirmed.

Goodfellow, Eells & Orrick, for appellant. Henry J. Brodsky, for respondent.

HALL, J. Defendants were sued as indorsers of a promissory note. Upon proof of personal service of summons and copy of complaint upon defendant, Dora Peyser, her default was regularly entered on the 14th day of July, 1910, and on the 30th day of July, 1910, judgment was entered against her upon said default for the sum of $1,975.36. On the 24th day of August, 1910, said Dora Peyser gave notice of a motion to vacate said judgment upon the ground that she had never been served with the summons or complaint. The court, after a hearing upon the motion, granted the same, and plaintiff has appealed to this court from such order.

[1] Appellant claims that the affidavit of merits filed and served by defendant with her notice of motion was insufficient, and that for this reason the court erred in granting the motion. Where, as in this case, the motion to vacate a judgment is promptly made upon the ground that the defendant has never been served with summons, and that the court therefore did not obtain jurisdiction over the defendant, no affidavit of merits is required. In such case the moving party is not invoking the benefit of section 473, Code of Civil Procedure, but is asking for the absolute right to have a judgment in fact void, vacated, and set aside, and is not required to show that he has a meritorious defense to the action as a condition to the granting of such right. Norton v. Atchison, etc., R. Co., 97 Cal. 388, 30 Pac. 585, 32 Pac. 452, 33 Am. St. Rep. 198; Toy v. Haskell, 128 Cal. 558, 61 Pac. 89, 79 Am. St. Rep. 70; Crescent Canal Co. v. Montgomery, 124 Cal. 134, 56 Pac. 797; Waller v. Weston, 125 Cal. 201, 57 Pac. 892.

[2] This brings us to the principal point urged for reversal, which is that upon the record it appears that respondent was in fact served with process. The motion was

heard upon affidavits and oral testimony. The evidence given pro and con upon the question as to whether respondent was served with process is in absolute conflict. The bill of exceptions, however, shows that, the taking of evidence having been concluded, "the court then stated that in his opinion the defendant Peyser was served as claimed by plaintiff, but expressed doubt as to his power to impose, as a condition to setting aside the judgment, that said defendant should waive the statute of limitations as a defense. Counsel for plaintiff then stated that, if desired, he would submit authorities in support of the power of the court to require the defendant to waive the statute of limitations as a condition to setting aside the judgment." The court thereupon ordered the matter to be submitted, and directed counsel for plaintiff to serve the other side with a copy of such authorities. Subsequently, upon the 24th day of September, 1910, the court granted respondent's motion upon condition that she pay plaintiff's costs expended. Subsequently, upon the 4th day of October, 1910, counsel for plaintiff, stating in open court that plaintiff waived such costs, the court made, and caused to be entered, an order, reciting the making of the order of September 24th and the refusal of plaintiff to furnish respondent with such items of costs, and vacating and setting aside the judgment against respondent.

Unless the statement made by the court at the conclusion of the taking of evidence, that he was of opinion that respondent had been served with process, had the effect of a finding of fact, the order finally made by the court after the submission and consideration of the motion must be sustained. For the evidence in the record, as before stated, presents a case of a direct conflict as to whether or not respondent was ever served with process.

The statement made by the court as to its then opinion at the conclusion of the taking of the evidence cannot be treated as a finding of fact for the purpose of overcoming the finding, necessarily implied from the making of the order vacating the judgment, that respondent was never served with process. The statement of opinion, relied on as a finding, was not signed or filed as the law requires for findings of fact. It was but the expression of a then entertained opinion, which the court had a perfect right to change upon further consideration of the matter before it. The court was not concluded by such statement from subsequently making a finding contrary thereto. Fisk v. Casey, 119 Cal. 643, 51 Pac. 1077. When the court finally made its order vacating the judgment, it impliedly found that respondent had never been served with process. Such was the only ground of the motion, and the motion could not have been granted upon any other ground than such as was indicated in the notice of the motion. McDonald v. California Timber Co., 151 Cal. 159, 90 Pac. 548. Such implied finding finds ample support in the evidence given by respondent, though such evidence was strongly controverted by evidence given on behalf of appellant.

We think upon the record before us the order appealed from must be affirmed, and it is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

18 Cal. App. 230

HIXSON v. HOVEY et al. (Civ. 962.)

(District Court of Appeal, Second District, California. Feb. 13, 1912.)

1. Vendor and Purchaser (§ 133*)—Performance of Contract—Title of Vendor.

Where a contract for the sale of realty provided that, upon the receipt of payments as provided therein, the vendor would deliver a certificate of title "showing the title to be vested in the seller," the purchaser was entitled to receive a certificate showing a title free from all incumbrances.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 234–237; Dec. Dig. § 133.*]

2. Vendor and Purchaser (§ 133*)—Action for Price—Conditions Precedent—Certificate of Title.

Where a contract of sale of lands provided that the purchaser should receive a good title, a tender of a certificate of title which showed an incumbrance on the land, in a grant of a right of way to lay, maintain, and repair water pipes, was not sufficient to charge the purchaser with liability under the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 234–237; Dec. Dig. § 133.*]

3. Vendor and Purchaser (§ 315*)—Actions for Purchase Price—Conditions Precedent—Tender.

Code Civ. Proc. § 2076, provides that a person to whom a tender is made must state any specific objection at the time thereof. An assignee of a vendor of a good title to land tendered a certificate of title which showed an incumbrance, and the purchaser made no specific objection thereto. In an action for the price, the plaintiff alleged the performance of all the conditions of the agreement, and that he was ready and able to perform. *Held*, the provision of the Code is a mere rule of evidence affecting the question of costs and the right to sue, where a tender is necessary before commencing the action; and it would not excuse a failure to prove the compliance with the terms of the contract which the plaintiff alleged, though there was no specific objection to the tender made.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 928–931; Dec. Dig. § 315.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Edwin B. Hixson against Clara W. Hovey and another. From a judgment for defendants, and an order denying a motion for new trial, plaintiff appeals. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Roland G. Swaffield, for appellant. George A. Skinner and E. S. Williams, for respondents.

JAMES, J. This appeal was taken from a judgment entered in favor of defendants, and from an order denying the motion of plaintiff for a new trial.

On the 15th day of November, 1906, one C. I. Thorp, as vendor, entered into a written contract with defendant Clara W. Hovey, whereby it was agreed that Thorp would sell and convey to said defendant a certain lot of land. The purchase price was to be paid in several installments at different dates subsequent to that upon which the contract was made. Thorp was then the owner of the property which was made the subject of the agreement; and he later conveyed the same to this plaintiff, and also assigned the contract of sale for the lot mentioned to the latter. Default having been made in the payment of the larger part of the consideration named in the contract of sale, plaintiff made tender of deed and certificate of title on March 17, 1910, to Clara W. Hovey, and demanded payment of the amounts due. Upon payment being refused, this action was brought to compel specific performance. Plaintiff, in his complaint, alleged that he had performed all of the conditions precedent on his part to be performed, and that he had made tender of sufficient deed and a certificate showing title to the lot to be vested in him prior to the commencement of the action, and that he was ready, able, and willing to comply with the terms of his contract. He deposited with the clerk of the court a deed and the certificate of title for the benefit of defendant Clara W. Hovey, and prayed for judgment for the balance of the purchase price and interest. The answer specifically denied all of the material allegations of plaintiff's complaint.

The court in its findings, among other facts, determined that the plaintiff had not performed all the conditions required to be performed on his part, and that he had not offered to perform all of such conditions, or to deliver to Clara W. Hovey "any good and sufficient deed of grant, bargain, and sale to, and which would convey, said property to said Clara W. Hovey, freed and unincumbered from all liens and adverse claims and rights thereto; * * * that neither said plaintiff nor said C. I. Thorp has at any time offered to deliver to said Clara W. Hovey a deed, as aforesaid, nor a certificate of title showing the title to said property to be vested in either C. I. Thorp or the plaintiff." The principal attack of appellant is made upon the finding which we have quoted; and it is claimed that the evidence was insufficient to support the conclusions therein reached by the trial judge.

The written contract of sale, executed between Thorp and Clara W. Hovey, contained this provision: "The seller, on receiving the full payments at the times and in the manner above mentioned, agrees to deliver a certificate of title showing the title to be vested in seller and to execute and deliver to the buyer, or her assigns, a good and sufficient deed of grant, bargain and sale." The evidence disclosed that the certificate of title tendered by the plaintiff prior to suit brought, and which was thereafter offered in court, showed an incumbrance existing against the lot, which consisted of a right of way to lay water pipes and maintain and repair the same, which right had been granted theretofore to the Alamitos Water Company by deed duly executed and recorded.

[1] Under the contract of sale, defendant Clara W. Hovey was entitled to receive the property free and clear of all incumbrance. When it was provided that the certificate should show "title to be vested in seller," that term necessarily meant a good title, or one which was free from incumbrance. "In every executory contract for the sale of land, there is an implied condition that the title of the vendor is good, and that he will transfer to the vendee, by his deed of conveyance, a title unincumbered and without defect." Easton v. Montgomery, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123, and cases there cited.

[2, 3] But appellant contends that, because it was not specifically objected at the time of the tender that the offer was refused on account of defect in title, Clara W. Hovey, in this action, would be estopped from raising the question as to the sufficiency of such tender. But the condition implied in the executory contract of sale, that a clear and unincumbered title should be conveyed, was one which the plaintiff was bound to satisfy and make proof of before he was entitled to a decree requiring the defendant Clara W. Hovey to specifically perform her agreement. He alleged in his complaint that he had performed all of the terms and conditions of the agreement, and that he was still ready, able, and willing to perform the same. The certificate of title which he tendered in court with the deed, however, did not support these allegations made upon his part; and he therefore failed to make out an item of proof essential to a recovery. Because he had tendered instruments showing defective title, and objection because of the defect had not been specifically pointed out prior to suit, did not work a change in his obligation in that regard, or permit him to enforce any different contract against Clara W. Hovey than that which was expressed in the writing, of which he had become the assignee. Referring to section 2076 of the Code of Civil Procedure, touching matters which shall be deemed to be waived by a party failing to object to the form or sufficiency of a tender, the Supreme Court, in Colton v. Oakland Bank of Savings, 137 Cal. 376, 70 Pac. 225, says: "These provisions of the Code of Civil

Procedure are mere rules of evidence affecting the questions of costs and the right to bring actions in cases where a tender is necessary before commencing the action." The trial court, therefore, was right in its determination that there had been no sufficient performance, or sufficient offer to perform, made by the plaintiff. As the finding which was made adverse to appellant upon that issue must be sustained, the other questions urged on this appeal need not be considered.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

18 Cal. App. 258

In re NEWELL'S ESTATE.

ANGLO & LONDON PARIS NAT. BANK et al. v. NEWELL. (Civ. 904).

(District Court of Appeal, Third District, California. Feb. 15, 1912.)

EXECUTORS AND ADMINISTRATORS (§ 35*) — REMOVAL FOR FRAUD—DISCRETION.

An executor in the lifetime of his testator, without the testator's knowledge, executed a note in favor of the testator, and as attorney in fact for the testator under a power of attorney not expressly authorizing the indorsement of notes indorsed the note to his sister-in-law in payment of a prior outlawed note made by him and the testator. After the testator's death, the executor allowed a claim against the estate in favor of his sister-in-law for the amount of this note. *Held*, that the trial court did not abuse its discretion in removing the executor under these circumstances in view of Code Civ. Proc. § 1436, authorizing the removal of executors for fraud.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 227-262; Dec. Dig. § 35.*]

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Proceeding by the Anglo & London Paris National Bank and another against Sidney W. Newell, as executor of the last will and testament of Sidney Newell, deceased. From an order and judgment removing the executor, he appeals. Affirmed.

Harding & Monroe, for appellant. A. L. Levinsky and Lilienthal, McKinstry & Raymond, for respondents.

BURNETT, J. The appeal is from an order and judgment of removal of the executor Several charges of misconduct were specified in the petition. The one which the court made the basis for its order is embraced in the following findings:

"That prior to the year 1895 Sidney W. Newell was a member of the firm of Eaton, Newell & Buckley, and prior to the year 1895 the above-named firm borrowed from Miss A. M. Upstone, who at said time was, and ever since has been, and now is, a sister-in-law of Sidney W. Newell, the sum of $3,000, and upon the dissolution of the above-named firm, in the year 1894 or 1895, it was agreed that said Sidney W. Newell should pay the said Miss A. M. Upstone the aforesaid sum of $3,000. That said Sidney W. Newell and his father, Sidney Newell, executed a note in favor of said Miss A. M. Upstone for said sum of $3,000, together with interest from date of said note, and said note remained in the possession of Sidney W. Newell, who at said time was attending to and from said time continued to attend to and manage all the business of Miss A. M. Upstone, and he continued to attend to all the business of Miss A. M. Upstone since said time and up to the present. That said note was never paid, and the same became outlawed, and the said Miss A. M. Upstone never demanded payment of said note from Sidney Newell (now deceased), or from the said Sidney W. Newell, and the said Sidney W. Newell destroyed said note. That in the year 1886 Sidney Newell (now deceased) executed and delivered to Sidney W. Newell a certain power of attorney, which power of attorney is general in its form and substance. * * * That said power of attorney nowhere and in no place authorizes the indorsement of a promissory note. That said power of attorney remained in one of the boxes in the vault of Stockton Savings Bank, and it was never recorded. That on the 31st day of August, 1909, and for some time prior thereto, Sidney Newell, now deceased, was sick and ill, and he died on the 25th day of November, 1909. That on the 31st day of August, 1909, at and in the city and county of San Francisco, Sidney W. Newell made and executed his certain promissory note in writing, in favor of his father, Sidney Newell, for the sum and amount of $7,561. * * * And thereupon the said Sidney W. Newell indorsed said note as follows: 'Pay to the order of Miss A. M. Upstone; Sidney Newell by S. W. Newell, his attorney in fact, for value received. Demand and notice of nonpayment are hereby waived this 31st day of August, 1909. Sidney Newell by S. W. Newell, His Attorney in Fact.' And on the same day the said Sidney W. Newell forwarded the said note to Miss A. M. Upstone, who at said time was temporarily in the county of Butte. That at the time of the execution of the aforesaid note, by the said Sidney W. Newell, in favor of his father, Sidney Newell, the said Sidney W. Newell was not indebted to his father, Sidney Newell, in any sum of money whatsoever. That the said Sidney W. Newell never informed his father that he had executed the aforesaid note in his favor, nor did he inform his father that he had indorsed said note to the said Miss A. M. Upstone, and he did not advise his father, Sidney Newell, of anything whatsoever, or at all, regarding the aforesaid note. That the said Miss A. M. Upstone had never demanded of the said Sidney W. Newell the execution of the aforesaid note, but he did the same voluntarily and without demand, and he arrived at the amount of said note by calculating the amount of interest on said outlawed note of $3,000 from the time the note was originally given in the year 1894 or 1895, and added to the principal sum of said note of $3,000 the sum of $4,561 as interest. That thereafter the said Miss A. M. Upstone returned from Butte county, in the state of California, and went to reside with, and ever since has resided with, the said Sidney W. Newell at his home in Alameda county. That the said Sidney W. Newell never at any time prior to the execution by him of the aforesaid note in favor of his father, and his indorsement thereon by him as attorney in fact to the said Miss A. M. Upstone, and at no time thereafter, ever used the aforesaid power of attorney at all, or exercised any rights thereunder. That on the 31st day of August, 1909, the said Sidney Newell was sick and ill and was expected to die at any time, and the fact that he was liable to die at any time was at the said time known to his son, Sidney W. Newell. That Sidney Newell was not indebted to Miss A. M. Upstone, and the said Sidney W. Newell by executing his note to his father, Sidney Newell, when he was not indebted to his father, and then indorsing said note in his capacity as attorney in fact for his father, in favor of Miss A. M. Upstone, sought to charge the estate of his father, to wit, the estate of Sidney Newell, deceased, with the payment of said note, not for the payment of a debt owed by Sidney Newell, but for a debt owed only by Sidney W. Newell. That on the 29th day of November, 1910, Miss A. M. Upstone, using the aforesaid note as a basis therefor, presented a claim against the estate of Sidney Newell, deceased, for the sum of $8,218.17, * * * and the said Sidney W. Newell, as the executor of the last will and testament of Sidney Newell, deceased, did on the 29th day of November, 1910, allow the said claim of the said Miss A. M. Upstone for the full amount of $8,218.17, and the said claim was upon the same day presented to the judge of this court for allowance, and the judge of this court disallowed and rejected the said claim." That the transaction in reference to the said note was without the knowledge of the deceased and that the amount of the said claim is greater than the value of the said estate.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The court concluded that the allowance of this claim under the foregoing circumstances by the executor was a fraud upon the estate, and the order of removal followed. There is no doubt that the evidence supports the said findings, and the only question can be whether they warranted the judgment of the court in removing the executor. Among the grounds for such removal enumerated by the statute is "fraud," as provided in section 1436 of the Code of Civil Procedure, that "an executor should be removed when he has committed, or is about to commit, a fraud upon the estate." Of course, the rule for our guidance in reviewing the action of the court below is as stated in Estate of Healy, 137 Cal. 474, 70 Pac. 455: "The court by which an executor or administrator is appointed has a very large discretion in determining whether, upon the facts presented to it, the officer shall either be suspended or removed, and unless it shall appear that such discretion has been abused, and especially where the evidence is such that different minds might reach different conclusions thereon, the action of the trial court will not be reviewed on appeal."

It is undoubtedly true, also, as stated in Estate of Bell, 135 Cal. 196, 67 Pac. 123, that "a probate court should not defeat the will of the testator by removing his chosen executor for light or trivial causes," but, as declared further in said opinion: "But, on the other hand, to the probate court is given, in the first instance, the supervision and protection of estates of deceased persons, with power, in the exercise of that supervision, to remove an executor when, in its discretion, such step is necessary for the protection of the estate; and that power is not to be interfered with by the appellate court, unless there has been a clear abuse of that discretion."

The findings that we have quoted and the evidence supporting them present an unusual situation involving such circumstances of suspicion and discredit as to render it impossible for us to say that the court below abused its discretion. The learned judge of the lower court in his opinion declared: "That the act of the executor in allowing the claim hereinbefore referred to, possessing at the same time full knowledge of how the claim had been created, and that he himself had created the claim for the purpose of reimbursing his sister-in-law for moneys which he himself had borrowed, constituted a fraud against the estate, seems to the court unquestionable. The fact that the judge of this court, to whom said claim was presented for approval, did not approve the same, does not in any manner lessen the character of the act of the executor. It is the duty of executors, not only to protect the estate from fraudulent claims, but also, if he has knowledge of the questionable character of any claim, to advise the court thereof. An executor is an officer of the court, and the judge whose duty it is to approve claims must to a greater or less extent depend upon the executor of an estate for information as to the merits of the claims presented."

We have given attention to the argument of appellant, but, in view of what has been stated, supplemented by the consideration due the situation of the trial judge as to the manner and appearance of the witnesses and the personal element involved, which cannot be reproduced by the record, we think further comment is unnecessary, and that we would be entirely unwarranted in interfering with the order or judgment.

It is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

MEMORANDUM DECISIONS

162 Cal. 762

EICHLER v. TEDFORD. (L. A. 3,009.) (Supreme Court of California. March 2, 1912. Rehearing Denied March 29, 1912.) Department 2. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge. Action by Mamie L. Eichler, Administratrix, against Sarah J. Tedford, executrix. Judgment for plaintiff, and defendant appeals. Affirmed. Will D. Gould and G. L. Whitham, for appellant. D. C. Burrey and Harris & Swanwick, for respondent.

PER CURIAM. The above-entitled cause presents the same propositions considered in Tedford v. Eichler (L. A. No. 2,772) 121 Pac. 730, decided February 7, 1912, and was submitted with the last-mentioned case for decision. For the reasons there given, the order appealed from is affirmed.

162 Cal. 761

SAN PEDRO, L. A. & S. L. R. CO. v. LEE et al. (L. A. 2,760.) (Supreme Court of California. March 2, 1912.) Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge. Action by the San Pedro, Los Angeles & Salt Lake Railroad Company against John Lee and others. From a judgment for plaintiff, defendants appeal. Affirmed. Dian R. Gardner, for appellants. A. S. Halsted, S. M. Johnstone, and Miner P. Goodrich (W. R. Kelly, of counsel), for respondent.

PER CURIAM. This case is in all essentials identical to the case of San Pedro, etc., Railway Co. v. Hamilton (No. 2,539) 119 Pac. 1073, decided by this court on December 19, 1911. The plaintiff is the same in both cases. The leasehold estate of the plaintiff is the same, and covers the same land. The defendant's right of possession is the same as that asserted by the Hamiltons, and, finally, all of the legal questions involved and discussed are identical with those in the above-mentioned case. The judgment and order appealed from are therefore affirmed.

162 Cal. 761

TEDFORD v. GAY et al. (L. A. 3,029.) (Supreme Court of California. March 2, 1912.) Rehearing Denied March 29, 1912.) Department 2. Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge. Action by Sarah J. Tedford against Leslie F. Gay and others. From a judgment for defendants, plaintiff appeals. Affirmed. G. L. Whitham, for appellant. Gibson, Trask, Dunn & Crutcher, Hammack & Hammack, E. T. Sherer, and Joseph Smith, for respondents.

PER CURIAM. The above-entitled cause presents the same propositions considered in Tedford v. Eichler (L. A. No. 2,772) 121 Pac. 730, decided February 7, 1912, and was submitted with the last-mentioned case for decision. For the reasons there given, the judgment and order appealed from are affirmed.

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